THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 753/2013
Reportable

In the matter between

COENRAD JOHAN LAMPRECHT **APPELLANT**

and

KLIPEILAND (PTY) LIMITED **RESPONDENT**

Neutral citation: *Lamprecht v Klipeiland (Pty) Ltd* (753/2013) [2014] ZASCA 125 (19 September 2014)

Coram: Cachalia, Bosielo, Shongwe and Swain JJA and Dambuza AJA

Heard: **03 September 2014**

Delivered: **19 September 2014**

Summary: Winding-up – Requirements – Section 345(1)(*a*) of the Companies Act 61 1993 – Agreement by the parties regarding respondent's *locus standi*, indebtedness and whether the debt is due – the legal effect thereof.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance):

It is ordered that:

1. The appeal is upheld.

2. The respondent is ordered to pay the costs on an attorney and client scale, such costs to include the costs of two counsel where so employed.

3. The order of the high court is set aside and the following order is substituted in its place:

> '(a) The respondent is placed under final winding-up;
>
> (b) The costs of the application including the costs reserved by Prinsloo J on 21 February 2012, and the costs of the appearances before Preller J on 19, 20 and 28 September 2012, including the costs consequent upon the employment of two counsel wherever employed, are to be costs in the winding up.'

JUDGMENT

Bosielo JA (Cachalia, Shongwe and Swain JJA and Dambuza AJA concurring):

[1] This is an appeal, with the leave of the court below, against the judgment by the North Gauteng High Court, Pretoria (Makgoka J) in terms whereof he discharged a provisional winding-up order with costs.

[2] Briefly stated the background facts to this case are as follows: during March 2003 the appellant and the respondent, duly represented by its directors concluded an agreement in terms whereof the respondent appointed the appellant as its Project Manager to have its property, the Remainder of the farm Klipeiland 524 JR, Gauteng, rezoned and proclaimed a township. This entailed the planning, co-ordination and supervision of all the professionals to be employed in the process of establishing a township. By September 2007, the appellant had succeeded to obtain approval for the proposed township from the Kungwini Local Municipality.

[3] The appellant avers that he was to be paid R6 million as remuneration for the project under the agreement. However, during November 2007, the respondent terminated the agreement with the appellant and appointed Dynadeals Three (Pty) Ltd in his position. The alleged reason was that the appellant had failed to perform in terms of the agreement. The appellant regarded this as a repudiation of the agreement, which he accepted. Alternatively, he regarded it as cancellation of the agreement.

[4] Based on the alleged repudiation or cancellation of the contract, the appellant demanded the R6 million from the respondent as his compensation. When the respondent failed to pay, the appellant served a formal demand for payment in terms of s 345(1)*(a)* of the Companies Act 61 of 1973 (the Companies Act) on the respondent. Despite numerous meetings between the appellant and Jung-FuTsai, one of the respondent's directors, and his undertaking to pay, no payment materialised. As a result the appellant instituted motion proceedings to have the respondent

wound up. The respondent opposed the application and filed an answering affidavit.

[5] The respondent raised a number of points *in limine*. Essentially, it denied that s 345(1)(*a*) was applicable as the appellant had not proved that his claim was liquid, and, further that the respondent was unable to pay its debt as envisaged by s 345(1)(*a*) of the Companies Act. Importantly, the respondent denied that it had agreed to pay the appellant R6 million for the project as alleged by the appellant. Its version of the agreement was that the appellant would be paid in kind, by way of transfer to him of 61, 3877 hectares of land, being the remaining portion of the total extent of the land in issue. This was to be effected once the appellant had succeeded in having the land rezoned from agricultural land, its establishment and proclamation as a township, and its subdivision. This had to be followed by a sale of approximately 192, 11 hectares for R120 million, and the issuing of a certificate in terms of s 82 of the Town Planning and Townships Ordinance 15 of 1986.

[6] Johannes Paulus Van Wyk (Van Wyk), who described himself as a town planner deposed to an affidavit in support of the appellant. He confirmed that he was appointed to undertake the establishment of a township on the respondent's property. He was to perform his duties under the supervision of the appellant who was the Project Manager. Essentially, he confirmed that he secured the approval for the establishment of the township from Kungwini Local Municipality as well as approval from the Department of Agriculture in terms of the subdivision of Agricultural Land Act 70 of 1970. This he accomplished under the supervision of the appellant as the Project Manager. Of

importance, he explained that whatever delays were occasioned regarding the approval of the establishment of the township could not be attributed to the appellant. He ascribed these delays to systemic problems. He confirmed that he was duly paid by the respondent for the work which he did.

[7] This application was enrolled on 20 May 2011 before Ranchod J, who, on finding that the matter presented serious disputes of fact on numerous issues, declined to grant the provisional winding up order. Instead, he referred the matter to oral evidence as follows:

'2. Oral evidence shall be heard on the following issues whether the applicant is a creditor of the respondent within the meaning of section 345(1)(a) of the Companies Act (61 of 1973) ie "a creditor…to whom the company is indebted in a sum not less than one hundred rand then due…" and thus has locus standi such that it can rely on section 345(1)(a) of the Companies Act?

[8] On 19 March 2012, whilst oral evidence was being led, the parties interrupted the proceedings and reached an agreement regarding the appellant's *locus standi*. With the consent of both legal representatives, this agreement was made an order of court by Kruger AJ on 20 March 2012. The relevant part of the order reads:

'That by agreement between the parties the respondent admits and concedes that the applicant is a creditor of the respondent within the meaning of section 345 (1)(*a*) of the Company's Act, ie, a creditor to whom the respondent is indebted in a sum not less than R100 then due and thus has *locus standi* such that it can rely on section 345(1)(*a*) of the Company's Act 61 of 1973'.

[9] On 24 April 2012, the matter came before Davis AJ in the opposed roll who granted the provisional order with 5 June 2012 being the return

day. On the return day the matter came before Makgoka J who discharged the provisional winding up order with costs. The reasoning underlying the judgment is set out as follows:

'[11] On a plain reading of the court order, the respondent admits that the applicant is its creditor of a sum of not less than R100. There is no mention of an amount of R6 000 000 or for payment of any other fixed amount of money. If it was the respondent's intention to admit the full amount, it would have done so expressly. The admission is patently nothing more than an admission of an illiquid amount of money.

[12] I therefore do not agree with the contention that the applicant is entitled to the R6 000 000. It is common cause that the applicant never completed his mandate. He is therefore not entitled to the initially agreed amount of R6 000 000. He is entitled to claim damages, which must still be quantified (*BK Tooling v Scope Precision Engineering* 1979 (1) SA 391 (A).

[13] The fact that the respondent was not willing to admit that no more than R100 was due and payable is a clear indication of the respondent's intention to place the balance of the amount claimed in dispute…'

[10] Contrary to the finding by the court below, the appellant did not claim the R6 million in this winding-up application. All he wanted was to assert or establish his *locus standi* under s 345(1)(*a*) of the Act as a creditor owed an amount of no less than R100 which amount was due and payable. The dispute as to what is owed will be settled either by the liquidator after the appellant has lodged his claim or by court in the event that the creditor and liquidator are unable to agree on the amount payable.

[11] As clearly foreshadowed in his heads of argument, appellant's counsel relied primarily on the order made by Kruger AJ. He contended that on a simple reading of this order, the respondent knowingly conceded that he was the appellant's debtor as contemplated by s 345(1)(*a*), with a claim of no less than R100 and further that the money was due and

payable. Furthermore, he submitted that the respondent's failure to satisfy the s 345(1)(*a*) demand is clear proof of its commercial insolvency. He contended further that the effect of the concession was that the appellant's debt was liquidated, that the debt was extant at the time when the s 345(1)(*a*) notice was served on the respondent, and further that the debt was due and payable. This, he contended, gave the appellant the right and *locus standi* to liquidate the respondent as it was proved that it was commercially insolvent as contemplated in ss 344(*f*) and 345(1)(*a*).

[12] On the other hand, the respondent's counsel assailed the validity of the agreement concluded by the parties. The essence of his contention was that the concession was made erroneously as the respondent never intended to admit any indebtedness. However, he was not able to offer any explanation as to why no effort had been made to withdraw this concession. In conclusion he submitted that the amount claimed by the appellant was not liquid as there was still a dispute regarding the precise amount agreed upon as remuneration for the appellant. He argued further that as the appellant had not performed fully in terms of the agreement, his claim was for damages which still had to be computed, hence it could not be said to be liquid.

[13] It is common cause that the court order issued by Kruger AJ is still valid. This order is couched in exactly the same words used in s 345(1)(*a*). It is noteworthy that the agreement that gave birth to this court order was made precisely to address the vexed dispute around whether the appellant is the respondent's creditor for an amount of not less than R100 and whether the money was due. The wording used is clear and unambiguous. There is in my view no room for any misunderstanding by any of the parties concerning what they agreed on. As a result, I am

constrained to find that the respondent is either being disingenuous in denying that he knew what he signed and agreed to, or that he was plainly dishonest with the court and the appellant. This conduct is reprehensible and deserving of censure. In addition, counsel for the respondent conceded that the concession made by the respondent in consenting to the order made by Kruger AJ was to avoid the respondent's representative giving evidence. The terms of the order directly contradicted the respondent's version on oath that the respondent had never agreed to pay the appellant a sum of money in whatever amount.

[14] Section 345(1)(*a*) of the Companies Act provides that:

'(1) A company or body corporate shall be deemed to be unable to pay its debts if –

(*a*) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due −

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of anybody corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the court may direct,

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.'

[15] To meet the threshold laid down in s 345(1)(*a*) it is essential that an applicant prove three essential requirements. These are, first, that he or she is a creditor of the respondent for an amount not less than R100, secondly, which must be due and payable. In other words, the debt must be liquid. Third, there must be proof that, notwithstanding service of the s 345(1)(*a*) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor.

[16] I have already found that the agreement was made an order of court by Kruger AJ was valid. This leads me to find that the respondent conceded that the appellant had *locus standi,* that he was a creditor for a sum no less than R100 and further that it was due and payable. There is no dispute that although the s 345(1)(*a*) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdictional requirements set out in s 345(1)(*a*) have been met. As stated by Malan J (as he then was) in Body Corporate of Fish Eagle v Group Twelve Investments 2003 (5) SA 414 (W) at 428B-C:

'The deeming provision of s 345(1)(*a*) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beek's case supra at 331F). If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(*a*) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.'

It follows that the court below erred in discharging the provisional winding up order.

[17] What remains now is the issue of costs. The appellant's counsel asked for a punitive order of costs. His primary reason was that the respondent proved itself to be a mendacious litigant. It made conflicting and mutually contradictory averments in its affidavit. Initially, it emphatically denied any monetary indebtedness to the appellant. Later, as pointed out above, during the trial, it performed a *volte face* and admitted a monetary indebtedness to the appellant in an agreement which was made an order of court. In its appeal to this Court, it attacked the validity of that agreement. The appellant's counsel submitted that, given the court order referred to above, the respondent's opposition of the application for

its liquidation was both vexatious and frivolous, and must be visited with a punitive order of costs.

[18] Respondent's counsel countered this by contending that the respondent was entitled to oppose the application for its liquidation as the applicant's claim is not liquid because the amount claimed by the applicant is seriously disputed. In conclusion, he submitted that objectively speaking, there was nothing untoward in the respondent's opposition to the application. He concluded by submitting that there is no basis for a punitive cost order.

[19] I have already said that the respondent behaved in a reprehensible manner. He put up strong opposition to the appellant's claim even in the face of an order of court made with its consent. This it did without any attempt to have the court order rescinded, varied or set aside. It is trite that every order which has been issued by a competent court remains valid and enforceable until it is rescinded, varied or set aside by a competent court. The respondent could not willy-nilly disregard the court order made by Kruger AJ. To my mind, the respondent's conduct amounts to an abuse of the court's process. The appellant has been put to unnecessary trouble and litigation costs. Justice and fairness requires that the respondent be ordered to pay the costs of the application on a punitive scale. See *In Re Alluvial Creek Ltd* 1929 CPD 532 at 535.

[20] In the result, the following order is made:

1. The appeal is upheld.
2. The respondent is ordered to pay the costs on an attorney and client scale, such costs to include the costs of two counsel where so employed.

3. The order of the high court is set aside and the following order is substituted in its place:

'(a) The respondent is placed under final winding-up;

(b) The costs of the application including the costs reserved by Prinsloo J on 21 February 2012, and the costs of the appearances before Preller J on 19, 20 and 28 September 2012, including the costs consequent upon the employment of two counsel wherever employed, are to be costs in the winding up.'

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	L W De Koning SC Instructed by: Gerhard Botha & Partners Inc.; Pretoria Phatshoane Henny Attorneys, Bloemfontein
For Respondent	:	A B Rossouw SC (with him F Saint) Instructed by: Afzal Lahree Attorneys; Johannesburg Azar & Havenga Inc., Bloemfontein