

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A324/10

In the appeal between:

D N H MAKELAARS BK

Appellant

and

J P KLEINHANS

Respondent

CORAM: EBRAHIM, J *et* MOLEMELA, J

JUDGMENT BY: MOLEMELA, J

DELIVERED ON: 26 MAY 2011

[1] This is an appeal against the final order of liquidation granted by the Magistrate, Kroonstad on the 30th August 2010.

[2] The salient facts giving rise to the appeal can be summarised as follows. The appellant is a close corporation that conducts business as a brokerage firm. The respondent is a member of the close corporation concerned and had also entered into an employment contract with it (the close corporation). The

respondent sued the appellant for arrear salary for February 2010 and March 2010 in the Magistrate's Court under case no. 1456/10. The appellant opposed the action and filed a plea and counterclaim.

- [3] While the afore-mentioned action was pending, the respondent, via his attorneys, issued a letter of demand claiming payment of his salary for the months of April 2010 and May 2010 in the amount of R40 224.00. This letter was duly served on the respondent. As the appellant did not pay the arrear salary claimed within the 21 day period stipulated in the letter of demand, the respondent brought an application for liquidation of the appellant. The respondent averred that its letter of demand had been issued in compliance with the provisions of section 69(1)(a) of the Close Corporations Act 69 of 1984 and that the appellant's failure to pay the amount claimed within the stipulated period was an indication of its inability to pay its debts.

- [4] The appellant opposed the application for liquidation. In its answering affidavit it denied liability to the respondent in respect of the salary claimed and averred that the respondent had on the 6th April 2010 advised the appellant that he was going to seek another job elsewhere and had never returned to the workplace. It further averred that the respondent had assumed employment with another company on the 1st May 2010, for which services he had already been remunerated by the said company. The appellant asserted in the alternative that should it be found that the respondent was indeed entitled to a salary then it re-iterated the averment made in its counterclaim under case no. 1456/10, viz that the respondent is indebted to the appellant in respect of a loan advanced by the appellant to the respondent, which indebtedness was, according to the appellant due and payable. The appellant further averred that it was solvent and attached its latest financial statements as proof of its solvency.

- [5] Having listened to a detailed address both in support of and against the granting of the liquidation application, the court *a quo* delivered a brief judgment in the following terms:

“Wel, soos die Hof dit verstaan is die wet baie duidelik, gronde vir likwidasië en een van die gronde is as die korporasie nie in staat is om sy skulde te betaal nie en dat daar – hier het die Hof dit voor hom – versoek gerig is om aan hierdie eis te voldoen om die skuld te betaal en dit dan binne 21 dae nie gedoen kan word nie. In hierdie geval is dit nie gedoen nie, want dit gaan hier soos wat hier betoog is om nie om Februarie en Maart se salarisse nie, maar vandag se aansoek is ten opsigte van April en Mei en daar is ‘n aansoek gedoen, versoek is gerig en dit is nie betaal nie. Daar is kennis gegee om te sê daar is ‘n kontantvloei probleem so dit kan nie betaal word nie. So wat die Hof aanbetref, is die BK nie in staat om dit te doen nie en word die aansoek toegestaan soos versoek, wor dit ‘n finale bevel gemaak” (sic).

- [6] Given the text of the court *a quo*'s judgment, the inference is irresistible that before delivering its judgment, the court *a quo* did not pay any regard to the financial statements submitted by the appellant. I make this statement mindful of the fact that

judgments are often brief and that they are not always expected to be all-encompassing. This does not detract from the fact that a judgment is expected to deal with all the important issues that were raised and which led to the finding that was made. In this particular instance, the court *a quo* had an opportunity to give reasons for its judgment but chose to confine itself to the scanty reasons enunciated in its judgment. In my view, the financial statements were a very important factor to be taken into account when assessing whether the appellant was unable to pay its debts or not. After all, the appellant did not merely make a bold allegation of its solvency, it also attached financial statements as proof thereof. These financial statements were not disputed by the respondent, who happens to be a member of the appellant close corporation and can thus be expected to have information on the veracity of such statements. (See **PLASCON EVANS PAINTS V VAN RIEBEECK PAINTS** 1984 (3) SA 623 (A).

- [7] Considering that the appellant's solvency and financial statements were canvassed at length in the closing arguments

submitted to the court *a quo*, it is not far-fetched for one to infer that the reason why the court *a quo* failed to, in any way, allude to such financial statements and/or the issue of solvency was because it did not take them into account before giving judgment.

- [8] The importance of considering solvency is in a way borne out by section 69(2) of the Close Corporations Act 69 of 1984, which enjoins the court to take contingent and prospective liabilities of the corporation into account when making a determination as to whether a corporation is unable to pay its debts. In my view, there ought to be something in the judgment that somehow demonstrates compliance with this important provision. I could not find even a semblance of such compliance in the court *a quo*'s judgment. Given the peremptory tenor of this provision, non-compliance therewith surely ought to constitute a material misdirection.

- [8] In ABSA BANK LTD v COOPER NO AND OTHERS 2001 (4) SA 876 (T), the financial statements did not form part of the

papers filed before the court, yet the court was not prepared to find that the close corporation in question was unable to pay its debts. The court stated as follows: "I can find no reason to differ with the principle laid down in *Taylor v Koekemoer (supra)*, namely that the inability of a company to pay its debts must be measured in the context of its winding up, that is in a weighing up of assets and liabilities. Mere commercial insolvency is not sufficient." *In casu* the financial statements were indeed part of the papers supporting the appellant's averment that it is solvent. The court *a quo* however paid no regard to them and confined itself to commercial insolvency relying on a letter, issued by the appellant two months before the application. In my view, the court *a quo*'s failure to take the financial statements into account constitutes a material misdirection warranting the setting aside of its finding in respect of the appellant's inability to pay its debts.

- [9] Another misdirection relates to the failure of the court *a quo* to take into account the factual dispute regarding indebtedness. From the content of its judgment, it can safely be concluded that the existence of a dispute pertaining to indebtedness was

not taken into account. It is evident from the respondent's own letter (exhibit "DD") that the respondent was aware of the appellant's dispute (regarding cancellation of the employment contract) before it even issued a letter of demand, yet it nevertheless proceeded with an application for liquidation. In

KALIL V DECOTEX (PTY) LTD AND ANOTHER 1988(1) SA

943 (A) at 976H where the court stated as follows: "Where the application for a provisional order of winding up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the *onus* lies, having to establish a *prima facie* case for the liquidation of the of the company seems wholly appropriate; but not so where the application is opposed and real and fundamental factual disputes arise on the affidavits, for it can hardly be suggested that in such a case the Court should decide whether or not to grant an order without reference to respondent's rebutting evidence". At **980B-D** the following

was stated: "Consequently, where the respondent shows on a balance of probability that its 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.” Also see WOLHUTER STEEL V JATU CONSTRUCTION 1983(3) SA 815 (0) AT 825G - 826A. If the court *a quo* had taken the factual dispute and the full context of the appellant’s failure to pay into account, it would most probably have realised that the failure to pay was prompted by unwillingness to pay, rather than inability to pay. See PAYSLIP INVESTMENT HOLDINGS CC v Y2K TEC LTD 2001 (4) SA 781 (C) at 788 A – C.

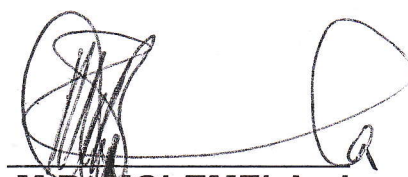
- [10] *In casu* the respondent also relied on an alternative ground for seeking the appellant’s liquidation, viz “that it is just and equitable that the appellant be wound up”. There is a paucity of averments in support of this ground and the respondent seems not to have pursued it in its arguments both in the court *a quo* and in this appeal. In any case, in view of the appellant’s averments regarding solvency as supported by the financial statements and the dispute regarding the appellant’s alleged

indebtedness, there was in my view no justification, on any ground, for the order of liquidation. Accordingly, the court *a quo*'s order ought to be set aside.

[11] Although the question of costs was not canvassed during the hearing of this appeal, there is no reason why the costs should not follow the result.

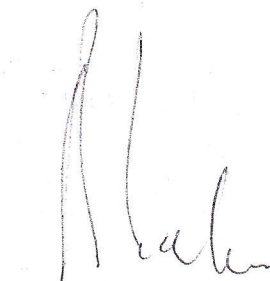
[12] I would accordingly make the following order:

1. **The appeal is upheld.**
2. **The order of the court *a quo* is set aside;**
3. **The respondent is ordered to pay the costs of both the application for liquidation and the appeal.**



M.B. MOLEMELA, J

I concur.



S. EBRAHIM

On behalf of appellant:

Adv. N. Snellenburg
Instructed by:
Naudes
BLOEMFONTEIN

On behalf of respondent:

Adv. S.J. Reinders
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

/sp