



**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO: 8275/2008

AR: 513/11

In the matter between:

WORLD FOCUS 754 CC

APPELLANT

(Respondent in the Court a Quo)

AND

BUSINESS PARTNERS LIMITED

RESPONDENT

(Applicant in the Court a Quo)

J U D G M E N T

K PILLAY J

[1] On 21 May 2010 the Appellant, upon the application of the Respondent, was placed under provisional winding-up by Skinner AJ, notwithstanding opposition by it. A final winding-up order was granted by Ngwenya AJ on 10 December 2010. Thereafter leave to appeal was refused by Skinner AJ.

[2] On 13 September 2011, the Appellant was granted leave to appeal by the Supreme Court of South Africa. Consequent upon the grant of that leave the

Appellant now appeals against the grant of both the provisional and final winding-up orders.

BACKGROUND

[3] On 18/7/2005, the Appellant and the Respondent concluded 3 agreements which were referred to respectively as the First Loan Agreement, the Second Loan Agreement and the “Royalty Agreement”.

[4] In terms of the First Loan Agreement, the Respondent loaned the Appellant the sum of R1070 000 and in terms of the Second Loan Agreement an amount of R430 000 was loaned to the Appellant.

[5] The “Royalty Agreement” formed an annexure to both Loan Agreements.

[6] In terms thereof the Appellant was required to pay a “Royalty” in the amount of 0.5% on the higher of the actual monthly turnover or projected monthly turnover, the latter being the amount reflected in the documentation submitted to the Respondent for purposes of the loan applications.

[7] On 15 May 2007 the Respondent instituted action out of the Durban High Court under case no 5300/2007 arising out of the aforesaid agreements. This action was defended and the matter was placed on the awaiting trial roll at the close of the pleadings.

[8] The Respondent’s case was that the Appellant breached both Loan Agreements, by failing to pay the instalments for the months of December 2005 to September 2006 inclusive and the further instalments since June 2007. In respect of the Royalty Agreement the Respondent contends that the

Appellant failed to pay any royalty fees whatsoever. The Respondent then invoked the acceleration clause, relying on the aforesaid breaches.

[9] The Appellant on the other hand contends that the Respondent delayed in granting it the necessary finance to purchase the business premises; and that the premises were vandalized requiring major renovations before the Appellant could commence trading. The Appellant asserts further that the Respondent, alive to these setbacks, agreed to extend the due dates for the instalments in terms of both Loan Agreements and the enforcement of the Royalty Agreement. The Appellant denied that it was in breach of its obligations in respect of both Loan Agreements and disputed therefore that the Respondent was entitled to invoke the acceleration clause to seek an order winding-up the Respondent.

[10] The Appellant averred that the Respondent held unlimited Deeds of Suretyship as security for the loans as well as the fact that it registered mortgage bonds over properties in the amount of R4 637 500.00 (four million six hundred and thirty seven thousand five hundred Rand) security for its indebtedness to the Respondent.

[11] In his judgment Skinner AJ found that by 1 March 2006, the Respondent had advanced all amounts due to the Appellant under the loan agreements save for an amount of R2614-90 which was advanced on 20 March 2006. He found however that the Appellants failure to make any payments subsequent to June 2007 resulted in the Appellant being in default from that date.

[12] He concluded that the full balance owing in terms of the loan agreements had become due, owing and payable and as such the Appellant is a creditor of the Respondent with the necessary locus to institute the application for the Appellant's winding-up.

[13] Subsequent to the grant of the provisional winding-up order, the Appellant filed a supplementary affidavit in which he indicated values of the property held by the Respondent as security but failed to put up any evidence from the bank regarding any process to refinance the debt.

[14] When the matter served before Ngwenya AJ on the return date he confirmed the provisional winding-up order. He found that no additional facts had been adduced to displace the order made by Skinner AJ and granted the order finally winding-up the Appellant,

[15] Skinner AJ's finding that a dispute exists as to whether any amount is owing in relation to the Royalty agreement is not challenged in this appeal, correctly in my view.

[16] The application for the winding-up of the Appellant was grounded in the provisions of Section 68(c) of the Close Corporations Act 69 of 1984(the Act), which provides:

"A corporation may be wound by a court if:

a.....

b....

c. the corporation is unable to pay its debts."

[17] For the purposes of Section 68(c), a corporation shall be deemed to be unable to pay its debts if...

"it is proved to the satisfaction of the court that the corporation is unable to pay its debts".

[18] The Respondent accordingly bears the onus of establishing on a balance of probabilities that it is a creditor of the Appellant and that the Appellant is unable to pay its debts.

[19] The Appellant, since it disputes the indebtedness upon which the Respondent relies, bears the duty of proving not that it is not indebted to the Respondent, but that the indebtedness is bona fide disputed on reasonable grounds.¹

[20] It is well established that winding-up proceedings ought not be resorted to in order to enforce a payment of a debt the existence of which is bona fide disputed by the company on reasonable grounds,² instead of a resort to ordinary litigation³.

[21] The legal position in this regard was aptly set out in Henochsberg on the Companies Act⁴ as follows:

“Abuse of the process of the Court

In addition to its statutory discretion, the Court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide bringing about the company’s liquidation for its own sake, eg the attempt to enforce payment of a debt bona fide disputed....”

¹ Machanick Steel & Fencing (PTY) LTD v Wesrhodan (PTY) LTD, Machanick Steel & Fencing (PTY) LTD v Transvaal Gold Rolling (PTY) LTD 1979(1) SA 265 W 269

² Badenhorst v Nothern Construction Enterprises (PTY) LTD 1956 (2) SA 346 T347-8

³ Helderberg Laboratories CC v Sola Technologies 2008(2) SA 627 634

⁴ 5th Edition Volume 1 693-4

[22] This approach is in line with English law. In *Re a Company* (no 0012209 of 1991)⁵ the court found that it was an abuse of the process of the Court to present a winding-up petition against a solvent company as a means of putting pressure on it to pay money which is bona fide disputed instead of applying for summary judgment under its relevant rules.

[23] A similar approach was taken in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*⁶, where the court referred with approval to the following passage from Buckley on companies⁷

'A winding petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on petition and make the order.'

[24] In this case, the Respondent has not referred to any other creditor but itself in the application for the winding-up of the Appellant, notwithstanding the Respondent's claim that a winding will bring about a *concursum creditorum*'. This has not been established. It is improper therefore to use winding-up proceedings as a form of debt collection.

⁵ (1992) 2 ALL ER 797

⁶ 1956 (2) SA 346 T 348 A

⁷ 11th Edition 357

[25] On the Respondent's own version, the Appellant complied with its payment obligations under the Loan Agreements except for a small amount of R2 014,90, until the Appellant stopped payment after action was instituted.

[26] Skinner AJ failed to consider the undisputed evidence that the Appellant stopped payment after June 2007, because of the action instituted by the Respondent and not because of an inability to pay its debts. This was a proper case for a finding that the winding-up process was an abuse of the process of the Court and Skinner AJ should accordingly have exercised his discretion against the grant of the provisional order.

[27] Ngwenya AJ's grant of the final order winding-up the Appellant was criticized on the basis that he was not alive to the standard of proof applicable to the grant of a final winding-up order and accordingly failed to apply the test to the facts extant herein.

[28] The standard of proof required for the grant of a final winding-up order is more stringent than that required for the grant of a provisional order. In an application for the grant of a provisional winding-up order, a mere prima facie case has to be established whereas a final winding-up order requires proof on a balance of probability that the provisional order should be confirmed.

[29] A supplementary affidavit was filed by the Appellant after the grant of the provisional winding order, which set out additional facts and information. The contents thereof were not disputed.

[30] In it the Appellant contended that in terms of the surety bond contained in Annexure 'F' to the founding affidavit, the properties described as:

- a. Portion 4 of Erf 60 Tongaat, situated at 4 Wall Street, Tongaat;
and
- b. Erf 1069 Wentworth, situated at 686 Marine Drive, Bluff, Durban.

are bonded in favour of the Respondent in the amount of R850 000.00 and an additional amount of R212 500.00. However each property is respectively valued at R1, million, the cumulative value being R2.2 million leaving an equity of R1 137 500.00. In addition the Respondent is said to hold a further mortgage over the property described as Remainder of Portion 32 of Erf 235 Wentworth, situated at 24 Hime Lane, Jacobs, Durban, in the sum of R800 000.00 and a further sum of R200 000.00. This property is valued at R4.5 million.

[31] Ngwenya AJ in granting the final order, for the winding up of the Appellant, appears to have attached little or no weight to the undisputed contents of the supplementary affidavit. The security held by the Respondent together with the additional assets held by the Appellant were sufficient to discharge the liability, if any, to the Respondent. Irrespective of the above, it should have been clear that the Respondent's claims were disputed on *bona fide* and reasonable grounds. Thus the issue as to whether the Appellant is able to pay its debts or not is irrelevant.

[32] It was submitted further that the issue of the Appellant's indebtedness to the Respondent was *lis pendens* and accordingly that the Respondent was effectively precluded from proceeding with any application for the winding-up of the Appellant.

[33] An issue raised at the hearing of this appeal was whether the Appellant had withdrawn the action against the Respondent in the Durban High Court under case number 5300/07, at the time that the application for the provisional

winding-up of the Appellant was made. This arose out of Respondent's contention that it did, although no evidence to this effect was furnished.

[34] With leave of this Court the parties were requested to submit a memorandum to deal with the aforementioned query. A copy of a notice of withdrawal of action under case number 5300/07 was then submitted.

[35] It is instructive to note that the notice of withdrawal is dated 3rd July 2008 and was served on the former Attorneys of record of the Appellant on 4 July 2008. The notice of motion in respect of the liquidation proceedings is dated 3rd July 2008. It is clear therefore that winding-up proceedings were instituted before the action was withdrawn.

[36] The requisites for a valid plea of *lis pendens* are that the actions must be between the same parties, on the same cause of action and in respect of the same subject matter.⁸

[37] In this case it is clear that the real issue of substance in both cases is likely to be whether or not the debt is owed. It is immaterial that the form of relief is not identical in both cases.

[38] In *Nestle (SA) (Pty) Ltd v Mars Incorporated*, the following was stated,⁹

“The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate

⁸ *William v Shub* 1976(4) SA 567 570

⁹ (2001) 4 ALL SA 315 (SCA) 319

upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens)”

[39] However a plea of *lis alibi pendens* is not necessarily an absolute bar to the proceeding in which it is raised. Interference occurs to stay one of the proceedings only because it is prima facie vexatious to bring two actions in respect of the same subject matter.”¹⁰ The Court has discretion in each case on whether to uphold the plea or not.

[40] In the case of *Socratous v Grindstone Investments*¹¹, Navsa AJ had the following to say about the Courts failure to uphold a plea of *lis pendens*

‘Courts are public institutions under severe court pressure. The last thing that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.’

[41] In my view the two cases herein are founded substantially on the same cause of action and the subject matter is substantially the same. The plea of *lis pendens* is therefore sound and should in my view be upheld.

[42] Even if the Respondent established on a balance of probabilities that the Appellant is unable to pay its debts, the Court still has discretion as to whether to grant a winding-up order. In this case, Skinner AJ and Nwenya AJ should have found that winding-up proceedings were resorted to primarily to enforce a debt, the existence of which was bona fide disputed on reasonable grounds. The application for the winding-up of the Appellant was in my view, an abuse of the process of the court and should have been regarded as such.

¹⁰ Herbstein & van Winsen The Civil Practice of The High Court of South Africa Volume 1 606

¹¹ 2011 (6) SA 325 SCA

[43] The following order is accordingly made:

- 1) The appeal is upheld with costs, including the costs consequent upon the employment of two Counsel.
- 2) The orders granted by the court a quo on 21/5/10 and 10/12/10 are set aside and substituted with the following.

“The application is dismissed with costs.”

K PILLAY J

KRUGER J

I agree

SCHAUP AJ

I agree

Date of appeal – 8 August 2012

Judgment handed down – 25 January 2013

Attorneys for Appellant – Messrs CKMG Attorneys, Verulam

Appellant’s Advocate – V Moodley SC and D Naidoo

Attorneys for Respondent – Messrs Maharaj Attorneys, Durban

Respondent’s Advocate – P Quinlen