IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 1868/2000

DATE: 9-6-2000

In the matter between:

PAYSLIP INVESTMENT HOLDINGS CC Applicant

and

Y2K TEC LIMITED Respondent

J U D G M E N T

BRAND, J: This is an application for the provisional winding up of the respondent company which is a public company listed on the Johannesburg Stock Exchange. There are numerous disputes of facts on the papers. Broadly speaking these disputes can be categorised under four headings, namely:

(a) The jurisdiction of this Court.

(b) Respondent's alleged indebtedness to applicant.

(c) Respondent's alleged inability to pay its debts as contemplated by section 344F of the Companies Act, No. 61 of 1973 ("the Act").

(d) Respondent's solvency.

Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in Kalil v Decatex 1988(1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the

application /...

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application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general.

I propose to deal with the disputes of facts on the papers in accordance with these guidelines.

Jurisdiction

I first deal with the disputes concerning the jurisdiction of this Court. In terms of section 12(1) of the Companies Act, this Court will have jurisdiction in this matter if the registered office or the principal place of business of respondent is situated within the area of jurisdiction of this Court. It is common cause that respondent's registered office is in Gauteng. Applicant's case is that respondent's main place of business is in Mowbray in the Cape. This is denied by respondent. According to respondent its main place of business is also in Gauteng.

Although this dispute cannot be determined on the papers I am satisfied that the balance of probabilities on the papers favours the applicant's version. The deponent to applicant's founding affidavit is Mr David Black ("Black"). It is common cause that at least until the end

of February this year, Black was also the Chairman and Chief Executive Officer of the respondent. The main answering affidavit filed on behalf of respondent was deposed to by Mr Russel Roth ("Roth"), who is the present CEO of respondent company. Apart from Roth's ipse dixit that respondent's main place of business is in Gauteng, the sole factual basis for his allegation to this effect is a letter which was written to the Johannesburg Stock Exchange ("JSE") on 26 October 1999. The letter does indeed aver that respondent's head office had relocated to Windy Wood in Sandton.

Black says this averment in the letter is incorrect. He also points to other statements in the letter which are demonstratably incorrect, such as the averment that Roth had been appointed as CEO of respondent whereas it is common cause that he was only so appointed on 26 February 2000. Black, on the other hand, relies on various other facts which are common cause and which tend to indicate that the respondent's main place of business was indeed in the Cape. These facts include:

(a) Black, who was the CEO of the company until 26 February this year, lives in Cape Town.

(b) Respondent's financial manager Ms Williams also resides in Cape Town.

(c) The company's bank account is in Cape Town.

(d) At present respondent's audit is being done in Cape Town.

In these circumstances I find, as I have indicated, that on the papers the balance of probabilities favour the applicant's version on the jurisdiction issue.

The applicant's claim

This brings me to the dispute regarding applicant's claim which forms the basis of its locus standi to bring this application. In the founding papers Black alleges that respondent is currently indebted to applicant in the sum of R135 543,00 in respect of rental. This rental is due, Black contends, in terms of a written lease concluded on 12 February 1998 which he annexed to his founding affidavit as Annexure DB1. For ease of reference I will refer to this document as "DB1".

Ex facie DB1 respondent was not a party thereto. It was entered into between applicant as lessor and another company, Commercial Software International ("CSI") as lessee. Black's explanation is, however, that CSI which subsequently changed its name to Computer Management Group ("CMG"), on 1 March 1999 ceded and assigned all its rights and obligations as lessee in terms of DB1 to respondent. Consequently, Black concluded, respondent became the lessee in terms of DB1. In fact, he alleges, respondent has exercised its rights as such by taking possession of the premises concerned, but failed to fulfil its obligations in terms of the lease by paying the rental for which it provides.

In the answering affidavit, respondent does not pertinently deny the conclusion of the lease agreement between applicant and CSI, which later became CMG. It is also not denied that the lessee's rights and obligations in terms of such lease were delegated to respondent. What is denied is the allegation that the lease which was delegated to respondent was the one reflected in DB1. The lease which was delegated to respondent, so it is contended, is the one annexed to the answering affidavit marked "B" to

which document I will for the sake of convenience refer to as "B". Respondent does not deny that rental was payable to applicant nor is it denied that no such rental was in fact paid. According to the answering affidavit, respondent's only answer to applicant's claim is:

> "That the rental is not due in respect of the alleged agreement of lease" and "that applicant has failed to establish a basis on which the alleged rental is due."

The matter first came before me on 18 May 2000. On that occasion, Mr Sievers appeared for applicant, while the respondent was represented by Mr Goddard. On that occasion it was pointed out to Mr Goddard during his argument that the written lease agreement, admitted by respondent as binding upon it (that is "B") also provides for payment of rental by respondent which, prima facie, is due and payable. Consequently, so it was suggested to Mr Goddard, respondent had, even on its own version, failed to disclose any defence to applicant's claim. Mr Goddard's response to the suggestion was to ask for a postponement in order to file further affidavits dealing, inter alia, with the potential problems regarding applicant's claim which transpired during argument. The postponement was granted until today's date.

In the interim, respondent filed a supplementary answering affidavit, again deposed to by Roth. The new defence raised by Roth differs quite radically from the putative defence originally raised. In a nutshell the new defence amounts to this; Black, so respondent avers, represented the vendor company which sold respondent's present business to it. Black required respondent to be listed on the Johannesburg Stock Exchange. In respondent's

prospectus it was predicted that applicant would earn a profit of R5,3 million during the year ending 29 February 2000. Black was also responsible for writing the specifications of a computer programme, the sales of which would significantly contribute to respondent's business. These allegations are not disputed by applicant in the supplementary replying affidavit. Its only response thereto is that the allegations are irrelevant. According to respondent, Black, however, failed to produce the specifications for the computer programme. At board meetings he was taken to task for such failure on his part. The supplementary answering affidavit then continues as follows:

> "He (Black) placated his critics by assuring them that he assumed full responsibility for the delay in producing the specifications and that he would personally subordinate any monies owing to him, either in his personal capacity or as a duly authorised representative of applicant, he being its only shareholder.
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> ...
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> From the inception of the lease Black waived applicant's right to receive rental until such time as the profits forecasted by him for the financial year ending 29 February 2000 as set out in RR5 hereto [that is an extract from the prospectus] had been achieved. As such profits had not been achieved applicant's claim is at this point in time not due, owing or payable."

In the supplementary replying affidavit and in argument at the resumed hearing, the answers on behalf of the

applicant to this line of defence are four-fold, namely:

(a) Black denied that he had waived or agreed to subordinate applicant's right to receive rental.

(b) Respondent's new defence cannot be regarded as bona fide, particularly since it has never been raised before and is in fact in conflict with the defences thus far raised, namely that respondent does not owe applicant any rental.

(c) The lease agreement "B" provides that no relaxation, indulgence or waiver which the lessor may grant to the lessee would become binding on the lessor who would at all times be entitled to claim due and prompt performance by the lessee of all its obligations. The lease further provides that no variation of the terms thereof would be of any force and effect unless reduced to writing and signed by both parties. There is no suggestion of any written variation of the lease agreement.

(d) Further and in any event applicant is, even on respondent's own version, a contingent and prospective creditor.

I believe that the fourth and last answer is a good one and I did not understand Mr Goddard to contend otherwise. It follows that even on respondent's own version, applicant has locus standi. I therefore find it unnecessary to dwell at length on the three other answers given by the applicant. Suffice it to say that these answers are not of such a

nature that they completely destroy the line of defence under consideration. The correctness of the answer in (a) cannot be determined on the papers. As to the answer in (b), I do not believe that the new line of defence is necessarily in conflict with the old defence. The old defence was a purely technical one, namely that the rental was not payable in terms of the document DB1. Although the answer in (c) appears to be a fairly good one, it may be that it can be met by the reasoning subscribed to, for example, in Phillips & Another v Miller & Another 1976(4) SA 88 (W) and in Minnitt v Stewart Wrightson (Pty) Ltd & Another 1979(4) SA 151 (C) at 154.

For present purposes it can therefore be accepted as a real possibility that respondent entertained at least the bona fide belief, though maybe mistaken, that the arrear rentals are at present not due and payable.

Respondent's inability to pay its debts

In the founding affidavit, applicant sought to establish its allegation that respondent is unable to pay its debts on the basis of the approach subscribed to, for example, in the case of Rosenbach & Company v Singh Bazaars 1962(4) SA 593 (T). According to this approach, evidence that a company has failed to pay a debt, payment of which is due, is cogent prima facie proof of inability to pay its debts, for, so it is stated by Caney, J at 597 of the report in the Rosenbach case:

> "A company which is not in financial difficulty ought to be able to pay its way from current revenue or a readily available resource."

In support of applicant's further contention that respondent had failed to pay a debt which is due, it relied on two

claims against respondent; first, applicant's own claim for arrear rental and secondly, a claim by another company, Computer Management Group Holdings (Pty) Ltd ("CMG Holdings") in the sum of R230 000,00. Black is the sole shareholder of CMG Holdings. The claim for R230 000,00 is based on an acknowledgement of debt for that amount, signed by Black on behalf of respondent, in favour of his own company, CMG Holdings. Black's allegation in the founding affidavit is that despite demand, this debt which is due and payable, remains unpaid.

Respondent's answer to applicant's claim for arrear rental has already been dealt with. As to the claim by CMG Holdings, respondent denies that the claim is a genuine one and contends that Black had no authority to sign the acknowledgement of debt on behalf of respondent in favour of his own company.

In the answering affidavit, respondent denies that it is unable to pay its debts. This denial is elaborated upon in the supplementary answering affidavit, essentially in three ways. First, by presenting a bank guarantee in terms whereof the bank binds itself to applicant as co-principal debtor with respondent for payment of the full amount claimed by applicant in the founding papers. Secondly, by filing an affidavit deposed to by respondent's auditors. In this affidavit the auditors, Messrs Isaacson Bamber, inter alia, makes the following unequivocal statement:

> "I have been requested by respondent to comment on its solvency. I accordingly annex hereto a solvency certificate. I state that respondent is both legally and commercially solvent."

Thirdly, by annexing respondent's draft financial statements

for the year ending 29 February 2000, which, so respondent contends, indicate that the respondent is in fact solvent.

In the supplementary replying affidavit applicant points out that the tender of a bank guarantee does not constitute payment and that it therefore does not constitute a bar to the relief sought. In any event, so it is suggested by applicant, applicant's claim is in fact more than the amount suggested in the founding affidavit and thus also exceeds the amount guaranteed by the bank. In response to respondent's reliance on the affidavit by its auditors and its draft financial statements, Black, on behalf of applicant, embarked on an analysis of the financial statements. On the basis of this analysis Black concludes that respondent is in fact both legally and commercially, totally insolvent.

After a consideration of all the facts and of the arguments and counter-arguments presented by Mr Sievers and Mr Goddard, who again appeared for the parties today, I am not persuaded that I can find on a balance of probabilities on the papers that respondent is unable to pay its debts as contemplated in section 344(1)(f) of the Act. I say this for the reasons that follow.

Both the claim by applicant and the claim by CMG Holdings are clearly disputed by respondent. I have already indicated that a finding that these disputes are not genuine and bona fide is not justified on the papers. The fact that respondent is able and willing to put up a bank guarantee for respondent's claim, tends to strengthen the view that this claim is in fact disputed on genuine grounds. It follows that it cannot be inferred from respondent's failure to meet these claims that respondent is unable to do so /...

so. It is equally likely that respondent is unwilling to do so.

As to the applicant's reliance on the analysis of respondent's financial statements by Black, it will, in my view, be unfair to respondent to accept the conclusion of this analysis. I say this for two reasons. The first is that it is in direct conflict with the opinion expressed on oath by respondent's auditor, which I cannot simply ignore. Secondly, respondent never had the opportunity to deal on affidavit with Black's analysis of its financial statements. Mr Sievers's response to this objection was, in essence, that respondent cannot plead prejudice when applicant makes out a case on respondent's own papers. However, as was pointed out by Botha, JA in Administrator Transvaal v Theletsane & Others 1991(2) SA 192 (A) 195-6, the fact that applicant's case is built on respondent's papers does not per se mean that respondent will not be prejudiced. The reason why this is so appears from the following dicta at 196B-E of the report:

> "It was not for the appellants to show that the respondents were given a proper hearing. They were called upon to meet the specific allegations put forward by the respondents in support of the relief claimed. The appellants were required to answer a case founded on the allegation of fact that the respondents were not given a hearing. They were not called upon in any other way to raise a valid defence to the relief sought. In particular, for instance, the question whether the hearing given was unduly limited in its scope was not an issue to which the appellants' deponents

were required to address their minds. It is not permissible to consider appellants' affidavits in isolation, divorced from the context of the case which they were answering. To the extent that the appellants' deponents went further than may have been necessary to answer the case as presented, it cannot be postulated a priori that they will not be prejudiced if their affidavits are relied upon to determine the nature and ambit of the hearing that took place. To do so may be unfair to the appellants and in effect is tantamount to reversing the onus."

Although these statements by Botha, JA obviously pertain to the facts of the case Theletsane case, the underlying reasoning is, in my view, also applicable to this matter.

In its founding affidavit, applicant founded its allegation that respondent was unable to pay its debts on certain inferences that I have alluded to. This was the case respondent was required to answer. Although it is true that the case that applicant now wants to rely on i.e. the one based on Black's analysis of the financial statements is ultimately based on respondent's papers, it is not a case that respondent was required to meet and, in the words of Botha, JA:

"It cannot be postulated a priori that they will not be prejudiced if applicant is allowed to rely on this new case."

It follows that applicant has, in my view, failed to make out one of the essential requirements for the order that it seeks. Consequently the application cannot succeed. However, even if I did conclude that respondent was unable

to pay its debts, I would still in the exercise of the judicial discretion that I am afforded in terms of section 344 of the Act, have refused the application.

What is clear from the papers is that there is bad blood between Black and the respondent's board of directors and that Black is the driving force behind this application. Respondent's board no longer trusts Black. Insofar as the claims by Black and his companies are based on facts which are at present almost exclusively within Black's knowledge, respondent's board requires further investigation. On the other hand it is difficult to understand how, on applicant's version, the winding-up of respondent can be in the applicant's interest, particularly in view of the bank guarantee which respondent tendered. It is true, as applicant says, that a guarantee is no payment, and it may even be that in fact applicant's claim exceeds the amount guaranteed. However, the fact remains that respondent was prepared to put up a guarantee for the exact amount that applicant initially claimed. Furthermore, and more importantly, on applicant's version it will at best receive no more than a few cents in the rand if respondent is to be wound up.

In the circumstances the inference is justified, in my view, particularly after the bank guarantee had been furnished, that the predominant motive or purpose of applicant in seeking the liquidation order, is something other than a bona fide attempt to enforce payment of its claim. In short, I cannot liquidate a public company on an application which may very well amount to an abuse of the process of this Court.

Costs

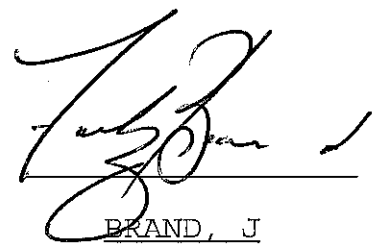
In my view, respondent's first proper answer to applicant's case is contained in the supplementary answering affidavit, which was only filed on 26 May 2000. This was also the date upon which the bank guarantee was tendered. In the circumstances I believe that it would be fair to order respondent to pay applicant's costs up until 26 May 2000, and for applicant to pay respondent's costs subsequent to that date. This is the cost order I propose to make.

For these reasons it is ordered:

(a) That the application is dismissed.

(b) Respondent is to pay the costs incurred by applicant up until 26 May 2000.

(c) Applicant is ordered to pay the costs incurred by respondent subsequent to that date.



BRAND, J