

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

12677/2007

DATE:

25 FEBRUARY 2008

5 In the matter between:

GIDEON ALBERT DE SWARDT

1ST Applicant

t/a DE SWARDT VERVOER

HUBERT ALEXANDER BLAESER

2ND Applicant

t/a TAMSUI PLANT HIRE

10 and

BALLPROP 33 (PTY) LTD

Respondent

J U D G M E N T

15 DAVIS, J:

[1] This is an application by first and second applicants for the winding up of respondent. In order to succeed, applicants are required to show the following requirements for a winding up order:

1. Applicants have a right in terms of section 346 of the Companies Act 61 of 1973 ("the Companies Act") to apply for the winding up of respondent on the basis that they are creditors of respondent.

SP

/

2. There exists a ground for the winding up of respondent as contemplated in section 344 of the Companies Act. The grounds, *inter alia*, which are set out in that section include:

- 5 (i) The company is unable to pay its debts as in turn defined in section 345 of the Companies Act;
- 10 (ii) it appears to the Court that it is just and equitable that the company should be wound up".

Section 345 of the Companies Act contains certain deeming requirements on the proof of one or more of which the company is deemed to be unable to pay its debts. *Inter alia*, these deeming provisions include the

15 following:

- 20 1. The creditor to whom the company is indebted in a sum of not less than R100 then due has served on the company be leaving the same at its registered office a demand requiring the company to pay the sum so due and the company for three weeks thereafter neglected to pay that sum or to secure or compound it to the reasonable satisfaction of the creditor.

- 25 2. It has proved to the satisfaction of the court that the company is unable to pay its debts.

[2] In the founding affidavit, first applicant makes out his case thus: .

"The respondent, represented by Mr Omar Fortune, telephonically contacted me and requested my business services as he required vehicles to be utilised at the Nature's Valley, Plettenberg Bay project, which project he was appointed as sub-contractor to Murray & Roberts. I accepted his invitation and at the specific order and request of a Mr Michael Alexander, as representative of the Respondent and acting as site manager, the services as and when required were rendered, which orders are reflected and hereinafter referred to in invoices and delivery notes.

I attach hereto marked "GAD2" a summary of 12 outstanding invoices in respect of the aforementioned hiring of construction vehicles by myself to respondent totalling an amount of R250192,95. I also attach hereto marked "GAD3(A)-GAD3(L)" each and every one of the 12 invoices and each and every delivery note pertaining to invoice.

Initially all the delivery notes were issued and addressed to Murray & Roberts as I was led to believe by Mr Fortune that my business services

would be rendered to them but after several enquiries to Mr Michael Alexander, the site manager, I was informed that the delivery note should be addressed to the respondent company.

During approximately the same period, second applicant also hired a number of construction vehicles to respondent in terms of oral agreements of lease entered into between second applicant and respondent duly represented by Mr Omar Fortune.

The second applicant was also telephonically contacted and invited to render certain services with his heavy duty vehicles for the Nature's Valley, Plettenberg Bay project, which orders were authorised by Messrs Fortune and Alexander as representatives of the respondent company. I attach hereto marked "GAD4(A)" and "GAD4(B)" two invoices in respect of the aforementioned hiring of construction vehicles by second applicant to respondent totalling an amount of R182 127,82.

From approximately January 2007, Wilma Rademan, my accounting officer, forwarded various requests for payment and requests for Mr Omar Fortune to contact her, to the Respondent copies, of which are attached hereto marked "GAD6(A)" to "GAD6(H)".

To date no response was received, neither telephonically nor in writing".

[3] Mr Engela, who appeared on behalf of the applicants submitted, that the explanation provided by respondent as to why these amounts had not been paid did not in his view constituted a *bona fide* dispute against first applicant's claim. The explanation was contained in the opposing affidavit in which respondent stated:

10 "Respondent never accepted liability for the full amount of R250 192,95 but intended to offer in full and final settlement R148 016,74...the balance of the account, R102 176,21 is thus and at all material times disputed".

15 Respondent then goes on to say the following: it never accepted liability for the full amount of R250 192, 95 but intended to offer in full and final settlement the sum of R148 016, 74. That sum, in respondent's view, was paid as follows:

20 25 October 2006 – R49 016,74

7 December 2006 – R99 000,00

It is clear that first respondent does admit to having received an amount of R148 016,74. Mr Swanepoel, who appeared on behalf of first respondent, noted that for the first time in reply, applicant stated that such payment

25

"was allocated by my accountant to a number of earlier invoices that were issued to Respondent, copies of which, along with their delivery notes, are attached hereto..."

5

[4] Further, Mr Swanepoel submitted that, if an assessment of these annexures was undertaken, there were no delivery notes substantiating the amounts reflected on the invoices forming part of Annexures GAD19(A) and GAD19(B). The delivery notes purporting to substantiate the invoice forming part of Annexure GAD19(6) are questionable for, *inter alia*, in Mr Swanepoel's view the following reasons:

10

1. Delivery note 2143 was made out to Murray & Roberts but subsequently seemed to be deleted. The contact person is one Norman who has no connection with the respondent.
2. Delivery notes 2311, 2057, 2145, 2313, 2315, 2059, 2147, 2316, 2148, 2060, 2317, 2149, 2150 and 2061 were all made out to Murray & Roberts and again one Norman is the name which appears as the contact person who has no connection with respondent.
3. Delivery note 2318 was initially made out to

25

Murray & Roberts and thereafter changed to

SP

/

Ballprop. Once more the contact person is one Norman.

4. All delivery notes supporting invoice number 0766 (Annexure GAD19(D)) were made out to respondent. However, the contact person is one Rihaan who has no connection with respondent. Accordingly, in Mr Swanepoel's view, respondent could justifiably question these notes as forming the very basis of invoice number 0766.

[5] So much for background to the first applicant's claim. There is, however, also a claim by second applicant. This is a curious adoption of process in that the claim is set out in the founding affidavit by first applicant without any clear indication as to the relationship between first applicant and second applicant. Second applicant does confirm the contents of the founding affidavit but only for the first time sets out a detailed basis of his case personally in a replying affidavit.

[6] It appears, however, that second applicant's claim amounts to the following: Second applicant's invoices totaling an amount of R182 127,82 were attached to the application papers. In these invoices, the registration

numbers of the vehicles leased, as well as the times worked, were set out in some detail. According to Mr Engela, the claim by second applicant is strengthened by the admission by respondent that during the period September 2006 to November 2006 certain construction vehicles or equipment was hired from second applicant. Mr Engela also submitted that the claim was strengthened further by the undisputed evidence that no equipment was hired or services rendered by second applicant to Murray & Roberts.

[7] The claims of second applicant were also disputed by respondent. In the answering affidavit, the various documentation for the amounts claimed by second applicant are disputed in some detail, details which, for reasons which will become apparent, I do not intend to traverse in any greater measure of analysis; the reason is that much of respondent's defence was focused upon the further requirement of respondent's inability to pay its debts, both to first and second applicant. It is this issue which, in my view, is central to the particular application which was launched.

[8] As regards respondent's inability to pay its debts, the following allegations were made in the founding affidavit:

"I furthermore submit, with respect, that it is clear from the aforementioned that respondent's liabilities in all probability far exceeds its assets. In this regard I wish to confirm that respondent had to lease the aforementioned vehicles as well as equipment as it did not have vehicles and equipment of its own. Respondent clearly does not have the necessary cash on hand or current assets with which to pay its creditors, more specifically myself and second applicant. Respondent is both commercially insolvent in that it is unable to pay its debts, as well as being actually insolvent in that its liabilities exceed its assets".

Mr Swanepoel submitted that these allegations were unfounded and extremely vague. In his view, there was no factual basis to support these allegations. Respondent, in the answering affidavit, averred that it was indeed commercially solvent. The relevant passage of the answering affidavit reads thus:

"I wish to state that respondent is a successful entity, commercially solvent and involved in numerous transactions. At present, respondent is involved in construction work for the building of roads in Hexrivier where the contract price is in excess of R4.2 million which would constitute

profits of at least R1.5 million. Not only is respondent involved in numerous contracts, but the assets of respondent is worth R500 000 which consists of two bakkies and six construction trailers, as well as construction equipment consisting of generators, portable offices, water pumps, lighting generators which is at present on the sites of Hexrivier, Vryburg and Rustenberg, as well as normal office equipment.

It is common in this industry that companies hire equipment depending on the needs of the company. The respondent does not buy heavy trucks but rents as the maintenance of vehicles does not fall within the ambit of its work(sic). Respondent does however have substantial overdraft facilities available should it be necessary to buy its own equipment. In addition to the above, the respondent is busy with the following contracts:
Hexrivier roads R5 000 000,00;
Vryburg road R5 000 000,00;
Rustenberg road R6 000 000,00.

Respondent is also concluding a further contract of R160 000 00 for road construction. Profits of these contracts approximately 30%. Clearly respondent is a strong and viable business entity and to state

without substantiation that respondent is insolvent does not take the realities into consideration or even furnish grounds for an application of this nature”.

5 [9] In support of his submissions, Mr Swanepoel referred to the judgment in Wiseman v Uys Table Soccer (Pty) Ltd 1991(4) SA (W) 171 at 168 where Claassen, AJ (as he then was) said:

10 “There is no allegation of a particular debt which was not paid. Neither does the applicant state that the applicant is called upon by any of its creditors to pay a particular debt and that the respondent company refused to do so. There is also no evidence of pending actions against the respondent which may be detrimental to its state of insolvency, nor is there any evidence with regard to any admissions to creditors that the respondent cannot pay its debts or any unsatisfied judgment against the respondent”.

20 In this particular connection, Blackman *et al*: Commentary on the Companies Act state the following:

“A company is deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company is unable to pay its debts. Something more than a mere admission or allegation of

commercial solvency is needed. A company's inability to pay its debts may be proved in any manner; evidence that a company has failed on demand to pay a debt, the payment of which is due, is cogent *prima facie* proof of inability to pay its debts, "for a concern which is not in financial difficulties is able to pay its way in current revenue or readily available resources..." Something more must be proved than simply that the company has not paid a debt; the circumstances surrounding the non-payment must justify the inference that the company is unable to pay its debts as they fall due, e.g. a series of dishonoured cheques might justify the inference. If part of the amount claimed or an assertion that the amount claimed is due and payable is disputed on substantial grounds, an omission to pay the total amount claimed will not give rise to an inference that the company is unable to pay its debts".

20

[10] The fact that a company, as is the case with respondent, resists a payment is not sufficient ground to justify an application of this nature. It is trite law that a winding up application is not a legitimate means to enforce payment of a debt, a point made initially in Badenhorst v Northern

25

Construction Enterprises (Pty) Ltd 1956(2) SA 346 (T)
and followed consistently thereafter.

5 [11] In short, even if I assume in favour of applicants that (1)
there is no reasonable dispute in respect of either debts
to first and second applicant; (2) that a case was not
made out in reply, particularly in respect of the
quantification of the alleged debts (in particular the
affidavit by second applicant in reply which, for the first
10 time, sets out its claim in any detail) the problem persists
as to the financial health of the respondent. In my view,
there has been no proper case made out that this is a
company which is unable to pay its debts.

15 [12] Section 345 of the Companies Act does provide deeming
provisions sufficient to justify that conclusion but, as I
have already stated, the law does not sanction a
conclusion on which no factual evidential basis is raised
in order to trigger the deeming provision in the first
place. Were it to be otherwise, it would mean that
20 liquidation proceedings would be the only legitimate
means of enforcing payment.

[13] In my view, there are a number of reasons why this is an
unsatisfactory application. The initial claims in the

founding affidavit were skeletal at best. Second applicant only came out of the proverbial woodwork at the stage of reply. Much of the dispute as to whether the R148 000 was paid in discharge of the obligation claimed or indeed, was for some previous amount, emerges in reply. There was no satisfactory or clear analysis of the claims in the founding affidavit where the case must be made out.

10 [14] I should add that an application by the respondent to reply to the replying affidavit was made. I refused that application because of the fact that it appeared to me, after a careful analysis of the papers, that this application could not pass legal muster for the reasons that I have set out. On the existing factual matrix, to make the assumption that there is no reasonable dispute that the case was satisfactorily made out in the founding affidavits, is an assumption that I am not prepared to make.

20

[15] However, it is not necessary to deal with this is one any further, because this was not a case where a court should exercise its discretion in favour of applicant on the basis that respondent is not in a position to pay its debts.

25

[16] For these reasons, the application is dismissed, with costs.

5


DAVIS, J.