

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

In the matter between:

CASE NO'S 10404/2013

DISTELL LIMITED

Applicant

and

MELODY HILLS TRADING PROPRIETARY LIMITED

Respondent

AND

CASE NO: 10403/2013

DISTELL LIMITED

Applicant

and

888 LIQUOR DEPOT (PTY) LTD

Respondent

JUDGMENT Delivered on: 24 April 2015

NTSHANGASE J

Introduction

[1] This case is before court on the return date of the rules *nisi* in cases 10404/2013 and 10403/2013 in which orders are sought for the winding up of Melody Hills Trading 184 Proprietary Limited (the respondent) and 888 Liquor Depot Proprietary Limited, (888 Liquor

Depot) in the respective cases. The respondent features as an alleged principal debtor and the latter as a guarantor in respect of liability of the respondent to the applicant to whom the respondent owes R2 001 523.24 according to the applicant.

[2] The parties have agreed that the cases be heard simultaneously with primary reference to be made to case 10404/2013 as the alleged liability of the guarantor is contingent upon the applicant proving the alleged liability of the principal debtor.

Background to the application

[3] It does not appear to be in dispute that on 27 September 2012 the applicant and the respondent concluded an agreement in terms whereof the applicant would supply and deliver liquor products to the respondent on credit. The respondent would, in turn, distribute the liquor products to Midmar Liquors Limited (Midmar). Midmar was placed under business rescue in 2012 but did not cease trading. The agreement is contained in an 'Application for Supply of Products and Purchase Facilities,' annexure "JJJ2" to the applicant's founding affidavit. (the agreement).

[4] The winding up is sought on the grounds that the respondent 'is unable to pay its debts as and when they fall due for payment in the ordinary course of its business,' alternatively on the ground that it is just and equitable that the respondents be wound up.

The issues

[5] The respondent argues that the applicant is not its creditor and that it has no *locus standi* to bring the present application before court. The respondent further submits that the applicant has failed to discharge the onus upon it to prove that the respondent is unable to pay its debts.

[6] The applicant on this issue avers that –

‘(t)he applicant is a creditor of the respondent in the amount of R2 001 523.24 (plus interest and costs). The debt arises as a result of goods sold and delivered by the applicant on account to the respondent.’

The applicant also states that –

‘(t)he debt consists of unpaid invoices for June 2013 and July 2013.’

[7] The respondent in turn states –

‘...I dispute that the applicant has made delivery of any liquor products to the respondent at its nominated address in relation to the amount claimed by the applicant. I submit further that the respondent did not have any liquor branch situated in the Western Cape at Parow.’

[8] I think the task of this court is to determine whether the applicant has proved that it is the respondent’s creditor who is unable to pay its debts and whether, upon consideration of all the papers before it, the applicant has, on a balance of probabilities, established a case for the winding up of the respondent.

[9] Germaine to this aspect is the question whether the respondent at any stage operated from the Western Cape and whether deliveries which bear on the amount claimed were made to the respondent or not. I shall deal with these issues in what follows. I pause here to state that there are no disputes of fact in this matter which cannot be resolved on the papers before court.

The issue whether the respondent operated at Parow

[10] I will deal first with the question whether or not the respondent operated at all as distributor of liquor products in the Western Cape. I do so in the light of the respondent's denial that it had a branch from which it operated in the Western Cape and also in the light of reference to Melody Hills (Pty) Limited alongside "Coastal Liquors Parow" as the entity "sold to" and "to deliver to" in the tax invoice, annexure "JJJ 4" and reference to the same entity as the debtor in the statement dated 31 August 2013, annexure "JJJ3" issued by the applicant. What the respondent does not dispute is that it traded as "Coastal Liquors."

[11] The respondent refers to Clause 3 of the Agreement, and points to the fact that the delivery address as agreed to by the parties is "corner of Moffat and Stewart Drive, Ballito, KwaZulu-Natal."

It further avers that -

'(a) perusal of the alleged invoices annexed by the applicant which appears as annexure "JJJ4" to the founding affidavit mention that delivery allegedly occurred to an address at 8 Voortrekker Road, Boston...' (my emphasis)

and that

'(i)t appears from the alleged statements of account, namely annexures "JJJ 3" that an address of an entity referred to as Coastal Liquors Parow is the entity to which the statements have been addressed. The reference to Parow might be an address intended by the applicant to refer to a destination in the Western Cape' (my emphasis)

[12] The tenor of the foregoing averments proclaims unfamiliarity with the address "Voortrekker Road, Boston as the place to "deliver to" as reflects on annexure "JJJ 4" as well as with "an entity referred to as Coastal Liquors Parow". The respondent's averment postulates uncertainty and a surmise that "Parow might be an address intended by the applicant to refer to a destination in the Western Cape."

[13] It is fair to grant that the respondent might be pleading lack of familiarity with 8 Voortrekker Road Boston (my underlining) as reflects in annexure “JJJ 4” as the place to “deliver to” whereas elsewhere 8 Voortrekker Road is placed in “Bellville.” But the respondent cannot truthfully plead unfamiliarity with “Coastal Liquors Parow” nor can it truthfully ‘submit ... that the respondent did not have any liquor branch situated in the Western Cape at Parow.’

[14] Appended hereunder are the relevant parts of an extract from the minutes of a meeting of the Directors of the respondent dated 27 September 2012 – annexure “RA 5” to the applicant’s replying affidavit:

‘Resolved that:

1. The Company will apply to the National Liquor Authority to transfer Registration RG 0003716 from the name of Melody Hills Trading 184 (Pty) Ltd and to add an additional address at c/o Moffat & Stewart Drive on Erf 3588, Liquor Depot Place, Ballito, KZN, to the existing address’

The application is annexed to the applicant’s replying affidavit as “RA 4”.

[15] The registration certificate of Premium Liquor (Pty) Ltd dated 16 September 2011 annexed to annexure “RA 4” reflects the following:

‘REGISTRANT’S NAME AND ADDRESS OF PREMISES AT OR FROM WHICH THE REGISTERED ACTIVITIES MAY BE CONDUCTED

Premium Liquor (Pty) Ltd t/a Premium Liquor, 44 Duiker Street, Parow Industrial, on Erf 11296, Parow, Western Cape Province.’

[16] On application for the transfer of the registration of Premium Liquor Distributors to it the respondent proposed the following registered addresses:

‘1.1 Liquor Depot Place Corner of Moffat & Stewart Drive on Erf 3588, Ballito, 4418, KZN Province

1.2 44 Duiker Street, Parow Industrial on Erf 11296, Parow, Western Cape Province.’

This appears at ‘annexure “A” to annexure “RA 4.”

[17] Appended hereunder is the relevant part of an extract from the minutes of a meeting of Directors of the respondent, annexure “RA 5”, held at Ballito on 2013/04/24.

“RESOLVED THAT:

1. The company will apply to the National Liquor Authority *to relocate its registered premises from 44 Duiker Street, Parow North, Western Cape to 8 Voortrekker Road, Bellville, Western Cape...*” (my emphasis).

It is evident from this that the respondent did in fact have registered premises, namely 44 Duiker Street, Parow North in the Western Cape from which it sought to transfer to 8 Voortrekker Road, Bellville in the Western Cape. The minutes were signed by the respondent’s Director Pravesh Rajkumar Singh (Pravesh).

[18] What further defeats the respondent’s attempt to distance itself from the Western Cape is a letter from its attorney Hemanth Haricharan, a professional assistant to Hemanth Rajkumar Singh (Hemanth), annexure “A 20” to applicant’s supplementary affidavit in response to the respondent’s affidavit dated 28 July 2014, whose relevant part reads:

‘It must be borne in mind that *the above company (Melody Hills 184 (Pty) Ltd (in liquidation) used to trade from an address in Cape Town, and all important documents were kept at one location.*’ (my emphasis).

[19] The foregoing belies the respondent’s assertion that

‘(it) did not have any liquor branch situated in the Western Cape at Parow’

an assertion proffered in a vain attempt to distance itself from Parow in aid of its denial that deliveries to it occurred in Parow. This demonstrates a lack of candour, to say the least, on

the part of the respondent. It is evident that the respondent traded from both Ballito and Parow. The untruthful denial by the respondent that it operated its distributor business in the Western Cape has constrained it to deny that liquor products were delivered to it, not only in Ballito, but also in Parow.

The alleged deliveries and debt amounting to R2001 523.24

[20] Central to the respondent's case, apart from asserting that no deliveries relating to the amount claimed were made to the nominated address, is the issue that the applicant has declined, for no stated reason, on demand, to furnish to the respondent, delivery notes evidencing delivery of goods to the value of R2001 523.24 in consequence whereof, so the argument goes, the applicant has failed to discharge the onus resting upon it to prove delivery of goods on which it relies.

[21] The respondent's attorneys by e-mail of 22 June 2014, demanded production of delivery notes as follows:

- '2. We request you to furnish us with all invoices, order notes and delivery notes from inception of your client's business relationship with Melody Hills, till final delivery.
3. We require all the documents for all collections made by any persons, or entity for the account of Melody Hills.
4. We further require the registration details of the vehicles attending to collection and confirmation of who had signed the order and delivery notes.'

It suffices to say that this was a tall order indeed. It was an unreasonable demand which expected the applicant to produce delivery notes covering not only a long period of the parties' business relationship but also delivery notes on transactions in which millions of rand changed hands. On the other hand, given the fact that the applicant assigns the debt to

deliveries in the months of June and July 2013 only, the applicant could have managed to supply the respondent with the required information if it chose to in the advancement of its case. While production of delivery notes would advance the applicant's case, failure to produce such notes is not *per se* fatal to the applicant's case unless its entire case is pillared on no other evidence. Similarly, a delivery by one party to another at an address other than one nominated for delivery does not by itself detract from the reality that delivery was made to the other party if other evidence establishes that it was.

[22] Much was made of the fact that any delivery at any but the place indicated on the invoice, without an order and an invoice containing the delivery address, would be a transgression of Regulation 23 of the National Liquor Regulations. Other alleged violations of the Liquor Act 59 of 2003 were referred to impugn the applicant's delivery process. Any transgression of the Liquor Act and Regulations has no bearing on the question whether deliveries were made or not to the respondent.

[23] What now falls to be determined is whether the applicant, by evidence other than delivery notes, has established that it delivered liquor products to the respondent. Viewed from the parties' business transactions which involved millions of rands it is inconceivable that for its operations in Parow the respondent would dispense with liquor product supplies from the applicant. Annexure "JJJ 3" dated 31 August 2013, a statement of account from the applicant reflecting an indebtedness of R2 001 523.24 was rendered to "Coastal Liquors, Parow, Melody Hills Trading 184 (Pty) Ltd." This alleged indebtedness was not challenged by the respondent. Instead of this the statement reflects payments of substantial amounts of money by the respondent which include R500 000, R600 000, R1 000 000 and others.

[24] On 21 August 2013 a letter of demand for payment of R2 001 523.24 annexure "JJJ 7" was addressed to the "Director(s)/Manager(s)" of the respondent. In the letter of demand the applicant represented by Daya Pillay, applicant's General Manager of the Southern Region wrote to the Director(s)/Manager(s) of the respondent as follows:

'Re letter of demand/overdue account (amount R2 001 523.24).

Previous correspondence as well as discussions regarding the above have reference. We are disappointed to note that the account remains overdue.

We take note of challenges relating to payment of your account by Midmar Ltd (under business rescue) but respectfully submit that this issue is no concern of ours. Our customer is Melody Hills Trading (Pty) Ltd to whom we look for payment together with the sureties and co. principal debtors. We must insist on your account being paid immediately.'

The respondent did not challenge this alleged indebtedness and the demand for immediate payment. It is evident from the foregoing that the parties had engaged in correspondence over the alleged indebtedness of the respondent.

A failure by any person who did not owe any money to challenge allegations of indebtedness and demands for payment would be as curious as it would be inexplicable.

[25] In e-mail correspondence which passed between Hemanth, the respondent's own attorney of record, no dispute is raised against the respondent's alleged indebtedness. Instead, by way of example, Hemanth, on 20 August 2013 sent to Juanito Damons (Juanito), the business rescue practitioner of Midmar, an e-mail, annexure "JJJ 6" whose relevant part reads:

'Further to your e-mail of even date, kindly note that we are now receiving letters of demand from the suppliers and this is simply due to the fact that stock from Melody Hills Trading was supplied to Midmar.

As you are aware, the stock in the Midmar Stores belongs to Melody Hills Trading.

In the event you cannot pay out the credit line, we are amenable to uplifting the stock from the Midmar Stores and returning to the suppliers.

Further, the payment held in trust which is in excess of R3.3 million could be used to pay the credit line of Melody Hills Trading.'

To this Juanito responded per e-mail on 20 August 2013 whose relevant part reads:

'I spoke to you earlier and informed you to hold the matter over about paying suppliers until Friday, when we hope to have judgment.'

[26] The relevant part of Hemanth's other e-mail, annexure "JJJ 9" dated 4 September 2013 reads:

'Dear Juanito

We need to attend to this payment to Distell urgently."

This was apparently triggered by the demand from the applicant dated 4 September 2013, annexure "JJJ 8" whose relevant part reads:

'Our letter of demand dated 21 August 2013 has reference.

We have not received a response to the demand which is unacceptable.

We demand that you settle this account by close of business on Monday, 9 September 2013.'

This shows that despite demand on 21 August 2013 the amount claimed had remained unpaid as at 4 September 2013.

[27] The e-mail of 20 August 2013, annexure "JJJ 6" was copied to Pravesh, a shareholder and Director of the respondent and other persons. He raised no dispute in regard to its contents, nor did he do so in regard to the contents of the e-mail of 4 September 2013, annexure "JJJ 9", copied to him.

[28] The respondent takes issue with the e-mails as lacking probative value. It avers that the applicant wrongly induced Hemanth into believing that it had delivered liquor products to the respondent and that the e-mails were a product of suspect information furnished by applicant to Hemanth. The respondent contends that the applicant's reliance on an e-mail involving Hemanth was wrong as Hemanth was neither a shareholder nor a director of the respondent and had no authority to bind the respondent. The respondent attempts to distance itself from Hemanth and refers to Hemanth as one would to a distant acquaintance. The respondent states that the applicant is

‘relying upon certain e-mail communications allegedly addressed by a certain Hemanth Rajkumar Singh ...’

[29] Hemanth and respondent cannot be distant acquaintances if regard is had to the e-mails, annexure “JJJ 6” to the applicant's founding affidavit which transmit –

‘the latest updated correspondence with B R (presumably business rescue) and another which conveys –

“... we are now receiving letters of demand from the suppliers...”

I have earlier referred to this e-mail in greater detail. What is significant is that the e-mails from Hemanth were copied to Pravesh. If the identity of the sender of the e-mails and the e-mails themselves to Pravesh were strange, his failure as Director of the respondent to react thereto, given the contents of such e-mails, was just as strange.

[30] The respondent submits that the e-mails ‘(do not) comply with the material-requisites of the Electronic Communications and Transmissions Act’ and are consequently inadmissible. No argument was devoted to this aspect at the hearing of the matter.

[31] Hemanth himself deposed to an affidavit in attempts to identify himself as an outsider whose involvement in e-mail communications with various persons relevant to this matter flew from 'a business relationship' born of dealings with the applicant in respect of other entities; it flew from an approach by the applicant about the respondent's account and a request by the applicant "to intervene"; it was born of an inducement to believe that the amount in arrears was due to the applicant for liquor supplies delivered by it to the respondent and "in good faith and upon representations made to (him) by the applicant (he) assisted." He does not state how he assisted.

[32] I had thought that Hemanth sought to describe impartially the circumstances which led to his involvement in the matter. Instead he engaged in argument about the applicant's invoice, annexure "JJJ 4" stating that "it is of particular concern that the alleged invoice describes the purported delivery mode as being "customer collect ..." and he further states that (his) understanding is that the National Liquor Act, as well as the National Liquor Regulations, do not allow the collection by a customer of liquor products from a distributor as a mode of distribution ..."

[33] Hemanth argues further on behalf of the respondent stating that "(a)s far as (he) is aware, the respondent did not have vehicles in the Western Cape to collect liquor from the applicant's premises bearing in mind the quantity in question to the alleged value of over R2 million."

Hemanth also attacks the applicant's replying affidavit as contradictory in regard to the issue of delivery of the liquor products.

[34] What Hemanth did not deal with is the nature of his association with the respondent. According to the applicant, the applicant was introduced to Hemanth in September 2012 when the applicant was involved in litigation against Midmar. Hemanth was, at that time, involved in negotiations to take over Midmar, a take over which eventually happened at the

end of 2012. After the end of 2012 Hemanth approached the applicant on behalf of the respondent for credit. Carol-Ann Wiese, the Customer Accounts Manageress at the applicant's offices required that he execute a suretyship in favour of the applicant for debts of the respondent, which Hemanth did. It is Annexure "A" to the affidavit of Jacobs, the applicant's Customer Accounts Manager and deponent to applicant's affidavit in reply to Hemanth's affidavit of 19 June 2014.

[35] It is as improbable as it is inconceivable that Hemanth, a surety for the respondent, would be so lacking on information regarding the respondent's financial affairs that he would be vulnerable to inducement by the applicant to believe that the respondent's alleged indebtedness arose from deliveries of liquor products to it (to the respondent) which never happened. The respondent's attempts to distance itself from Hemanth's communications are defeated by the respondent's acquiescence to his involvement in communications copied to Pravesh which pertained to the respondent's alleged indebtedness. Needless to say that in the light of the foregoing, Hemanth fails dismally in his vain attempt to distance himself from what he conveyed in his e-mails.

[36] What emerges from the foregoing is the fact that the respondent was aware of its alleged liability in the amount R2 001 523.24; if from no other source, then from the statement, annexure "JJJ 3" and from the letter of demand as well as from the e-mails copied to its director. It was also aware that the amount of R2 000 523.24 was in respect of deliveries of liquor products which include deliveries to Parow in the Western Cape.

[37] In what is relevant to the aspect of indebtedness, Clause II of the parties' agreement provides –

'A certificate under signature of any Manager or Director of the supplier (applicant) whose authority shall not be necessary to prove, *prima facie* shall be proof of the obligation of the Applicant (respondent) towards the supplier and also of the fact that the amount so stipulated is already due and payable with any interest payable thereon.'

The certificate as contemplated under this Clause signed by the applicant's Customer Accounts Manager (Southern Africa) reflects the respondent's indebtedness to the applicant, as R2 001 523.24 plus interest and costs.

[38] The relevant part of Clause 12 of the agreement provides –

‘Unless the applicant (respondent) objects in writing within 14 (fourteen) days of date of the statement to any item appearing thereon, the applicant shall be deemed to have accepted the statement as correct.’

The respondent lodged no such objection. This signifies its acceptance of the certificate as correct.

[39] Although the respondent, in its answering affidavit disputes the correctness of the contents of annexure “JJJ 2”, the ‘Application for supply of Products and Purchase Facilities,’ it provides no indication as to the nature of such incorrectness: Annexure “JJJ 2” constitutes an agreement between the parties on whose behalf it was signed.

[40] In the light of the foregoing it is inescapable to conclude, as I do, that the applicant did in fact deliver to the respondent the liquor products for which R2001 523.24 is claimed. The respondent does not, on reasonable and *bona fide* grounds, dispute its indebtedness to the applicant. The respondent in fact made payments on the account as earlier indicated. Payments ceased when the respondent apparently became unable to make further payments. When respondent became unable to make further payments, in a frantic effort to find money, Hemanth, in annexure “JJJ 6”, explored the possibility of utilising ‘the payment held in trust which was in excess of R3.3 million ... to pay the credit line of Melody Hills Trading.’ Juanito, explained, in response, that the money was no longer available.

[41] The respondent points to assets whose value it approximates at R6 900 000 to show that it is not insolvent. The respondent is in fact insolvent; it is commercially insolvent. Its commercial insolvency lies in its manifest inability to pay its debts as and when they fall due for payment in the ordinary course of business. Although the respondent avers that it has substantial assets, it has not demonstrated that there are readily realisable assets available out of which or out of the proceeds of which the respondent is in fact able to pay its debts.

[42] On a preponderance of probabilities the applicant has established that it (the applicant) is in fact the respondent's creditor in respect of the unpaid amount of R2 001 523.24 and that neither the respondent as the principal debtor nor 888 Liquor depot is able to pay its debts.

I accordingly make the following order:

1. The provisional liquidation orders in cases 10403/2013 and 10404/2013 are confirmed as final.
2. Costs shall be costs in liquidation.

DATE OF HEARING: 13 February 2015

DATE OF JUDGMENT: 24 April 2015

FOR THE APPLICANT: Mr J C King SC, instructed by Edward Nathan Sonnenbergs Inc, locally represented by Edward Nathan Sonnenbergs Inc.

FOR THE RESPONDENT: Mr M Manikam, instructed by Hemanth Singh & Company, locally represented by Beekhan & Company.