

22/9/2009

NOT REPORTABLE

DELETE WHICHEVER IS NOT REPORTABLE
(1) REPORTABLE: YES/NO. ☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES
(3) REVISED. ☐ YES
22/9/09
DATE
[Signature]
SIGNATURE

IN THE NORTH CAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 49149/2008

In the matter between:

DYNAMIC WEALTH STOCKBROKERS (PTY) LTD

First Applicant

THE BRIDGING FACTORY (PTY) LTD

Second Applicant

and

BEZUIDENHOUT HEPPLER INC
(Reg. No. 2003/017256/21)

First Respondent

T W R HEPPLER

Second Respondent

G BARNARD

Third Respondent

C H L EARLE

Fourth Respondent

M JOHNSON

Fifth Respondent

JUDGMENT

MOTHLE A J

1. The Applicants brought an application seeking relief against the Respondents in the following terms:

- (i) That an order be granted for the final winding-up of the First Respondent;

- (ii) *In the alternative to prayer (i), that an order for the provisional winding-up of the First Respondent be granted, with a suitable return date;*
- (iii) *That it be declared that the Second to Fifth Respondents are liable, jointly and severally, the one paying the others to be absolved, to the Applicants for the payment of R2,509,560.00 being the capital amount of R1,200,000.00 plus a discounting fee at the rate of 3.99% for the first 30 days from 1 September 2006 and thereafter 0.14% per day up to 21 October 2008;*
- (iv) *In the alternative to prayers (i) and (ii) above, and only in the event that an order for the winding-up, whether final or provisional, be granted against the First Respondent, then an order for judgment against the First Respondent for payment of R2,509,560.00 being the capital amount of R1,200,000.00 plus a discounting fee at the rate of 3.99% for the first 30 days from 1 September 2006 and thereafter 0.14% per day up to 21 October 2008;*
- (v) *Costs of suit."*

2. The notice of motion and the prayers sought are accompanied by a founding affidavit in which the Applicants make certain allegations, amongst others, that:

- 2.1 They are the creditors to the First Respondent and have the necessary *locus standi* to bring the application. The relationship of the Applicants in particular is described in the following terms, namely:

"The Second Applicant is the duly authorised intermediary of the First Applicant, which renders a service that is commonly referred to as bridging finance to its customers". Consequently, it will be respectfully contended on behalf of the Applicants that "The Second applicant concludes the relevant agreements with the First applicant's customers" and the First Applicant is the party with the necessary locus standi and the First Applicant is the creditor."

- 2.2 The Applicants further raise an allegation that it seems there is a link between the First Respondent and a firm of attorneys in Bloemfontein calling themselves "Bezuidenhout Inc". In support of that contention, they claim further that correspondence has been exchanged between the parties

where different letterheads have been used. The Applicant concludes that the impression left by the use of the letterheads is that it is in fact one and the same firm of attorneys that practices at different addresses namely, in Pretoria, Bloemfontein and Roodepoort.

3. The Respondents filed an answering affidavit in which it denies the contract, the liability and the amount as alleged by the Applicants. In particular, the Respondent raises the allegations that the Applicants do not have *locus standi* to bring the application and that there are *bona fide* disputes which can only be resolved in a trial.
4. As it will appear hereunder, and in particular the order I intend to make, it is unnecessary to deal with the rest of the other details of the allegations contained in the founding affidavits, the answering affidavits and the replying affidavit.
5. It is now common cause between the parties that the allegations and counter allegations exchanged in the affidavits are such that disputes of fact exists between the parties which, in my view, cannot be resolved on the papers as they stand. The question of

locus standi raised by the Respondents is one such issue, which will require oral evidence to prove.

6. Prior to the hearing of this matter, I indicated to both counsel the problem of disputes of fact and the matter stood down for counsel to obtain instructions. When the matter was called, the parties conceded that there was indeed disputes of fact but differed on how the matter should be handled. The Applicants agree that the matter be referred to trial, while the Respondents want the application dismissed.
7. It is trite that where there is a dispute of fact in an application, the Court may, where there is no request for the hearing of oral evidence, grant a final order on the notice of motion if the facts, as stated by the Respondent, together with the facts alleged by the Applicant that are admitted by the Respondent, justify such an order. I refer to **Wightman t/a J W Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)**. Where, however, a request for oral evidence is made by either one or more of the parties, the Court may either:

- 7.1 Dismiss the application;

7.2 Refer it to oral evidence only in respect of the allegations which may not be resolved on the papers; or

7.3 Refer the matter to trial.

I refer in this regard to the seminal case of Room Hire Co. (Pty) Ltd v Jeppe Mansions (Pty) Ltd 1949 (3) SA 1155 (T).

8. The Applicant's counsel submitted that in their view, prayers 1 and 2 dealing with the request for provisional and/or final winding-up order, should be refused as this cannot proceed by way of action, but the alternative prayers in regard to the alleged debt arising out of the contract between the parties, be referred to trial and that costs be reserved. The Respondents on the other hand submitted that the application be dismissed because amongst others, the action would have in any way prescribed and further that there is really no real cause of action raised by the Applicants.

9. The issue of prescription as contended by the Respondent is referred to in the answering affidavit and the replying affidavit but not raised as a point *in limine* for determination by the Court. In fact, Respondent contends that the point of prescription will be

raised in the action. I agree that the prescription issue as well as any defence to the Applicant's cause of action will be better dealt with in action proceedings.

10. Having considered the allegations and counter allegations contained in the affidavits in this application, I am of the view that a real dispute of fact exists in this matter, justifying the referral of the matter to trial.
11. It is also practice that liquidation proceedings can only be brought by way of application. For that reason, the action proceedings cannot deal with the relief sought in terms of prayers 1 and 2 regarding the request for an order to provisionally or finally winding-up the First Respondents *alternatively* provincial liquidation.

In the premises I make the following order:

- (i) Prayers 1 and 2 of the application are dismissed;
- (ii) The cause of action including Prayers 3 and 4 is referred to trial;
- (iii) The notice of motion stands as simple summons;

- (iv) The notice of intention to oppose shall stand as notice of intention to defend;
- (v) The Applicant is ordered to file a declaration within 20 days from date of this order;
- (vi) Upon filing of the declaration, the ordinary rules relating to action proceedings shall apply;
- (vii) The costs of this application shall be reserved for determination by the trial Court.

MOTHLE A J
2 September 2009