IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 54987/2012

In the matter between:

18/6/2014

HUGH FINLAY MOORE APPLICANT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

18/06/2014 Tlhapi
DATE SIGNATURE

and

LEAMAR ENVIRONMENTAL SOLUTIONS RESPONDENT

JUDGMENT

TLHAPI J

[1] This is an application for the final or provisional winding up of the respondent on the basis that the respondent was unable to pay its debts Companies Act, as contemplated by section 344(f) of the old Companies

Act and/ or that it was just and equitable as contemplated by section 344(h) of the same Act. The application was opposed.

Condonation is granted for the late filing of the replying affidavit.

[2] During 2001 the applicant designed and manufactured a product known as a 'jet mixer'. Since the intellectual in the product vested in him, the respondent indentified a mutual opportunity to exploit and employed him . A written agreement was entered into on 1 May 2003.

[3] The clause pertaining to the applicant's remuneration read as follows:

> "The company offers a total cost to company package scheme of R240 000.00 per annum, which will be paid monthly in arrears into a bank account of your choice. Pro rata bonuses might be paid to you, on discretion of the director of the company, based on your performance and the performance of your company. The total cost to company package scheme enables you to structure your remuneration in the best way possible to suit your needs at the discretion of the company. The total cost to company include the cost of medical aid and provident fund contributions referred to below. .....In addition to the above cash payment you will also be entitled to an annual bonus based on 5 (five) percent of sales turnover of the company. Further bonuses on installations will be discussed and agreed upon when you start employment whereafter it will become part of this contract."

Furthermore, the respondent had to contribute 7.28% towards the applicant's provident fund and he was entitled to full pay in

respect of the 20 working leave days in each 12 months completed service. The applicant averred that there was a further oral agreement with the following terms:

1. that the plaintiff would be entitled to 20% per invoice of jet mixers sold and that same was payable on receipt of payment from a client.
2. that the applicant would be entitled to a 13th cheque and that respondent would be liable for relocation costs from the United Kingdom to South Africa;

[4] The applicant averred that the respondent had breached the above agreements and was indebted to him in the amount of R2 245 523.00, made up as follows:

1. failed to pay the 13th cheque for the years 2008, 2009, 2020 and *pro rata* 2011 and further failed to contribute and was indebted in the amount of R77 227.00;
2. failed to pay the 7.28% towards the applicant's provident fund after 2007;
3. failed to pay the 5% bonus and was indebted in the amount of R725 115.00;
4. failed to pay the 20% installation bonus and was indebted in the amount of R684 408.00;
5. failed to pay relocation expenses and was indebted in the amount of R548 490.00;

6. failed to pay outstanding 15 days annual leave pay at date of resignation and was indebted in the amount of R5 500.00

The applicant contends that some of the claims could result in factual disputes therefore he decided to focus on those claims which the respondent could not dispute on *bona fide* and reasonable grounds, these being the claim in respect of the 5% bonus and contribution towards his provident fund.

[5] The applicant denied he was ever paid the 5% bonus. From the financial statements of the respondent in his possession 'A3' and 'A4' (year ending 28 February 2008, 2009 and 2010) which were annexed he calculated that what was due to him amounted to R162 999.41. In respect of those years for which no financial statements were available (year ending 28 February 2004 to 2007 he estimated that the annual turnover would not be less than R1 100 000.00 and in this regard he was owed R220 000.00.

The respondent's provident fund contributions not paid over a period of 36 months amounted to R204 783.00.

[6] A statutory demand in terms of section 345(1)(a)(i) in terms of the old Companies Act, was served by Sheriff on the registered office of the respondent on 28 November 2011. The respondent acknowledged receipt of the demand but denied there were any amounts due to the applicant and in particular denied '*that there was any further agreement*

*reached with regard to bonuses on installation; ....*contended '*that it had paid the 5% bonus on annual sales; ....* denied that applicant was entitled to any leave days;.....denied that there was an oral agreement concluded during 2003 regarding installation bonuses;..... denied that applicant was the inventor of the '*jet mixer'* and entitled to a percentage on invoice price; ... denied agreement on entitlement to a 13th cheque or entitlement to any relocation expenses. The respondent did not deny its obligation towards the provident contribution.

[7] The respondent raised several points *in limine*. It contended that this court lacked jurisdiction in terms of section 157 (1) of the Labour Relations Act 66 of 1995 (the 'LRA') because the dispute revolved around 'non-payment of his salary, bonuses, leave pay and contribution towards his provident fund'. The applicant had also failed to engage the dispute resolution process under the LRA. The respondent contended further that the applicant was made aware prior to the application that the indebtedness was unequivocally denied and that this raised factual disputes and also that the applicants claims were unliquidated in several respects. Furthermore that since this application was served on 25 September 2009 that all claims preceding this date had prescribed.

[8] The respondent denied that it was insolvent or that it was indebted to the applicant. It contended that its assets exceeded its liabilities and that it had traded at a profit prior to the application being launched and as was evident from the financials annexed to the founding affidavit.

Furthermore the respondent :

1. denied that the applicant was the designer of the 'jet mixer' product
2. denied that an oral agreement on the terms alleged by applicant was entered into during June 2003;
3. that from the remuneration clause in the employment agreement it was made clear that the installation and other bonuses including the 13th cheque would be paid out at the discretion of the directors of the respondent;
4. admitted to having stopped contributions towards the provident In November 2007 after reaching agreement at a meeting attended by the applicant, the respondent's bookkeeper and the deponent to the answering affidavit that the respondent would no longer be making contributions for its employees and that applicant agreed and accepted such change; the applicant never raised this issue till receipt of the letter of demand and the applicant was not entitled to any contribution after October 2007;
5. that the respondent had paid all 5% bonuses due;
6. denied that applicant was entitled to any relocation expenses or outstanding leave;

[9] The respondent contended that the applicant had failed to mention the dates when the said bonuses were allegedly not paid and the respondent was unable to determine which amounts were in dispute; the

applicant had failed to state the basis upon which claims in paragraphs 4.13.1, 4.13.3 and 4.13.4 were founded and had provided no proof for the claims in paragraphs 4.13.5 or 4.13.6. The respondent contended that the claims were unproven, unliquidated and disputed and, that a large portion of the claims had prescribed

The respondent contended that the applicant failed to state what amounts he had received with regard to the 5% bonus. A statement by its bookkeeper annexure 'F' indicated that the applicant had received additional payments amounting to R1 381 692.

[10] Preceding the replying affidavit the applicant served a Rule 35 (12) notice on the respondent and obtained information which applicant contended assisted in properly formulating its claims as was confirmed in the replying affidavit.

In response to the points *in limine* the applicant contended that this court had jurisdiction to determine the matter because he launched the application as a creditor who had an undisputed claim against the respondent and not as an employee; furthermore, that since the respondent contended that it disputed the claims on reasonable grounds, the court had to determine whether the applicant had made out a case for winding up by it proving that respondent was indebted to him in the sum of more than a R100.00.

[11] The alleged oral agreement of November 2007 regarding respondents obligation to pay provident contributions did not comply with

the terms of the non-variation clause in employment agreement, which provided that, '*this contract may be amended in writing only'.* While certain amounts may have prescribed the respondent did not dispute the amount and obligation to pay and still remained indebted in the amount of R102 648.00 for no less than two years contributions (R4 277.00 x 24 months).

[12] The respondent contended that prescription had been interrupted when respondent alleged that it had paid all amounts due in respect of the 5% bonus. Having regard to the information provided in response to the Rule 35(12) notice the respondent was indebted in the amount of R470 484.00 calculated for each financial year ending February for the years 2004 to 2012.

[13] The applicant then dealt with payments by the respondent recorded in annexure 'F' which did not constitute payment of the 5% bonus. In part one under the heading 'Bonus' and against dates reflected were payments for the full or part payments of his 13th cheque (*15/12/2003; 6/12/2004; 6/12/2005 ; 10/6/2005*); part payments of salary (*8/2/2007*); only one and not two payments as reflected of R10 000.00 on *9/1/2008* was paid; the respondent conceded that an amount of R20 000.00 (*10/8/2008*) was never paid to applicant; an amount of R20 000.00 (*11/8/2010*) was paid to applicant's wife for services rendered.

[14] In part two and three payments reflected related to his overseas business travel expenses, payment to the Department of Home Affairs for work permits; payments on behalf of applicant and other employees for accommodation during a business trip; the respondent never contributed towards the applicant's medical aid and payment for medical purposes was never claimed from him and the same applied to alleged overpayments in respect of provident fund; the cellphone costs related to office expenses and reflected as overpayment for medical aid; the Toyota LD Cruiser was donated to applicant's wife and was sold by the respondent on its return for R120 000.00.

Points *in limine*

[15] Jurisdiction: The submission for the applicant that this matter was not related to a labour dispute presents difficulties in my view, in relation to only one of the claims, being the claim with regard to the provident fund contributions.

Although the application relates to an employment contract, in my view, the issue that is raised in respect of the other claims is about the breach of the said employment contract, which resulted in the applicant considering himself or becoming a creditor of the respondent. It is this court that has jurisdiction to deal with an application for the winding up of the respondent by a creditor and not the CCMA or the Labour Court under the Labour Relations Act ('LRA'). The issue to determine, therefore, is whether the claims raised are claims that may result in the

respondent being wound-up on account of it being unable to pay its debts.

[16] Factual Disputes: The applicant has conceded that there are factual disputes relating to some of his claims. The applicant has therefore confined his claims to the one relating to his provident fund contributions and the 5% bonus.

[17] Prescription: In my view the issue of prescription was still relevant to the determination of this matter and can only be dealt with when there is clarity on what constitutes the claims of the applicant as at the time when the demand was served on the respondent .

[18] Provident Fund: It was common cause that the employment contract provided for 7.28% contribution, which represented a 100% contribution by the employer (respondent). It is not the case for the applicant that a portion of the contributions were deducted from his salary. The employment contract was subjected to a non-variation clause and on the other hand, the provident fund contribution constituted a benefit of his employment.

According to the applicant there was a unilateral change to his conditions of employment which was denied by the respondent. In my view, this is a dispute that should have been dealt with under the Labour Relations Act, that is, before the CCMA and a referral to the Labour Court on failure by the CCMA to resolve the dispute. It is a dispute which is distinct from the other claims and should have been dealt with

separately. In this regard the applicant was out of time and I am not certain that condonation would have been granted so many years after the incident occurred or after the termination of his employment with the respondent.

[19] Furthermore, I am not satisfied that the applicant has made out a proper case why this contribution is due to him directly. In 'A1' under Provident Fund membership was subject to the fund rules. The employer was responsible for entering into an agreement with the provident fund on behalf of a group of employees. When the employer ceased to make any contributions on behalf of an employee then certain consequences under the rules of the fund follow. The applicant has not given any information relating to the rules of the fund, or if he endeavoured to resolve his complaint with the fund or as to whether the fund at any stage dealt with the respondent's failure to meet its obligations. As I see it, where an employer contributes 100% (or even 50%) the loss to the employee is not the value of the contribution but the value of the benefit derived from contributions from November 2007 and for 24 months thereafter. Even if the value of the contribution was payable it does not in my view, accrue directly to the applicant. The answering affidavit does not give clarity on the provident fund issue because even the respondent in my view cannot negotiate with its employees regarding the contributions without engaging the rules of the fund.

[20] According to the respondent an agreement was reached with a group of employees during which they were informed that the

respondent would no longer make any contributions towards the provident fund and that each would be liable for his or her own contribution towards their respective provident funds. It is not clear whether the applicant did so after November 2007. There is in my view no clarity as to what happened with the employee benefits from contributions made prior to this change. This has to be determined by the rules of the Fund. The benefits derived could have been kept in a preservation fund or transferred to another fund, or a retirement annuity, that is depending on the circumstances of each case. If it is a transfer to another fund it may be that the respondent would be responsible for paying the equivalent of the contributions owing on behalf of the applicant to that fund for that period.

[21] The 5% bonus: It was common cause that in terms of the agreement the respondent had to pay a 5% bonus. The respondent does not deny such fact and has stated in the answering affidavit that it had complied with its obligations in this regard. Annexed to the founding affidavit were copies of some audited financial statements of the respondent which formed the basis of applicant's calculations of the 5% bonus due on annual sales turnover.

The applicant relied on figures in the financial statements available to calculate what was due to him. In the financial statements for 2009 the cost of sales for 2008 and 2009 are reflected as R1 126 923.05 and 896 887.25 respectively on page 33 of the papers (under notes: Income statement for the year ended 28 February 2009). At page 42 (under

heading: Detailed Income statement for the year ended 28 February 2009) the same amounts are reflected, but now these related to sales and services rendered. The question is how much of the said amounts represent annual sales and how much income for services rendered. In response to the Rule 35 (12) notice, annexure 'F' prepared by the respondent's bookkeeper is an exposition of its summary of payment made in respect of the 5% bonus. The bookkeepers affidavit gives no further explanation of the source of the calculations and how these are accounted for in the financial statements. There is further no explanation why the payments reflected in annexure 'F' should be considered as constituting payment of the 5% bonus other than the contention in the answering affidavit that all 5% bonuses due have been paid. What is evident though is that it would seem that some of the payments could be payments over and above the applicant's salary in terms of the employment agreement. What I find is that there is no unequivocal acknowledgment of debt in this regard by the respondent. The applicant has in the replying affidavit given an explanation of what the payments were for, which is in contradiction to what the respondent has put forward, but which in my view presents another instance where it could be said that there is a factual dispute.

[22] The winding-up: It was submitted for the applicant that the respondent had failed to show that the claims were denied on reasonable grounds and that the applicant had *prima facie* established and proved that the respondent was indebted to him in the amount of

R100.00. I have given reasons why I have problems with the provident fund claim and on the calculation of the 5% bonus allegedly owing. With regard to these two issues and in the light of uncertainty I find it necessary postpone the giving of an order for the provisional winding up of the respondent to and to refer oral evidence the determination of certain issues.

[23] In the result I give the following order:

The matter is referred to oral evidence for the following issues to be determined:

1. Provident Fund: What were the circumstances prevailing during November 2007 when contribution towards provident fund by the respondent stopped.
2. How was the issue resolved in terms of the rules of the fund;
3. Why should the applicant be reimbursed directly;
4. 5% Bonus: what constitutes the basis of calculation of the 5% bonus and has this been paid by the respondent;
5. Costs are reserved.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	22 MAY 2013
JUDGMENT RESERVED ON	:	22 MAY 2013
ATTORNEYS FOR THE APPLICANT	:	WEAVIND & WEAVIND
ATTORNEYS FOR THE RESPONDENT:		VAN ZYL LE ROUX ATT