



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

Case No 19128/2014

In the matter between:

SPECIALIZED EDIBLE OIL AND FATS (PTY) LTD

T/A CAPITAL RICE

Applicant

And

EEZI FOOD IMPORTS AND EXPORTS (PTY) LTD

Respondent

JUDGMENT DELIVERED 06 MAY 2015

RILEY AJ

[1] This is an application in which the applicant seeks a final order of liquidation against respondent pursuant to having obtained a provisional liquidation order in respect of the respondent on an *ex parte* basis on 31 October 2014 returnable on 1 December 2014. The return date was anticipated by the respondent in terms of Rule 6(8) and the matter was enrolled on 20 November 2014.

[2] By agreement the Rule 6(8) application was postponed to ensure the filing of papers and on 9 December 2015 Kushke AJ, after hearing argument, made an order in the following terms:

- 2.1 The respondent's application in terms of Rule 6(8), in terms of which it sought amended relief i.e. granting it and its directors leave to conduct the business of the respondent, pending finalisation of the liquidation application, was dismissed;
- 2.2. A rule *nisi* was issued, returnable on 25 February 2015, to be determined together with the final winding up application, calling upon the respondent's directors, Messrs L.A. Ebrahim and A.O. Ebrahim, to show cause why they should not be ordered to pay the costs of the application referred to under (2.1) above in their personal capacity jointly and severally;
- 2.3. It was recorded that applicant undertook to unconditionally pay the wages and salaries of the employees of the respondent for the period between the granting of the provisional order on 31 October 2014 and the final determination of the winding up application;
- 2.4. The respondent's directors were directed to provide the applicant's attorneys with a list of names of all wage / salary earning employees of the respondent at the time of the granting of the provisional order having been granted, setting out further their contact details, the wages / salaries to which they are entitled in terms of their contracts of employment, details of the sums paid to

them as wages / salaries at the time, any further payments made to them in the interim, their bank account details (if available) and proof of their employment (IRP5 certificates and any written contracts of employment) by no later than 17 December 2014;

2.5. The application for the final winding up of the respondent was postponed for hearing on 25 February 2015 and the provisional order of liquidation granted on 31 October 2014 was extended to 25 February 2015;

2.6. Service of the papers in the winding up application, the provisional order and a copy of the order of 9 December 2015 was to be effected on the employees of the respondent referred to in paragraph 2.3 above in person by the sheriff of this Honourable Court by no later than 23 January 2015.

2.7. The further costs of the winding-up application, which costs included the costs of two counsel, stood over for later determination on the return date.

[3] On 25 January 2015 the parties agreed that the matter be postponed for hearing to 18 March 2015 due to the fact that the respondent filed an application to file a further supplementary affidavit as well as its actual supplementary affidavit. The parties also agreed that in the event the court allows the respondent to file its further supplementary affidavit, the applicant may file a reply thereto on or before 11 March 2015, which it did.

Compliance with S 346(4A) of the Companies Act 61 of 1973 (as amended):

[4] Section 346 (4A)(a)(i), (ii) and (iv), (b) of the Companies Act 61 of 1973 (as amended) (“the Act”) provides that:

“(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application-

(i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and

(ii) to the employees themselves-

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application...

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with.”

[5] It is now accepted law that the aforesaid provisions of the Act have as their purpose to ensure, as far as is reasonably feasible, that applications for winding-up come to the attention of the employees of the employer in question and their representatives so that the interests of the employees can be protected. In terms of our law it is not permissible for the court to grant a final winding-up without the employees being furnished with the application papers.

[6] The court should satisfy itself that the persons who are entitled to be furnished with the papers have had an adequate opportunity to consider the application and to decide whether or not to intervene.

[7] I am mindful that the court should not refuse an order merely because it is not satisfied that the papers in the application have come to the attention of all employees. I agree that once the court is satisfied that the method adopted by the applicant to furnish the application papers to the employees is satisfactory and reasonably likely to make the application papers accessible to the employees, there should be no reason to refuse either a provisional or final winding-up order.

[8] It is now settled law that the requirement that the application papers be furnished to the persons specified in S346(4A) is peremptory. As appears from the provisions of S346(4A)(a)(ii) hereinbefore referred to, applicant may

however also make use of the methods referred to in the subsection to comply with the peremptory requirement.

[9] It is clear that when Kuschke AJ heard the Rule 6(8) application he was concerned that the provisional order may have been a nullity given the lack of service of the application on the respondent's employees prior to applicant obtaining the provisional winding-up order as the provisions of s346(4A)(a)(ii) of the Act are peremptory. It is for this reason that he granted an extension of the provisional order so that effective service of the application could be effected on the respondent's employees prior to the hearing of the application on the extended return day.

[10] In its further affidavit on this issue, the applicant has explained why the application was brought on an *ex parte* basis and undertook to give effective notice on employees before the extended return day.

[11] In the compliance affidavit, applicant sets out how it sought to ensure that service of the application be effected on all the known employees of the respondent in person as best as this could be achieved. I also accept that applicant has in accordance with the Kuschke AJ order tendered payment of the wages / salaries of the respondent's employees, thereby removing any prejudice the employees may have suffered in the meantime by virtue of the respondent having been placed under provisional liquidation.

[12] In *Hendricks NO & Others v Cape Kingdom (Pty) Ltd 2010(5) SA 274 (WCC)* Sholto-Douglas AJ, in dealing with a similar issue, held that it is settled law that compliance with the relevant section was peremptory, but

that, on the facts of the case, even though there might not have been strict compliance at the time when the provisional order was granted, service of the application had been effected on the respondent's employees at the time the matter was being heard by him, namely on the return date, and by that time all of the employees should have had due notice.

[13] The approach adopted by Sholto-Douglas AJ in the Hendricks NO & Others v Cape Kingdom (Pty) Ltd matter *supra* was endorsed by the SCA in *E B Steam Company (Pty) Ltd v ESKOM Holdings Soc Ltd (979/2012) [2013] ZASCA 167 (27 November 2013), [2014] 1 All SA 294 (SCA) at para [16]*.

[14] Prior to the hearing of the application I was advised by counsel for the applicant and the respondent that the provisional order of the liquidation of the respondent had been served on the employees of the respondent and that the employees of the respondent did not intend to oppose the confirmation of the rule, nor have they filed any affidavits in opposition to the application, the granting of the provisional order, or in respect of any prejudice they may have suffered in the interim as a result of the order being obtained without notice to them at the time. In fact several of the employees had attended the proceedings on 18 March 2015 out of interest in the outcome of the matter.

[15] Considering the assurances given to me by counsel for the parties and the authoritative pronouncements of the SCA referred to hereinbefore on this issue, I am satisfied that applicant has complied with the '*peremptory*' requirement of service on the respondent's employees.

[16] The principle issues to be determined in this matter are whether the respondent should be finally wound up and whether the directors of the respondent should pay be held liable personally for the costs of the Rule 6(8) application.

The *bona fides* on the part of the applicant in bringing the application for the provisional liquidation of the respondent on an *ex parte* basis

[17] Before dealing with the main issue it is necessary to consider the applicant's *bona fides* in bringing the provisional application on an *ex parte* basis. It is trite law that an applicant who applies to court to obtain an order on an *ex parte* basis must in his / her or its conduct be beyond reproach. Such an applicant is required to place all relevant facts before the court and the applicant may not furnish incorrect information to the court. Due to the nature of, and consequences of, such applications our courts have made it clear that in cases where the incorrect information is furnished to the court carelessly, and not recklessly or deliberately, the court is entitled to discharge the rule *nisi* on that ground alone. See *Hall and Another v Heyns & Others 1991(1) SA 381 (C) at 397 B – C*.

[18] In *M V Rizcun Trader (4) M V Rizcun Trader v Manley Appledore Shipping Ltd 2000(3) SA 776 (C)* Van Heerden J held at 794A – E as follows in regard to the obligation which is placed on an applicant who brings an application on an *ex parte* basis:

'Applications for the arrest of vessels as security are as a matter of practice brought ex parte and almost invariably as a matter of urgency

before duty Judges with increasingly heavy workloads. The instant matter appears not to have been an exception as, according to a handwritten note on the Court file, the arrest order was granted by Thring J at 21:50. EM Grosskopf JA in Knox D'Arcy Ltd and Others v Jamieson and Others 1996(4) SA 348 (A) at 379 F – G adversely commented on the making of orders in such circumstances, particularly if the relief sought is based on largely untested hearsay. It appears to me to be axiomatic that where orders are sought in circumstances such as those set out above the need on the part of deponents to adhere to the requirements of the uberrima fides rule is more pronounced.

Le Roux J in Schlesinger v Schlesinger 1979(4) SA 342 (W) at 349 A – B extracted the following principles to the uberrima fides rule from the relevant authorities:

- '(1) (I)n ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision;*
- (2) the non-disclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission [i.e. of the order obtained ex parte]; and*
- (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.'*

[19] In the present matter the founding affidavit in the *ex parte* application was deposed to by Haroon Abba Tayob Essack, the sole shareholder and managing director of the applicant. For the sake of convenience I shall hereinafter refer to him as Uncle Haroon. His affidavit reveals that the sole basis for launching the provisional liquidation application on an *ex parte* basis is his alleged fear that it would be easy for the respondent to conceal the stock of rice which is the subject matter of dispute in these proceedings, or to sell the rice without leaving a trace. It is necessary to consider this averment against the background of the allegation by Uncle Haroon that the respondent had at some stage indicated that there were approximately eighty tons of rice which it could not sell and that it was then allegedly agreed between the parties that applicant would collect the rice from the respondent's premises. According to Uncle Haroon the respondent had allegedly only provided applicant with forty-eight tons of rice in two loads and that respondent had refused to load any further rice.

[20] On a conspectus of the evidence, this allegation cannot be correct. What is more probable is that when the respondent found out that applicant had inflated the prices that it was charging it, respondent decided that it would source rice from another Cape Town importer. I pause to mention that at this stage the relationship between the parties was already strained and very tense. When Uncle Haroon found out that respondent was sourcing rice from an alternative source, he collected all the rice of the applicant during October 2014. The reason advanced by applicant for proceeding by way of an *ex parte* application can therefore not be true. It seems to me that at the

time when the liquidation application was brought on an *ex parte* basis, there was no rice on the respondent's premises that belonged to the applicant. Uncle Haroon himself avers that the rice belonged to a certain Mr Parker.

[21] Mr Lawrence for the respondent contended that the *modus operandi* and or conduct of the applicant, considering the manner in which Uncle Haroon proceeded with the *ex parte* application against respondent without notice, amounts to an abuse of the court process and that it was a deliberate strategy to prevent the respondent from opposing the application. There is merit in this contention. It is common cause that Uncle Haroon knew the Ebrahim brothers, the sole directors of the respondent, very well. They have known each other over a number of years and did business with each other. In fact the Ebrahim brothers are Uncle Haroons' son's, brothers in law. He knew where the business premises of the respondent was as his wife and son previously conducted business from it and or occupied it. The parties also had telephonic and other electronic media access to each other. For these reasons alone it seems to me that there was no reason why applicant could not have telefaxed, emailed and or telephoned the respondent directors to notify them of the intended application.

[22] I further agree with the contentions of Mr Lawrence that if regard is had to the following further facts and circumstances then the only conclusion that I must come to is that when Uncle Haroon launched the provisional liquidation application on an *ex parte* basis, he was motivated by bad faith and malice directed at the respondent's directors:

1. The dispute regarding payment for stock had been simmering for several months at least.
2. There seems to be no logical reason why, considering the huge amount outstanding and due to it, applicant never formally demanded payment from the respondent.
3. The liquidation papers were signed on 22 October 2014, but the application was only issued out of this court on 27 October 2014.
4. There was accordingly more than enough time to serve the papers on respondent.
5. No notice whatsoever was given to the respondents.
6. Subsequent to obtaining the order, Uncle Haroon accompanied the Sheriff to serve the provisional liquidation order at the business premises of the respondent.
7. Uncle Haroon, immediately on arriving at the respondent's business '*took over the business*', and then informed customers who called that the respondent was bankrupt and that he had liquidated the respondent.

[23] The conduct of Uncle Haroon exhibits elements of malice and was clearly intended to cause prejudice to the respondent and or its directors. Of further concern to me is that on a reading of the papers, what stands out, are the glaring disputes of fact. It is further clear that after launching the

provisional application on an *ex parte* basis, applicant had on several occasions amended its papers in regard to the amount allegedly due and owing to it by the respondent, and in the process also adjusted its version, and advanced unacceptable and improbable explanations for the amounts provided in the founding affidavit.

[24] It is not unreasonable to conclude that Uncle Haroon was not exactly frank and forthright when he deposed to the founding affidavit. It is clear that he failed to adhere to the *uberrima fides* principle and it is apparent that he was extremely selective about what information he decided to place before the court. There is no doubt in my mind that at the time that he decided to launch this application on an *ex parte* basis that he must have been in possession of all the information which has subsequently come to light. I say this because on his own version applicant had been experiencing problems with respondent for some time in regard to the payment of its account. One would therefore have expected that the applicant would have all the information that it intended to rely on readily available at the time when he decided to launch this application.

[25] On the available evidence it would appear that:

1. The amount allegedly due and owing by respondent to applicant as at March 2014 was R1 281 463-00 and not R1 317 000-00 as alleged by Uncle Haroon.
2. It cannot be correct that only five payments were made on the old accounts during August and September 2014. The evidence

clearly shows that at least R1 281 463-00 was paid by the respondents during the period March – October 2014.

3. According to the respondent's bank statements, which were tendered as evidence, the respondent paid the applicant the amount of R400 000-00 by means of cash deposits and also made an internet transfer in the amount of R60 000-00 from respondent's FNB account on 15 August 2014 and a further amount of R50 000-00 was paid in September 2014.
4. The applicant further failed to disclose that at the time of launching the application the respondent had paid applicant the total amount of R1 960 800-00.
5. The applicant further omitted to disclose to the court that respondent has been making payments of approximately R200 000-00 per month to the applicant.

[26] I am satisfied that all this information was available to the applicant when he decided to launch the application. Considering the multitude of disputes on the facts and particularly in relation to the amount allegedly owing by the respondent to applicant it cannot be so that the applicant has or had any basis in fact or in law to aver that an amount of R3 317 000-00 was due and owing to it at the time when the application was launched on an *ex parte* basis. On the contrary the evidence rather shows that the respondent was making payments at the time when the *ex parte* application was launched and would be able to continue to make the payments that it was

making in terms of the agreement as averred by it in the ordinary course of conducting its business.

[27] What is further telling is that if the amount of R 3 317 000-00 was indeed due and payable by respondent to applicant, then it is extremely strange and quite frankly illogical that applicant has never formally demanded payment from the respondent considering the history that the parties had with each other.

[28] On the facts before me it is further highly unlikely and improbable that the applicant could seriously have believed at the time of launching the *ex parte* application that there was an agreement in place between the parties in terms of which a facility of R2 million was negotiated and that respondent would pay to applicant monthly instalments of R100 000-00 on the amount due in terms of the initial supply of rice.

[29] Having regard to the above facts and circumstances I must conclude that had the respondent been given a reasonable opportunity to oppose the provisional liquidation application and had the court seized with the *ex parte* application been placed in possession of all the facts referred to hereinbefore it is likely that the court would not have granted the provisional order.

[30] The overwhelming probabilities favour a finding that the provisional order was improperly obtained and in circumstances where Uncle Haroon did not adhere to the requirement of the *uberrima fides* rule when he approached the court on an *ex parte* basis. Accordingly and for the above reasons alone I am of the view that the provisional order of liquidation should be set aside.

Is it just and equitable that respondent be placed in final liquidation and or is the respondent unable to pay its debts in terms of S344(f) of the Act?

[31] In any event, even if I have erred in finding as I have, the applicant must satisfy the court on a balance of probabilities that a final order of liquidation is to be granted. It is trite law that the degree of proof required at this stage is higher than that required for the granting of a provisional order. See *Paarwater v Soutt Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) at 186 para [3]. There is no onus on the respondent to show that it is not indebted to the applicant. All respondent is required to show is that the indebtedness is disputed on *bona fide* and reasonable grounds. See *Kalil v Decotex (Pty) Ltd & Another* 1988(1) SA 943(A) at 980C.

[32] Mr du Preez, who was assisted by Mr Bosman, contended in the main that the respondent should be finally wound up on the grounds that:

1. the respondent was unable to pay its debts as provided in terms of s.344(f) of the Act;
2. that it would be just and equitable that respondent be wound up as provided in terms of s.344(h).

[33] Notwithstanding the fact that there are serious disputes of fact in regard to essential matters that the applicant is required to satisfy this court upon in order to establish that it is just and equitable to wind up the respondent, applicant did not seek an order referring such disputes for the

hearing of oral evidence as it was entitled to do. It is trite law that where there is a dispute of facts, a final order, such as is requested in the present matter, should only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order. See *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957(4) SA 234(C) at 235 E – G and *Plascon-Evans Paints limited v Van Riebeeck Paints (Pty) Ltd* 1983(A) SA 623(A) at 634H – 635A.

[34] It is further settled law that the applicant must raise the issue upon which it would seek to rely in its founding affidavit. In *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others* 1999(2) SA 279(T) at 323 F to 324G Joffe J made it clear that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties. The learned judge held further that the parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.

[35] I am not persuaded that the version of the respondent is so far-fetched or clearly untenable that I am justified in rejecting it merely on the papers. If I apply the Plascon-Evans test to the facts of this matter then the following facts, as is succinctly summarised in the respondent's heads of argument, emerges:

35.1 Uncle Haaron's son Faheem, managed his mother's business in Cape Town and returned home to Durban leaving the

business in the hands of his brother-in-law, the then still inexperienced Liyaqat Ebrahim.

35.2 Uncle Haaron's wife's business (Capital Eezi CC) was run from the premises, eventually leased by Liyaqat, in his personal capacity. With the consent of Uncle Haaron, Liyaqat was assisted to run the business by his brother Qayum Ebrahim. By agreement they were to receive a monthly salary of R20 000, 00 which was never paid by the applicant. The amount of R260 000,00 is presently due and payable to them in respect of salaries.

35.3 After the business was conducted by the Ebrahim brothers for a while, Uncle Haroon simply one day decided to close the business, loaded up all the stock together with equipment and moved the operations to Zimbabwe, leaving Liyaqat responsible for the obligations under the lease agreement.

35.4 The respondent commenced receiving stock from the applicant in December 2012 and by March 2014 owed the applicant R1 281 463,00 on account. The amount was payable by agreement, interest free in such monthly instalments as the business could manage without compromising its cash-flow.

35.5 In March 2014 it was agreed that the applicant would supply the respondent with rice on consignment at cost plus 10%.

Between March – July 2014 rice in the amount of R1 972 064,31 was supplied. Rice was not supplied strictly on order by the respondent, but was delivered to the respondent's premises in loads of rice which arrived at Cape Town harbour from India. The respondent would subsequently be invoiced. It later transpired that the respondent was being overcharged in breach of the agreement between the parties.

35.6 The respondent made regular payments to the applicant in compliance with the agreement between the parties. Between March to October 2014 payment in excess of the amount due under the 'old account' was made to the applicant. The current outstanding amount is being liquidated in accordance with the terms of the agreement.

35.7 Uncle Haaron unsuccessfully tried to persuade the respondent to assist the applicant to obtain an overdraft facility. The respondent started looking for alternative suppliers.

35.8 Uncle Haaron was aggrieved by the fact that the respondent was not prepared to assist with the overdraft and that it was exploring the prospect of doing business with other suppliers.

35.9 Uncle Haaron's malice is demonstrated by his attendance at the respondent's premises when the Sheriff served the provisional order on the respondent, and his further taking calls at the respondent's business premises, where he informed customers

of the respondent that it was bankrupt and that he had liquidated it.

35.10 Furthermore, despite the fact that it was a matter for the provisional liquidator to decide upon, Uncle Haaron interfered with this discretion, and insisted that the respondent be closed which prejudiced not only the respondent, but also its employees.

[36] As I have previously mentioned I have serious concerns about the veracity of the information placed before this court by the applicant and the manner in which it sought to do so. What is clear is that the applicant and Uncle Haroon conducted business with the respondent in what has been described as a 'loose basis' concerning the supply of stock and on the terms as outlined by the respondent. I agree with Mr Lawrence that the fact that applicant might now be unhappy with this situation does not constitute grounds for winding up and certainly not on the basis that it is just and equitable to do so.

[37] I am not persuaded that the respondent failed to make monthly payments as it had agreed upon and the evidence further does not support a finding that the respondent is unable to pay its debts.

[38] On the evidence presented by the respondent, respondent appears to be a successful going concern with a substantial turnover which for the period March to October 2014 exceeded R6,2 million, almost equalling the turnover for the entire previous financial year. It appears to have assets in

excess of R2,5 million and it is paying its debts as and when they fall due. The applicant itself valued the business for at least R12 million through the offer of R4 million for a 30% share in the business.

[39] It is not the task of this court to speculate as to, or to try to determine what amount, if any, is owing by the respondent to the applicant and or how these amounts are arrived at. As I have previously mentioned, there are material disputes of fact between the parties in relation to what the terms of the agreement between them are, and in relation to the amount owing. In my view these disputes should rather be resolved by action proceedings as opposed to liquidation proceedings. On the whole I am not persuaded that the applicant has established that the respondent is unable to pay its debts or that it is just and equitable for the respondent to be finally wound up. The application for the final liquidation order must therefore fail.

The issue of costs arising out of the unsuccessful Rule 6(8) application

[40] I turn now to deal briefly with the issue as to whether the respondent's directors ought to be held liable personally for the costs of the unsuccessful Rule 6(8) application in terms of which they applied to the court for an order that the respondent be allowed to trade in the interim. It is clear that the Rule 6(8) application was brought by the directors personally after the respondent had been placed in provisional liquidation. I am satisfied that at the time that they brought the application that they had no authority to do so. Since they did not have the necessary *locus standi* it follows that they must bear the costs of the abortive application in their personal capacities.

[41] In the result I make the following order:

1. The provisional order of liquidation is discharged and the applicant is ordered to pay the costs of suit.
2. The respondent's directors Messrs Liyaqat – Ali Ebrahim and Abdul Quayum Ebrahim are ordered to pay the costs of the Rule 6(8) application under the above case number on the scale as between party and party jointly and severally, the one paying the other to be absolved.

RILEY, AJ