IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 15643/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES / NO
(2) OF INTEREST TO OTHER JUDGES YES / NO
(3) REVISED ✓

25/2/2014
DATE

SIGNATURE

In the matter between

SPHANDILE TRADING ENTERPRISE (PTY) LTD	First Applicant
DUMISANI ELLIS NTULI	Second Applicant
and	
HWIBIDU SECURITY SERVICES CC	First Respondent
NGWENYANA, NAOMI	Second Respondent
RACHIDI, WALTER THEKELO	Third Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fourth Respondent

---

JUDGMENT

André Gautschi AJ :

[1] The second applicant seeks an order that the fourth respondent (The Companies and Intellectual Property Commission, known by the acronym CIPRO) rectify its records by indicating thereon that the second applicant is a 50% member of the first respondent, and a winding-up of the first respondent.

[2] The background to this application is briefly the following :

2.1 The second and third respondents are respectively 70% and 30% members of the first respondent.

2.2 They were approached by the second applicant in about April 2012 to discuss a joint venture between the first respondent and the first applicant (the second applicant's company) or some other form of business structure in order to bid for a security services contract with the Ekurhuleni Municipality.

2.3 The second applicant contends that at a meeting between himself and the second and third respondents held on 30 April 2012 it was agreed that he would become a 50% member of the first respondent and be employed as its marketing director; that the first applicant would make the necessary loan to the first respondent to assist it to set up its business; that the first respondent would rent offices from the first applicant; that the first applicant would be paid a marketing fee of R2 000 000; and that the members of the first respondent would each receive a salary of R50 000 per month.

[3] Because of the view which I take of this matter, it is not desirable that I analyse the issues in any detail. I have come to the conclusion that certain issues are to be referred for the hearing of oral evidence. I shall accordingly briefly identify those issues and indicate why I do not believe that they can be resolved on the papers.

[4] **The agreement regarding the members' interest**

4.1 The applicant relies on an unsigned resolution taken at a meeting held on 30 April 2012 between himself and the second and third respondents (annexure "DN1", page 33).

4.2 The resolution is badly drafted and it is difficult to make any real sense of it. It indicates that the second applicant is to become a 50% member of the first respondent, but in the same breath it adds that "if he brings more contract we will consider him as the permanent member …". (*sic*) The applicants do not have a signed version of this draft resolution, although they contend that it was signed.

4.3 It is the respondents' case (I exclude the fourth respondent who has not opposed this matter and who stands apart from the other three respondents) that there was no signed agreement or resolution on 30 April 2012, but that an oral agreement was reached at that meeting to the effect that the second applicant would become a 50% member of the first respondent on condition that the Ekurhuleni tender was a

success and that he brought in more security work in future for the first respondent. The snippet from the draft resolution which I have quoted above tends to lend support to this although the probabilities do not.

4.4 Notwithstanding that the third respondent (the "managing director" of the first respondent) referred in a letter dated 12 February 2013 to "an agreement which was signed on 30 April 2012 at the board meeting", it is the respondents' case in the answering affidavit that the agreement was an oral, conditional agreement.

4.5 I am not prepared to find, applying the Plascon-Evans test[1], that I can reject the respondents' version merely on the papers. Not only is there no available signed version of the resolution but the wording of the resolution is so obscure that I would not be confident to reject the respondents' version without a referral to oral evidence.

[5] **A winding-up on just and equitable basis**

5.1 One of the grounds for winding-up advanced by the applicants is that, because the second applicant is a 50% member of the first respondent, and the two camps of members are unable to work together and, indeed, all trust has been lost between them, it is just

---

1 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635

and equitable that the first respondent should be wound-up.

5.2 This ground obviously depends on the success of the second applicant's claim that he is a 50% member of the first respondent. This aspect will therefore have to wait for a finding on the first issue. This aspect can be dealt with on the papers if the second applicant is found to be a 50% member, since in my view it is inevitable that a winding-up will then follow, subject to the unclean hands aspect.

[6] **Unclean hands**

6.1 The respondents contend that the applicants approach the court with unclean hands, which would ordinarily preclude the applicants from seeking a winding-up of the first respondent on a just and equitable basis.

6.2 The basis for this contention is that at a stage where the third respondent was withdrawing monies for personal use from the bank account of the first respondent (in relatively small amounts), the second applicant withdrew R280 000 "to protect the funds" of the first respondent.

6.3 Whether this constitutes unclean hands which would preclude the applicants from succeeding in a winding-up is in dispute. The respondents claim that there was no justification for the withdrawal

whereas the second applicant claims that he was protecting the funds of the first respondent. This issue must also be referred for the hearing of oral evidence.

[7] **The marketing fee**

7.1 The applicant claims that there was an agreement that the first applicant would be paid a marketing fee of R2 000 000 which would be "repayable" at the rate of R200 000 per month over a period of 10 months.

7.2 The respondents contend that the amount to be paid for marketing was only R1 000 000; that this was to be paid to an external marketing company called Ubizolwethu Trading; and that it was to be paid as to R200 000 before the tender was awarded and the remainder of R800 000 after the tender had been awarded.

7.3 The documents show that the first amount of R200 000 was paid by the first applicant, one assumes to Ubizolwethu Trading, and regarded by it as part of the loan which it made to the first respondent. A further R600 000 in tranches of R200 000 each was paid out of the first respondent's bank account directly to Ubizolwethu Trading.

7.4 The documents therefore support the respondents' version that the marketing fee was due to an external third party, and not to the first

applicant.

7.5 It may be that there is some relationship between the first applicant and Ubizolwethu Trading, although the applicants have not revealed that in their affidavits.

7.6 Had this been the only issue to be resolved, I believe that the allegations and documents would make it possible for me to decide this point in favour of the respondents, but once there are other issues to be referred for the hearing of oral evidence, it seems to be wrong to deny the applicants the chance to overcome the probabilities which appear from the papers.

[8] **Other debts**

8.1 The applicants contended in the founding papers that the first respondent was also indebted to them in respect of the loan (to the first applicant) and salary (to the second applicant).

8.2 I am satisfied from the papers that no such indebtedness has been shown, and that any indebtedness which there was, has been adequately shown to have been discharged by the respondents.

[9] **Inability to pay debts**

9.1 If the marketing fee is in fact due to the first applicant, then, even on

the respondents' version, only R800 000 of the R1 000 000 has been paid.

9.2 The question would then be whether the first respondent has been proved to be unable to pay its debts.

9.3 To counter the inference which could be drawn from the founding papers, the first respondent has merely annexed certain bank statements, reflecting an amount of about R2 000 000 paid by the Ekurhuleni Municipality each month, from which its debts are then discharged to the point where the amount is generally depleted before the next one is received. Although it also furnished a list of certain assets, it did not produce any financial statements in the form of a balance sheet or income statement. The bank statements merely show its cash flow, but not its assets and liabilities or income and expenses on a proper accounting basis. That is not sufficient. I therefore find that the first respondent has been shown to be unable to pay its debts. If the debt referred to in paragraph 7 above is proved to be due and payable to the first applicant, the court would in my view be entitled to grant a winding-up order.

[10] When the matter was heard by me, there was no security bond as required by section 346(3) of the Companies Act, 61 of 1973 ("the Companies Act"), in the court file. The security bond was only filed after the hearing, and shortly before I was due to hand down this judgment. It is now established that security must

have been given before a winding-up order is granted[2]. The failure to have obtained a security bond before the hearing is therefore not fatally defective.

[11] A further aspect which arose at the hearing was that service on the South African Revenue Services ("SARS"), as required by section 346(4A)(a)(iii) of the Companies Act, only took place on the morning of the hearing, notwithstanding that the application had been launched in May 2013.

[12] Section 346(4A)(a)(iii) of the Companies Act provides as follows :

> "346. **Application for winding-up of company**
>
> ...
>
> (4A)(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –
>
> ...
>
> (iii) to the South African Revenue Services."

[13] The wording of the section gives rise to a debate whether its provisions are peremptory. It used to be, but is no longer, in vogue to distinguish between "mandatory" or "peremptory" and "directory" provisions. The question now is whether there has been compliance with the statutory provision viewed in the

---

2 Court v Standard Bank of SA Ltd; Court v Bester N.O. and Others 1995 (3) SA 123 (A) at 127E-131F, dealing with the equivalent section in the Insolvency Act, 24 of 1936, but equally applicable to a winding-up. Although it is said in that matter that "security must have been given before the matter is heard" (at 131B-C), the judgment of Klopper J in Melcost Investments (Pty) Ltd v Kruger 1968 (2) SA 69 (O) at 72A-C is quoted with apparent approval, in which it is said that security is required "voor enige bevel nog gemaak word" (at 131D)

light of its purpose[3]. A statutory provision should therefore be interpreted without regard to historic labels, and important guides to the correct interpretation would be "the apparent purpose of the provision and the context in which it occurs"[4]. In what follows I use the term "peremptory" purely in a descriptive sense, namely whether on a correct interpretation of the section something *must* be done.

[14] It is clear that compliance with section 346(4A)(a)(iii) is peremptory in the sense that a copy of the application must be furnished to SARS. The same applies to proof of service on SARS by means of an affidavit (section 346(4A)(b))[5]. What is not clear is precisely when the copy of the application has to be furnished to SARS. In terms of the section, it must be furnished "when (the) application is presented to the court". Van Loggerenberg AJ in Corporate Money Managers (Pty) Ltd and Others v Panamo Properties 49 (Pty) Ltd[6] concluded that it was peremptory that a copy of the application had to be furnished to SARS at the time when the application is lodged with the

---

3 Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others 2014 (1) SA 604 (CC) at para [30]. See also Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) at para [13]

4 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [26]

5 Hendricks NO and Others v Cape Kingdom (Pty) Ltd 2010 (5) SA 274 (WCC) at para [31], dealing with section 346(4A)(a)(ii); Roberts v The Taylor of Buckingham CC, unreported, WLD, 28 November 2008, referred to in Hendricks case *supra* at para [31]; Hannover Reinsurance Group Africa (Pty) Ltd and Another v Gungudoo and Another 2012 (1) SA 125 (GSJ) at para [14] (left open on appeal *sub nom* Gungudoo v Hannover Reinsurance Group Africa (Pty) Ltd 2012 (6) SA 537 (SCA) at para [42]); Standard Bank of SA Ltd v Sewpersadh and Another 2005 (4) SA 148 (C) at para's [17] and [27] and Chiliza v Govender and Another 2013 (4) SA 600 (KZD) at para [23], the latter three cases dealing with section 9(4A) of the Insolvency Act, 24 of 1936

6 2013 (1) SA 522 (GNP)

Registrar of the Court and that such furnishing had to be proved by way of an affidavit[7]. He found that furnishing a copy of the application to SARS on the morning of the hearing and the failure to file an affidavit proving such furnishing were fatal, and he discharged the provisional liquidation order[8]. Whilst I agree that a copy of the application must be furnished to SARS, to find that it must be furnished at the time when the application is lodged with the Registrar is in my view too rigid and, with respect, wrong.

[15] The "presenting" or "presentation" of an application is used more than once in the Companies Act. In section 348[9] it means when the application is duly lodged with the Registrar of the Court[10]. It seems to me that as used in section 346(2)[11] it refers to the launching of the application but could equally refer to the hearing thereof. As used in section 346(4)(a)[12] it clearly cannot mean lodged with the Registrar, because the application must first be issued before it can be served, even on the Master[13]. It is therefore not a given that the

---

7 At para [10]

8 Van Loggerenberg AJ was dealing with the extended return day of a provisional liquidation order. The provisions of section 346(4A)(a)(iii) should have been complied with before the provisional order was granted, and the provisional order was, it seems, therefore wrongly granted in the first place.

9 "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."

10 Henochsberg on the Companies Act, 71 of 2008, Vol 2, APPI-91

11 "A member of a company shall not be entitled to present an application for the winding-up of that company unless he has been registered as a member ... for ... at least six months ...".

12 "Before an application for the winding-up of a company is presented to the Court, a copy of the application ... shall be lodged with the Master ...".

13 Otherwise it would not have a case number.

expression "When an application is presented to the court" as used in section 346(4A)(a) means when it is lodged with the Registrar.

[16] One must therefore look to the purpose of the section. It is of no consequence whether a copy of the application is furnished to SARS[14] immediately when the application is lodged with the Registrar, or within a reasonable period of time thereafter, as long as it is done within a reasonable period of time before the hearing of the application. The purpose of the provision is that SARS should have notice so that it can take steps to protect its interests should it wish to do so. To find that a copy of the application must be furnished to SARS at the very moment that the application is lodged with the Registrar leads, with respect, to an absurdity. It is physically impossible to achieve both simultaneously. If a copy of the application is furnished to SARS on the next day, has the peremptory provision been met? If so, what about the day after that? What are the parameters within which it would be found that the peremptory provision has been met? It seems to me that the timing of the furnishing of a copy of the application to SARS will be dictated by requirements of reasonableness and prejudice, and not by any rigid formula.

[17] In this regard, Davis J in Moodliar N.O. and Others v Hendricks N.O and

---

[14] I confine myself to SARS but it would apply to the other intended recipients of the application as well.

Others.[15] found a solution in the standard of substantial compliance, as follows :

> "[29] To sum up : a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties, as specified in section 346(4A)(a). I do not consider that the inherent jurisdiction would extend the power of the court. But a court may, in my view, determine whether the applicant has been in substantial compliance with each of these sections. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met.
>
> [30] To express this point in another way, the means adopted by the applicant to comply with the section is something which the court is required to determine to decide whether there has been substantial compliance, as I have set it out."

If it is peremptory that the furnishing to SARS take place at the time when the application is lodged with the Registrar, then strict compliance is necessary; substantial compliance traditionally applies to "directory" provisions[16]. Accepting that substantial compliance is permitted, that should occur within a relatively short timeframe. However, if the timeframe is extended simply to a reasonable time before the hearing (which may be many months later), then it would in my view be inappropriate to rely on or refer to substantial compliance; why would such "compliance" be "substantial"? The timing of the furnishing to SARS must rather be found in a purposive interpretation of the

---

15 2011 (2) SA 199 (WCC) at para's [29] and [30]

16 Allpay Consolidated Investments Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency *supra* at para [30]

section.

[18] I accordingly hold that, whilst the furnishing of a copy of the application to SARS, and proof of such furnishing by way of affidavit, are peremptory, section 346(4A) (a)(iii) does not require the furnishing of the copy to SARS to occur at any particular time. The purpose of the section is met if such furnishing takes place within a reasonable period of time prior to the hearing of the application, and the affidavit is filed before or during the hearing[17].

[19] In the present case, service on SARS on the morning of the hearing is clearly not a reasonable period of time prior to the hearing. It does not give SARS the opportunity to consider its position, and to decide whether it needs to protect its interests in the application. But for the referral to oral evidence, I would have dismissed or postponed the application for winding-up for want of proper compliance with the section. However, the fact that the matter is to be referred for the hearing of oral evidence changes that. Before the application for the winding-up will be heard, on the evidence in the affidavits as supplemented by the oral evidence, the reasonable period of time to which I have referred above would have occurred.

[20] The affidavit which purportedly proves service is perfunctory to say the least, and not proper compliance with section 346(4A)(b). The applicants would be

---

17 This is also the conclusion arrived at by Tsoka J in Hannover Reinsurance *supra* at para [14]

well advised to file a proper affidavit prior to the next hearing.

[21] In the circumstances, I make the following order :

"1. The application is referred for the hearing of oral evidence, at a time and on a date to be allocated by the Registrar, on the following questions :

1.1 The agreement reached between the second applicant and the second and third respondents in relation to the second applicant becoming a member of the first respondent and the terms thereof, specifically whether such agreement was subject to any conditions precedent.

1.2 Whether the second applicant approached the Court with unclean hands.

1.3 The agreement reached in relation to a marketing fee, who is entitled to such marketing fee and the amount thereof.

2. The evidence shall be that of any witness whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 3, infra.

3. Save in the case of any deponent to any affidavit in the application, neither party shall be entitled to call any witness unless:

3.1 it has served on the other party at least 15 days before the date appointed for the hearing (in the case of a witness to be called by the applicants) and at least 10 days before such date (in the case of a witness to be called by the respondents), a statement wherein the evidence to be given in chief by such person is set out; or

3.2 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 evidence.

4. Any person may be subpoenaed to give evidence at the hearing, whether such person has consented to furnish a statement or not.

5. The fact that a party has served a statement in terms of paragraph 3, supra, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6. The provisions of rules 35, 36 and 37 shall apply to the hearing of oral evidence.

7. The incidence of the costs incurred to date (which has not already been determined) shall be determined by the Court hearing the oral evidence."

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	30 January 2014
Date of judgment	:	25 February 2014
Counsel for the applicants	:	J G Dobie
Instructed by	:	Twala Attorneys (Mr Mzinyathi)
Counsel for first, second and third respondents	:	N Mahlangu
Instructed by	:	Routledge Modise Inc (D Sebola)

c:\users\morag\documents\arg\acting\2014\sphandile v hwibidu.docx