



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NUMBER: 55088/2010

13/12/2012

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED:
	2/12/2012
	DATE
	<i>[Signature]</i>
	SIGNATURE

In the matter between:-

COENRAAD JOHAN LAMPRECHT

APPLICANT

and

KLIPEILAND (PTY) LTD

RESPONDANT

JUDGEMENT

De Vos J,

- [1] This matter came before me on the extended return day of a provisional winding-up order which was granted on 24 April 2012, with return date June 5th 2012. The provisional order was granted by Davis AJ after hearing argument from both parties.
- [2] On the 5th of June 2012 the matter was removed from the unopposed roll and set down on the opposed roll for the 11th of June 2012. Due to some oversight no order was made to extend the rule *nisi* to the 11th of June 2012.
- [3] On June 11th 2012 Bertelsman J:
- 3.1 revived the interim order that had lapsed;
 - 3.2 extended the return date to August 6th of 2012; and
 - 3.3 ordered the respondent to file such additional document(s) as it wishes by no later than July 16th of 2012, the applicant to file his answering affidavit, if any, by no later than Monday, July 23rd of 2012 and the respondent to file its reply by noon on Monday, July 30th of 2012.
- [4] The respondent failed to comply with the order of Bertelsman J and on July 17th 2012 served an UNSIGNED copy of an affidavit by e-mail. Gerhard Botha & Partners Inc (applicant's attorneys) responded to Respondents failure to comply with the Court order in two letters dated 17 July and 20 July 2012 respectively, addressed to Respondent's attorneys stating that the document forwarded by e-mail is not accepted as due compliance with the order.
- 4.1 The respondent only filed its further affidavit on July 31st of 2012;
 - 4.2 On 6 August 2012, the Rule was extended to 18 September 2012;

- 4.3 The applicant filed its answering affidavit to the aforesaid on September 10th of 2012.
- 4.4 On 17 September 2012, Preller J extended the Rule to 19 September 2012.
- 4.5 On 19 September 2012 and 20 September 2012, the matter was argued before Preller J. The matter was eventually postponed to 28 September 2012 and the Rule was extended to that day. The respondent was ordered to file a further set of affidavits by not later than 16h00 on 26 September 2012;
- 4.6 On 26 September 2012 at 16h14, the respondent faxed an affidavit to the applicant's attorneys stating that the respondent was unable to respond to the applicant's answering affidavit by virtue thereof that the respondent's directors were in Japan and Taiwan respectively;
- 4.7 On 28 September 2012:
- (a) the applicant filed an affidavit of an official of the Department of Home Affairs stating that Mr Tsai, one of the respondent's directors, was in fact in the Republic of South Africa and by necessary implication could have made and affidavit.
 - (b) Van der Merwe DJP, by agreement between the parties, extended the Rule to 4 October 2012 and ordered the respondent to file its further affidavits by no later than 12h00 on 2nd October 2012.

4.8 The respondent did not comply with the Court order. The matter was then set down for the argument on the 5th of October 2012 before myself.

[5] The granting of the provisional winding up order was preceded by the following events:

5.1 The notice of motion for the winding up of the respondent was served on the respondent on September 23rd of 2010. Applicant's claim against Klipeiland (Pty) Ltd would become prescribed in late November 2010. To avoid prescription the applicant also issued a summons against the Respondent during or about September 2010. By agreement between the parties the summons was stayed pending the application to liquidate.

5.2 The only asset of the insolvent is a farm Klipeiland in the district of Bronkhorspruit. Due to the dispute between the parties, the applicant applied by way of notice of motion on 29 September 2011 for an interdict restricting the respondent to sell the farm pending the outcome of the liquidation application. The respondent opposed this application and the matter was heard by Prinsloo J on March 19th of 2012, when judgement was given in favour of the applicant including costs.

5.3 On 20 May 2011, the matter was placed before Ranchod J. After considering the application he referred the application to oral evidence and postponed same *sine die*. The referral to oral evidence was unlimited and included the question whether the applicant has *locus standi* to bring the application in terms of the provisions of section 345 (1) (a) of the Companies Act, 61 of 1973 (i.e. a creditor to whom the company is indebted in the sum of not less than R100 (One Hundred Rand) then due. I will revert to Ranchod J judgement at a later stage.

5.3.1 The respondent filed an application for leave to appeal on 3 June 2011 against this order. The application for leave to appeal was heard on 29 November 2011 by Ranchod J and on 5th December 2011 the application was dismissed.

[6] On the 19th of March 2012 the referral to oral evidence served before Kruger AJ. By agreement the following order was made by Kruger AJ, on the 20th of March 2012.

“That by agreement between the parties the respondent admit and concede that the applicant is a creditor of the respondent within the meaning of section 345 (1) (a) of the Companies Act, 61 of 1973 (i.e. a creditor to whom the Company is indebted in a sum of not less than R100 (One Hundred Rand) then due and thus has *locus standi* such that it can rely on section 345 (1) (a) of the Company Act 61 of 1973”.

6.1 Kruger AJ ordered the respondent to pay for the costs incurred during the period May 20th of 2011 up to and including March 19th of 2012, such costs to include the qualifying fees of Pual Van Wyk, the applicant's expert.

6.2 The application was then postponed to April 2012.

[7] When the provisional order was granted, Davis AJ, found that the respondent's admission before Kruger AJ (March 2012), i.e. that the applicant was a creditor in terms of the provisions of the Act, could on the evidence be nothing other than an admission of liability for R6 000 000.00 (Six Million Rand) claimed by the applicant. He found that: "Once the respondent conceded the liability and in the absence of any allegations in that regard the respondent became liable for that which was agreed being the full remuneration "and" it is difficult to come to any other conclusion that this admission can be anything else than for this full remuneration "and" I need not however find that the full amount of R6 000 000.00 (Six million Rand) is owing. I need not make express findings against the respondent's deponent".

[8] The respondent in an attempt to avoid the provisional order being made final filed a further affidavit stating:

8.1 that the admission recorded in the order of Kruger AJ was
"strategically" made;

8.2 that the applicant's claim is disputed, and that the applicant's
remuneration would be in kind ... most definitely not handing of money.

- 8.3 that the applicant is put to the proof of the amount of its claim,
- 8.4 that the applicant is the only creditor of the respondent,
- 8.5 that the applicant holds security for its claim i.e. for "an amount that it may ultimately prove to be entitled to" which has to be weighed up against the value of the property which is according to the respondent's version worth R60 000 000.00 (Sixty million rand);
- 8.6 that the respondent's monthly income is in excess of its monthly expenses;
- 8.7 that the respondent recently received a true and bona fide offer for the purchase of its only asset, the farm Klippeiland for an amount of R60 000 000.00 (Sixty million rand) and that should the provisional order for liquidation hereof be discharged, the applicant would be able to sell the property and would have sufficient funds at its disposal to meet its obligations.

[9] I will now revert back to the proceedings before Preller J. On the 10th of September 2012, the applicant filed a further opposing affidavit to rebut the allegations made by the respondent. On the 20th September 2012 the matter was postponed to 28 September 2012 (after argument was heard) and the Rule extended to that day. The reason for the postponement was the certain "new matters" were raised by the applicant and that the respondent needed time to respond thereto. The respondent was accordingly granted leave to file a further set of affidavits by not later than 16h00 on 26 September 2012 to deal with the "new matters".

- [10]** On the 26th September 2012 at 16h14 the respondent's attorney faxed a document to applicant's attorney stating that the respondent's attorney is unable to respond to the applicant's further affidavit due to the fact that the respondent's directors were in Japan and Taiwan respectively.
- [11]** On the 28 of September 2012, the applicant filed a further affidavit obtained from an official of the department of Home Affairs stating that Mr Tsai one of the respondent's directors was in fact in the Republic of South Africa during the period given by Preller J to respondent's directors to file a further affidavit.
- [12]** It appears that due to the excuse raised by the respondent on 26 September 2012 (that it is unable to file its further affidavit) the matter was referred back to the DJP who then ordered that such an affidavit had to be filed not later than 12h00 on 2 October 2012. The respondent, as said, failed to file such affidavit in time. On the 3rd October 2012, the Deputy Judge President Van der Merwe referred the matter to myself which was to be heard on the 5th October 2012. On the 4th October 2012 during the morning I was approached in chambers to accept the respondent's further affidavit. This request was refused by myself as there was no explanation for the late delivery of the statement nor was it accompanied by an application for condonation. I therefore refused to accept such statement and made it clear that unless the respondent files a proper application for condonation I will not read the additional affidavit.

[13] On October 5th 2012 when the matter was called before me I enquired from respondent's counsel whether they are proceeding with a condonation application in order to place their affidavit before me. I was informed that they are not proceeding with such application as it will cause a delay. The upshot of this is that only the original three sets of affidavits are before the Court except in so far as the applicant's previously amplified these papers.

[14] I now return to Ranchod J judgement. To understand the issues raised before Ranchod J, I refer to an extract of his judgement which reads as follows:

14.1 Very briefly the facts are as follows:

The applicant alleges that the cause of the respondent's indebtedness to the applicant is an oral agreement that was concluded during March or April 2005 between the applicant and the respondent represented by its directors Jauline Cole and Youngful Tsai. In terms of the agreement the applicant was appointed as project manager in respect of the establishment of a township and certain immoveable property owned by the respondent.

14.2 It is further alleged that as remuneration the respondent would pay the applicant R6 million as well as give the applicant an erf of his choice in the proposed township, the agreed value of the erf being R1,5 million.

The said moneys would be paid to the applicant and the erf transferred to him as soon as a certificate in terms of Section 82 of

the Town Planning and Township's Ordinance 15 of 1986 had been issued.

14.3 The applicant says he then set about his work with the local authority approving the proposed township on 7 September 2007. On or about 25 November 2007. On or about 25 November 2007 the respondent and a company called Dyna Deals 3 (Pty) Limited concluded a joint venture agreement. The terms of the joint venture agreement, which was signed on behalf of the respondent by Tsai, effectively made the applicant's involvement as project manager superfluous and unnecessary.

14.4 Later, says the applicant, in November 2007 the applicant was asked by the respondent to be available and present after a meeting between the respondent and Dyna Deals. After the respondent's meeting with Dyna Deals Tsai advised the applicant that his services as project manager were no longer required by the respondent.

14.5 Further, because at that point in time the requisite consent in terms of the Agricultural Land Act 70 of 1970 in respect of the proposed township was still outstanding, Tsai requested the applicant's assistance in securing such consent.

14.6 The applicant says he then set about obtaining the aforesaid consent which was granted on 6 May 2008.

14.7 The applicant further alleges that in terminating the applicant's appointment as project manager as aforesaid the respondent either repudiated the oral agreement between the parties which repudiation the applicant accepted or it cancelled the same without just cause.

14.8 The applicant says he has numerous meetings with Tsai since December 2007 as well as others professing to represent the respondent concerning the respondent's indebtedness to the applicant with a view to reaching an amicable settlement and the payment of the respondent's indebtedness to the applicant but all this to no avail.

14.9 On 23 June 2009 and again on 27 April 2010 the applicant met with Tsai in order to secure payment of the moneys due to him. In the course of these meetings Tsai acknowledged unequivocally that the respondent was indebted to the applicant and made various offers of settlement none of which resulted in the respondent's indebtedness being paid, so says the applicant.

14.10 He says further that the respondent was fully aware of the applicant's claim but did not attempt to satisfy the same. For this reason the applicant caused a demand in terms of the provisions of Section 345 of the Companies Act to be served on the respondent.

14.11 The respondent replied to the aforesaid letter of demand by way of a letter dated 20 August 2010. In paragraph 3 of this letter the respondent denied:

“That any agreement was concluded in terms of which the applicant would be paid an amount of remuneration in money”

14.12 The respondent went on to allege that the agreement between the parties which was oral and was concluded in 2003 was that the applicant was *inter alia* to have had the property rezoned from agricultural to *developable land*, to have the property proclaimed as a township, to have a general plan for the property approved by the surveyor-general and to find a purchaser for approximately 192, 11 hectares of the property for R120 million. As remuneration the applicant was to receive 6, 3877 hectares of land once he had attended to these matters.

14.13 The applicant failed to attend to the aforesaid, says the respondent and was thus not entitled to remuneration. Further, as the agreement was not in writing the same fell foul of the provisions of the Alienation of Land Act 68 of 1981.

14.14 The respondent followed up its reply four days later by way of a letter dated 24 August 2010. In this letter the respondent alleged *inter alia* that a winding up application would be an abuse of process of Court.

14.15 The aforesaid letter was replied to by the applicant by way of a letter dated 16 September 2010. In this letter each of the respondent's allegations were refuted in turn.

14.16 Thereafter the applicant instituted legal proceedings against the respondent based upon the abovementioned cause of action in this Court under case number 55086/10. The reason for this was to stay the running of prescription. The proceedings in the aforesaid action have by agreement between the parties been stayed.

14.17 The respondent denies that it is indebted to the applicant in the amount claimed by the applicant or at all. The respondent raised several points in *limine*. One was that the agreement as propounded by the respondent was not in writing and thus fell foul of the provisions of Section 2 of the Alienation of Land Act and was therefore invalid. Secondly, that it constituted a sale of unidentified immoveable property before a declaration of an approved township and thus fell foul of the provisions of Section 67(1) read with 67(2) of the Ordinance and is therefore of no force or effect.

Thirdly, that no case is made out in terms of Section 345(1)(b) or (c) of the Companies Act in that the respondent's assets exceed its liabilities by approximately R60 million.

Furthermore, that the applicant cannot rely on Section 345(1) (a) of the Companies Act because its claim is illiquid and the applicant is only a contingent creditor.

14.18 Also that there are material and *bona fide* disputes of fact that cannot be resolved on the papers and that the application constitutes an abuse of process and a weapon in terrorem.

14.19 It is common cause, as I said, that the applicant relies on Section 345(1) (a). Section 345(1)(a) reads as follows:

(1) "A company or body corporate shall be deemed to be unable to pay its debts if:

(a) A creditor, by cession or otherwise, to whom the company is indebted

in a sum not less than R100 then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due."

I will not read (ii) and continue then:

“And the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.”

14.20 In argument the respondent's counsel said the real issue is whether the debt is due as set out in the Section of the Act. It is on this point that there are factual disputes as I mentioned earlier.

14.21 Mr Marcelled for the respondent submitted that the points in *limine* are a matter of law and can be determined, if I understood him correctly, without reference to the facts.

14.22 However, to determine whether those points of law raised are valid or relevant one cannot but refer to the relevant facts.

14.23 I therefore agree with Mr Wesley's submission that one has to take into account the substantial facts in determining the points in *limine* and in this case in particular the issues whether the debt is due and payable. The problem is that the substantial facts are as I said in dispute in this regard.

14.24 The evidence of the applicant and that of the respondent differs materially concerning the circumstances surrounding the conclusion of the agreement between the parties, the terms

thereof and the remaining facts of the matter, respondent's indebtedness to the applicant and thus the applicant's *locus standi* as a creditor of the respondent is also disputed.

In the event I am of the view that the aspect of the matter should be referred to oral evidence.

[15] Ranchod J concluded on page 8 of his judgement:

"In all circumstances I am of the view that a provisional winding up order should not be granted at this stage and that the matter be referred to oral evidence on the disputed facts."

[16] The referral to oral evidence includes factual and legal disputes. On this basis the matter was placed before Kruger A.J. Apparently the order granted by Kruger A.J was given as a result of an agreement reached between the appellant and the respondent. Only one of the disputes referred to by Ranchod J is dealt with in this order i.e. "that by agreement between the parties the respondent admit and conceded that the applicant is a creditor of the respondent in view of the provisions of the Companies Act." It is merely a concession that the applicant has the necessary locus standi to act in terms of the provisions of Section 345(1)(a) of the Companies Act 1973.

[17] It seems that when the matter thereafter served before Davis A.J, he was of the view that all other disputes of fact and law has been conceded by the

respondent and that the admissions could not be anything else then admitting liability for the full remuneration.

[18] I do not sit as a Court of Review or appeal on Davis A.J's findings. However, it is clear that Kruger A.J order deals with only one of the disputes referred to him for oral evidence i.e. the *locus standi* of the applicant. None of the other disputes referred were decided upon for example:

- (a) The terms of the contract;
- (b) Whether the applicant was to remunerated in money and or the form of the transfer of land.
- (c) The applicability of the Provisions of the Alienation of Land Act 68 of 1981 and its effect on the validity of the oral contract ect.

[19] The concession made by the respondent must be seen against the applicant's claim for damages based on the applicants acceptance of the respondents unlawful termination of his mandate. This is common cause.

[20] When the matter was argued before me respondents counsel again submitted that certain disputes are not capable of being resolved on the papers, and that the application should be dismissed on this ground alone with a punitive cost order. See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956(2) SA 346 (T) at 347 – 348.

[21] It is also submitted that it is by no means clear that the applicant is entitled to damages. Applicants claim is based on agency alternatively on mandate, however, applicants case is not that his mandate was irrevocable. If it were to be found to be revocable the applicant would not be entitled to damages. See Joel Malamed and Hurwitz v Cleveland Estates (Pty) Ltd. Kpr; Joel Melamed and Hurwitz v Vormer Investments 1984(3) SA155(AD) at 171 C-G

Where a mandate is not irrevocable and there is no agreement not to revoke but the agent/mandatory has commenced to act on it before revocation, , the principal is bound to pay *id quod interest* of the agent, i.e to reimburse and indemnify the agent for all expenses and liabilities properly incurred prior to the revocation. (See De Villiers and Macintosh, The Law of Agency in South Africa 3rd edition p614 – 615 and 622.

It was also submitted that there is no indication on the papers what the applicants *id quod interest* is.

[22] The mere fact that the applicant has *locus standi* to institute winding up proceedings in terms of the provisions of Section 345 of the Companies Act of 1973, does not entitle him to rely on the deeming provisions of inability to pay its debtors as contemplated in Section 345 of Act 61 of 1973 unless he also proves that the Company is also insolvent. The respondent denies that it is insolvent. See HBT Construction vs Uniplant Hire 2012(5) SA 197 (FB) at 199 A-G.

- [23] What remains in dispute is whether the amount was due and payable as the respondent disputes the applicant's claim. The concession made by the respondent that he is indebted in a sum of not less than R100 is not an admission that the full amount of R6 million was due and payable. The concession clearly does not go that far. In my view the respondent's willingness to admit more than R100 being due and payable is a clear indication that he places the balance of the amount claimed in dispute.
- [24] I concur with the view expressed by Ranchod J that certain factual issues had to be resolved after hearing oral evidence and only thereafter legal findings can be made. This was not done.
- [25] The respondent challenges applicant's claim. The reason for referring the matter to oral evidence was done to establish on a balance of probabilities if a provisional order should be granted. If it were to be found that the indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding up order. The onus on the respondent is not to show that it is not indebted to the applicant, it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds. See *Kalil v Decotex (Pty) Ltd and Another* at 980 B to D.
- [26] The word Provisional entails the notion that greater clarity and certainty will be obtained later. The same principle is applicable when the matter was referred to oral evidence. This in my view was not achieved as it is still in

dispute whether the respondent has *bona fide* and reasonable grounds to dispute applicant's claim for final relief. The only part disposed of is that it was found that the applicant is a creditor of the respondent in terms of the Provisions of the Companies Act. The effect of the failure to comply with Ranchod J order is that the *facta probandum* remains open to doubt.

In all the circumstances I am of the view that the provisional order should not be confirmed.

I therefore make the following order;

1. The provisional order granted by Davis A.J for the provisional winding up of the respondent, Klipeiland (Pty) Ltd is discharged.
2. The matter is referred back to Kruger A.J to determine all other outstanding issues referred to him by Ranchod J.
3. The interdict granted by Prinsloo J restricting the respondent to sell the farm Klipfontein is extended pending the outcome of the liquidation application.
4. Costs of this application is reserved.



H. DE VOS

**JUDGE OF THE NORTH & SOUTH
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