

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No. 15902/2009

In the matter between:

NORMAN WELTHAGEN

Applicant

and

**ROSMEAD INVESTMENT CONSULTANTS (PTY) LTD
(Registration No: 1994/006008/07)**

Respondent

JUDGMENT DELIVERED ON 14 MAY 2010

CLOETE , AJ:

[1] This is an opposed application for the provisional winding up of the Respondent. According to the Applicant, he is a creditor of the Respondent. He maintains that the Respondent is unable to pay its debts (section 344 (f) read with section 345 of the Companies Act, 61 of 1973), and also that it is just and equitable that the Respondent should be wound up (section 344 (h) of the Act).

[2] The Respondent disputes that it is indebted to the Applicant, and accordingly the Applicant's *locus standi* to present an application to the Court as a creditor of the Respondent for its winding up is in dispute.

[3] It is common cause between the parties that during or about November 2006 they entered into an agreement with each other in terms of which the Applicant paid the sum of R 2 270 000 to the Respondent to invest on his behalf. Furthermore, the Applicant would be entitled to redeem the capital amount of his investment on fourteen days notice to the Respondent.

[4] It is also not in dispute that in a letter dated 30 March 2009 by the Applicant's attorneys to

the Respondent, the Respondent was informed that the Applicant required the immediate repayment of the said sum of R2 270 000. What is in dispute is whether the Applicant was at that stage still entitled to the repayment of the said sum on demand.

[5] The Respondent's version is that subsequent to the conclusion of the initial agreement, there was an express further agreement between the parties in terms whereof the Applicant agreed to the conversion of his investment with the Respondent into an investment in partnership in the Sky Harrier Partnership and the Sky Hawker Partnership. According to the Respondent it was, subsequent to the conclusion of this latter agreement, not liable on any basis to either the Applicant personally or the partners in the partnership, and that once the Applicant had provided the mandate for his investment to be placed in the partnerships, his investment with the Respondent had ceased. At that stage it was thus no longer open to the Applicant to seek repayment of its investment, or the payment of any other amounts, from the Respondent. Accordingly, the Respondent denies that it is indebted to the Applicant in any amount whatsoever.

[6] The Applicant's application is therefore opposed on the basis of a dispute as to the existence of the alleged debt. Accordingly, there is therefore a duty on the Respondent to show that the alleged debt is disputed on *bona fide* and reasonable grounds. (See: **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (AD)). In **Helderberg Laboratories CC v Sola Technologies** 2008 (2) SA 627 (C) a full bench of this Division preferred to refer to this duty as an evidential burden and not an *onus*.

[7] The Applicant requested that this Court, in the event of it not being disposed to grant a provisional winding up order, should refer the issue of the Applicant's *locus standi* as a creditor (i.e. whether the Respondent is indebted to him) for the hearing of *viva voce* evidence . In exercising its discretion in this regard the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the Applicant. (See the **Kalil** case at p 979 H).

[8] In considering whether the Respondent has managed to show that the alleged debt is disputed on *bona fide* and reasonable grounds, I have had regard to the caution expressed *inter alia* in ***Robson v Wax Works (Pty) Ltd and Others*** 2001(3) SA 1117 (C) at para 15 that a lack of *bona fides* is not readily inferred.

[9] Having carefully considered the affidavits in this matter and the arguments before me on behalf of the parties, I have arrived at the conclusion that I should in the exercise of my discretion in this regard allow the matter to be referred for the hearing of *viva voce* evidence on the disputed issue of whether or not the Applicant is a creditor of the Respondent. I have decided to do so because genuine questions have been raised about the veracity of the versions of both the Applicant and Mr Wells who deposed to the answering affidavit on behalf of the Respondent, and in my view the probabilities on the disputed issue are at this stage evenly balanced.

[10] I have decided against embarking in this judgment on an exposition of what I regard as being contradictions, discrepancies and improbabilities in the versions of both the main deponents to affidavits in this matter, in order to allow the judge who will hear the oral evidence to form his own views in this regard in due course.

[11] Accordingly, it is ordered as follows:

1. The application is postponed to a date on the semi-urgent roll to be arranged with the Judge President, for the hearing of *viva voce* evidence.
2. The issue to be resolved at such hearing is whether or not the Applicant is a creditor of the Respondent.
3. The evidence to be adduced at the aforesaid hearing shall be that of any witness whom the parties or either of them may elect to call, subject, however, to what is provided below.

4. Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless -

4.1. he or it has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such a person wherein the evidence to be given in chief by such person is set out; or

4.2. the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

5. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

6. The fact that a party has served a statement or has subpoenaed a witness shall not oblige such party to call the witness concerned.

7. Within 45 days of the making of this order, each of the parties shall make discovery on oath, of all documents relating to the issue referred to above, which documents are, or have at any time been, in the possession or under the control of such party.

8. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

9. The costs of the hearing of the application before Cloete AJ stand over for determination by the Court which hears the postponed application.

CLOETE, AJ