IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 3936/2011
Date Heard: 21 June 2012
Date Delivered: 16 November 2012
NOT REPORTABLE

In the matter between:

DERECK CECIL PLATT Applicant

and

UMGAMANZI FISHING (PTY) LTD Respondent

JUDGMENT

GOOSEN, J:

[1] The applicant, an employee of the respondent, seeks the winding-up of the respondent on the basis that the respondent is unable to pay its debts and that it is just and equitable that it be so wound up.

[2] The respondent company was established by the applicant and his wife in order to enable them to engage in a business venture in the fishing industry. The respondent company acquired a fishing vessel and a fishing permit. The shares in the company are presently held by the applicant's wife (in the sum of 70%) and by the Faulkner Group (in the sum of 30%). The applicant is neither a shareholder nor director of the respondent. The applicant is employed by the respondent as a shore-skipper, a position that requires the performance of various duties when the fishing vessel is in port.

[3] The respondent and his wife have become estranged and divorce proceedings are presently pending between them on the basis that their marital relationship has irretrievably broken down. It is common cause between the parties that the breakdown in the marital relationship has resulted in the business and employment relationship between the applicant and the respondent breaking down. It is against the background of the breakdown of the marital relationship that this application is brought.

[4] The applicant, in seeking the winding up of the respondent, alleges that the respondent is indebted to him in respect of unpaid salary as well as in respect of certain amounts paid by him to creditors of the respondent on the respondent's behalf. The applicant alleges that the respondent is unable to pay its debts; that it is commercially and factually insolvent and that it would be just and equitable that a provisional order winding up the respondent be made. The application is opposed on several grounds. Respondent denies that the applicant is a creditor entitled to seek an order winding up the company on the basis that the applicant's claims are disputed on *bona fide* grounds. It is further alleged that the applicant and his wife formed a universal partnership pursuant to their marriage and that the respondent company is an asset in such universal partnership. It is also alleged that the applicant is precluded by reason of a *pactum de non petendo* from instituting any claim against the respondent and that in any event, the respondent is not factually or commercially insolvent. On the basis of these defences it is further contended that it is not just and equitable that the respondent be wound up and that the application ought to be dismissed and a punitive costs order made.

[5] As indicated the respondent was established by the applicant and his wife for the purposes of conducting a business to their mutual benefit. This much is common cause. The applicant alleges that the respondent was capitalised by way of loans either provided or procured by the A & C Investment Trust, a registered trust in which both applicant and his wife served as trustees. The Trust's funds are alleged to have derived from an inheritance which the applicant received from his late aunt. The Trust procured a loan from Investec Bank which was utilised to purchase a fishing vessel. The loan was secured by way of a mortgage bond registered against an immovable property owned by the Trust. The respondent allegedly undertook to effect payment of the monthly mortgage bond repayments.

[6] According to the applicant he is no longer prepared to finance the respondent company by way of making available his inheritance via the Trust. The applicant recently had his wife removed as a trustee of the Trust and thereafter the Trust allegedly resolved to call up its loan to the respondent. On this basis it is alleged that the underlying capital which was available to the respondent is no longer so available and that this fundamentally affects its financial viability. It is furthermore alleged that the respondent's assets exceed its liabilities and that it is accordingly factually insolvent. I shall deal hereunder with the allegations made in this regard. Before dealing with the particular issues raised in the application it is appropriate to note that the respondent, by way of an affidavit deposed to by the applicant's wife, disputes the source of the underlying capital. It is admitted that the Trust lent money to the respondent in order to facilitate the purchase of the fishing vessel. It is however denied that the Trust funds are solely those derived from the applicant's inheritance. The respondent points out that the inheritance funds were utilised to acquire, inter alia, a game farm which when sold realised a

substantial profit. This allegation is not placed in dispute in reply. On the contrary the applicant admits that he utilised his inheritance to refurbish a fishing vessel which he then owned and when this was sold that he utilised the proceeds to acquire a game farm. The proceeds of the sale of this game farm were utilised by the A&C Investment Trust to acquire certain assets and to provide capital for the conduct of the respondent's business. The papers do not set out when these various transactions occurred. What is clear however is that the source and ownership of the underlying capital is in dispute.

[7] The winding-up of a company is regulated by the provisions of the Companies Act, 71 of 2008 (the new Act). The new Act draws a distinction between 'solvent' and 'insolvent' companies. Although a 'solvent company' is not defined by the new Act, section 4 sets out a solvency and liquidity test to be applied. The section provides that a company satisfies the solvency and liquidity test if, at the time that the test is applied, considering all reasonably foreseeable financial circumstances, its assets fairly valued equal or exceed its fairly valued liabilities and it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of 12 months after the date on which the test is considered or the distribution event.

[8] Part G of Chapter 2 provides for the winding up and deregistration of solvent companies. Section 79 (2) provides that the winding up and liquidation procedures for winding up a solvent company are governed by Part G and, to the extent necessary Item 9 of Schedule 5. The winding up and liquidation of insolvent companies is governed by section 224(3) of the new Act which provides that the repeal of the previous Act does not

affect the transitional arrangements which are set out in Schedule 5. The relevant portions of Item 9 of Schedule 5 in turn provide that,

> (1) Despite the repeal of the previous Act, until the date determined in terms of sub item (4), Chapter 14 of that Act continues to apply with respect to the winding up and liquidation of companies under this Act, as if that Act had not been repealed subject to items (2) and (3) below.
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> (2) Despite sub-item (1), sections 343, 344, 346 and 348 to 357 do not apply to the winding up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
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> (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.

[9] It was argued on the basis of these provisions that since the applicant founds his application upon the alleged inability of the respondent to pay its debts the applicant is required to first establish that the respondent is an 'insolvent' company to which the provisions of Item 9 of Schedule 5 apply. Since the applicant has failed to make out such a case the application falls to be dismissed.

[10] It is clear from the provisions of the new Act that section 344 of the previous Act only applies if the company sought to be wound up is an insolvent company. I do not, however, consider that it is required that a party seeking to wind up a company on the basis that it is insolvent must first establish that the company is insolvent before section 344 may be invoked. It is sufficient if the party sets out allegations which bring the application within the ambit of Item 9 of Schedule 5, read with the particular provisions of

the previous Act. In other words it is sufficient if it is alleged that the company to be wound up is or may be insolvent inasmuch as it is unable to pay its debts.

[11] It is of course a wholly different matter as to what must be proved in order for a company to be wound up in terms of section 344. In this regard the new Act specifically excludes the operation of the section in circumstances where the company is solvent. In my view it must follow that section 344 may only be applied if it is found that the company concerned is in fact insolvent notwithstanding the deeming provisions provided for in section 345 of the previous Act (see *HBT Construction and Plant Hire CC v Uniplant Hire CC* 2012 (5) SA 197 (FB)).

[12] In this matter the applicant seeks to wind up the respondent on two grounds, namely that it is unable to pay its debts and that it is just and equitable to do so. In order to succeed on the first ground the applicant must prove that the respondent company is as a matter of fact insolvent and accordingly unable to pay its debts. In the absence of such proof that the respondent is insolvent, the only ground upon which the respondent may be wound up is that contemplated in section 81(1)(c)(ii) of the new Act, namely that it is just and equitable to do so.

[13] The respondent, as indicated above, raised a number of defences to the application. Foremost amongst these was a denial that that the applicant is a creditor whose claims may properly found an application for the winding up of the respondent. It was submitted in this regard that the alleged indebtedness upon which the applicant relies

is subject to a *bona fide* and reasonable dispute and that the application ought to be dismissed on this ground alone.

[14] Liquidation or sequestration proceedings are not designed for the resolution of disputes as to the indebtedness of a debtor. Where an applicant's claim against a respondent is disputed on *bona fide* and reasonable grounds a winding-up order cannot be granted (see *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T) at 348B; *Laeveldse Ko-operasie Bpk v Joubert* 1980 (3) SA 1117 (W) at 1122; *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) 980 B- I).

[15] The *onus* is upon the respondent to establish, on a balance of probabilities, that its dispute of the claim is reasonable and *bona fide.* It need not be shown that the respondent is not indebted to the applicant, only that the respondent has a reasonable basis upon which to dispute the indebtedness (*Kalil v Decotex (supra)).* A court is not required to undertake an extended inquiry into the dispute or to determine the dispute. It is sufficient if, having regard to the issues raised and the evidence presented that the court is able to conclude that there is a dispute and that the dispute is *bona fide*.

[16] In this instance the applicant alleges that the respondent is indebted to it in a sum in excess of R171 000, which amount is made up of several amounts alleged to be due in respect of arrear salary, motor vehicle expenses, telephone bills and payments allegedly made to third parties on behalf of the respondent. The respondent in its answering affidavit has placed each of these items in dispute. It points out that the applicant, as shore skipper, was furnished with cash for the payment of crew members and for the

purchase of numerous sundry items. Any excess cash not spent on these items was, as a matter of practice, retained by the applicant. In respect of other items the respondent has denied that there is any amount outstanding pointing to payments made to the third parties in this regard. These allegations, not challenged in reply, suggest that the alleged debts, including the alleged arrear salary, have been paid.

[17] I do not consider it necessary to traverse the full detail of each and every item. I am satisfied that the disputes raised by the respondent are indeed *bona fide* and that reasonable grounds are advanced upon which the applicant's claims are resisted and I accordingly find that the respondent has succeeded in establishing that the applicant's claims are subject to *bona fide* dispute. It follows therefore that the application cannot succeed.

[18] Even if I am wrong in coming to this conclusion the application cannot succeed on other grounds. In the first instance the applicant has not established that the respondent company is, as a matter of fact, insolvent and therefore unable to pay its debts in the ordinary course of business. The applicant has therefore not established that the respondent is an insolvent company to which the provisions of section 344 of the old Act may be applied. The applicant in this regard relies upon the respondent's financial statements of 2010 and a schedule of assets and liabilities which purportedly show that the liabilities of the respondent exceed its assets. The applicant has however not tendered evidence to establish that the assets and liabilities are fairly valued. The values are in any event disputed by the respondent. The respondent points out that the main assets of the company comprise of fishing vessel together with its equipment which is

valued at approximately R6 million. Some measure of support for this value is to be found in a certificate of insurance tendered by the respondent. In addition the respondent holds a fishing permit to which significant value (in excess of R2 million) attaches. In his founding affidavit the applicant does not deal with this asset. In reply it is admitted that the permit has value but this value is presented as less than that claimed by the respondent.

[19] It is incumbent on the applicant to prove on a balance of probabilities the fair value of the respondent's assets. This he has failed to do. The same may be said in regard to the alleged liabilities. The respondent pertinently denies that it is indebted to the creditors as alleged by the applicant. It also denies that it has an overdraft with its bankers and in this regard supporting bank statements are provided. Inasmuch as there is a dispute on the papers in regard to the extent, if any, of the respondent's liabilities, the facts put up by the respondent in this regard must be accepted.

[20] Although it is common cause that the respondent is indebted to the A&C Trust the respondent disputes its liability to make payment on the basis of an alleged *pactum de non petendo*. It is however not necessary to consider this issue in this regard. I am satisfied on consideration of the evidence placed before me that the applicant has not established that the respondent is as a matter of fact insolvent or that it is unable to pay its debts in the ordinary course of its business. It follows therefore that the applicant has not established that the respondent is an insolvent company which may be wound up in terms of the provisions of the old Act.

[21] Finally there is the alternative basis upon which the applicant seeks the winding up of the respondent, namely on the basis that it is just and equitable to do so. The approach to this question must be informed by the fact that the respondent is a solvent company. This requires that consideration be given to the objects and purposes to be served by the new Act, which seeks to foster as far as may be possible the financial rescue of companies in financial distress and which recognises the particular role that business entities play in the growth and development of our national economy (see section 7 of the new Act). What also falls to be considered are the interests of other parties, most notably employees of the respondent company who are dependant for their livelihoods on continued employment. Against this must be weighed the interests served by the application and the particular circumstances in which it is brought.

[22] As indicated the applicant and his wife are presently embroiled in a hotly contested divorce action in which the proprietary regime and the proper distribution of assets is a major point of dispute. The respondent points out, by way of the applicant's wife who is a director and major shareholder of the respondent, that the divorce action will involve consideration as to whether a universal partnership came into existence between the applicant and his wife and whether the A&C Trust served as vehicle through which universal partnership assets were held. It will also involve determination as to whether the respondent company is an asset of the universal partnership.

[23] It is not necessary (nor indeed appropriate) to consider these issues in this application. These are issues which are no doubt best resolved at trial in the pending

divorce action. The fact that this is so, in my view, militates decisively in my view against a finding that it is just and equitable that the respondent now be placed in liquidation.

[24] In the light of this I am of the view that the application cannot succeed on any of the grounds advanced. Although it was suggested that a punitive cost order should be made against the applicant in the light of the circumstances giving rise to this application I do not consider that such a cost order should be made. In the result I make the following order:

The application is dismissed with costs.

GG GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT: Mr Dyke, instructed by Joyzel L Obbes Attorneys

FOR THE RESPONDENT: Mr Nepgen, instructed by De Villers & Partners