IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

Case Number: 13778/2008

In the matter between:

DAVID HAMMEL **APPLICANT**

And

RADIOCITY CONTACT CENTRE CC **RESPONDENT**

Coram	:	DLODLO, J
Judgment by	:	DLODLO, J
For the Applicant/Plaintiff	:	ADV. S. MILLER
Instructed by	:	Bernadt Vukic Potash & Getz 11th Floor 1 Thibault Square CAPE TOWN TEL. NO. 021 405 3800 REF. MJ TYFIELD
For the Respondent	:	ADV. M. IPSER
Instructed by	:	Schliemann Inc. 2 Fairview Centre SOMERSET-WEST TEL. NO. (021) 852 7511 REF. J.E. SCHLIEMANN C/o LESTER & ASSOCIATES Unit 2, 10 Pepper Street CAPE TOWN
Date(s) of Hearing	:	2 DECEMBER 2008
Judgment delivered on	:	12 DECEMBER 2008

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JUDGMENT DELIVERED ON FRIDAY, 12 DECEMBER 2008

DLODLO, J

[1] The Applicant in his capacity as a creditor brought an application for the winding up of the Respondent in terms of section 68 (c) of the Close Corporation Act 69 of 1984 (the Close Corporation Act) on the basis that the Respondent was unable to pay its debts. The Respondent did not dispute its indebtedness to the Applicant. On the contrary, the Respondent tendered payment of the sum of Five thousand nine hundred and six rands sixty seven cents (R5906.67), due at the time the application was launched, and the payment of the sum of One thousand six hundred and thirty six rand and seventy cents (R1636.70), due and payable on 10 September 2008. The Respondent did indeed pay both the abovementioned sums of money to the Applicant on 1 September 2008. Accordingly, as the Applicant received the above mentioned sum of money, by the time the application for the provisional winding up of the Respondent was heard on 3 September 2008, the cause for the application had been removed. In other words, the *locus standi* the Applicant had had in the matter, had been taken away. The issue

for determination in the instant matter is simply which party is responsible for the costs incurred in the matter.

[2] The Applicant is an adult male engineering student resident at 5 Bellwood Road, Fresnaye, Western Cape. The Respondent is a Close Corporation duly incorporated in terms of the Close Corporation laws of the Republic of South Africa and it has its registered address and principal place of business at Suite 20—201C, Waverly Business Park, Wyecroft Road, Mowbray, Cape Town. The Respondent conducts business as a producer of an in-house radio pursuant to mandates furnished to it by its clients. Its entire member's interest is owned by Marnus Flats who controls the Respondent's sister company in Australia. Much of the Respondent's business relates to work delegated to it by its Australia sister company. Mr Miller and Ms Ipser appeared before me for the Applicant and the Respondent respectively.

[3] It was submitted on behalf of the Respondent that the general rule is that a party withdrawing proceedings is liable, as the unsuccessful litigant, to pay the costs of the proceedings. It was further emphasised that very sound reasons, such as dishonesty or fraud, must be shown before a defendant or respondent would not be entitled to his costs. Ms Ipser relied on the following cases for the aforementioned assertion, namely: ***Germishuys v Douglas Bespreingsraad*** 1973 (3) SA 299 (NKA) at 300D—E; ***Waste Products Utilisation v Wilkes*** **(Biccari interested party)** 2003 (2) SA 590 (W) at 597A-B; ***Reuben Rosenblum Family Investments v Marsubar*** 2003 (3) SA 547 (C) at 550 C-D. In Ms Ipser's submission, there exist no sound reasons in the instant matter

which would justify the Respondent being deprived of its costs. It, however, needs to be mentioned hastily that the cases Ms Ipser referred to *supra* are factually distinguishable from the matter at hand. I may revisit this aspect latter on in this Judgment.

[4] Another submission made on behalf of the Respondent is that it is not necessary for the Court to go into the merits of the application when determining liability for cost in a situation where an application has been withdrawn prior to being heard. In Ms Ipser's submission, the very fact that the application was withdrawn is conclusive as regards the issue of determining costs, save in those circumstances where the aforementioned good grounds exist which would justify the Court depriving the other party of costs. I was referred to ***Germishuys v Douglas Besproeingsraad*** *supra* at 303G —304A where the following, *inter alia* appears: *"In Jenkins se saak,supra, het dit gegaan om die toekenning van koste en die houding wat die Hof moet inneem wanneer 'n saak op die meriete geskik is en die Hof daarna 'n bevinding op koste moet doen. In so 'n geval is dit vir die Hof dienstig om aandag aan die meriete te skenk om te sien wat 'n billike kostebevel sou wees……Daar is na my mening 'n kernverskil tussen die posisie van 'n applicant wat sy saak skik op die meriete en dan vir die Hof om uitsluitsel oor koste vra en die posisie van 'n applikant wat sy eis terugtrek en dan probeer om 'n kostebevel teen hom af te weer.*

Mnr. Zietsman se hele betoog dat daar na die meriete gekyk moet word om te sien of applikant op 'n sekere kostebevel geregtig is, al dan nie, gaan vir my in die onderhawige geval nie op nie. Vir my is die aangeleentheid duidelik. Applikant het 'n aansoek gerig teen die respondent en sy eise teen respondent laat vaar sonder enige

uitsluitsel deur die Hof of sonder dat enige aansoek aan die Hof gerig is op die meriete. Respondent het geweier om toe te stem dat applikant nie die koste hoef te betaal nie; wat respondent geregtig was om te doen".

[5] In the instant matter, however, in my view, it would virtually be impossible to reach a just decision without considering the merits of the application. I accept that there is some inconvenience in allowing the merits to be examined at any length, when only costs are at stake. This is at times unavoidable in cases settled on the merits without an agreement between the parties as to what must happen with regard to costs incurred. In Ms. Ipser's submission the Applicant did not really have a case made out against the Respondent in this matter. In her view, the Applicant brought this application with the sole purpose of merely embarrassing the Respondent. Accordingly, in Ms. Ipser's submission, the Applicant engaged himself in proceedings which tantamount to an abuse of the Court process. I deal with these submissions *infra*.

[6] I agree with Mr. Miller that upon receipt of the payment which constituted the reason for the application, the Applicant had three (3) choices open to him, namely: Firstly, the Applicant could either have persisted with the application for purposes of recovering the costs it had incurred in bringing the application. In this category, the Applicant's principal argument would have been that despite having received payment after the launching of the application, he was nevertheless justified in launching the application and was therefore entitled to his costs. Secondly, the Applicant could tender to withdraw the Application on the basis that each party pay their

own legal costs incurred up to that time. Thirdly and lastly, the Applicant could have tendered to withdraw the application on the basis that he pays the Respondent's costs incurred up to that time. I am told the Applicant did in fact choose the second option. I am also told that the Respondent was not amenable to the proposal contained in the offer made.

[7] I have mentioned earlier on that the only issue for determination in the instant matter is which party ought to be liable for the costs of this application. Both parties sought costs on the punitive attorney and client scale. It seems to me that the first and primary question for consideration is whether the Applicant was justified in launching the application for the winding up of the Respondent. In this regard, the Respondent's view is that there was never any justification for this application. On behalf of the Respondent, it was contended that it is the Respondent which is entitled to costs because the Applicant has not made out a case that the Respondent is unable to pay its debts as envisaged in section 68 (c) of the Close Corporation Act and that the application, as mentioned above, is an abuse of the Court's process.

[8] The question is simpler than the Respondent apparently contended it to be. The question is not whether the Applicant ought to succeed with the winding up of the Respondent on the basis that it is not able to pay its debts in terms of section 68 (c) of the Close Corporation Act. Rather, the question is whether the Applicant made out a proper case, in principle, in the Founding papers that the Respondent was not able to pay its debts and was hence justified in bringing the application. An entity's inability to pay its

debts remains a question of fact that may be proved in any manner. In ***Rosenbach and Co. (Pty) Ltd v Singh's Bazaars*** 1962 (4) SA 593 at 597, it was held that evidence that an entity has failed on demand to pay a debt of which payment is due is cogent *prima facie* proof of its inability to pay its debts "*…for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily resources".*

[9] When one deals with the inability to pay a debt, one immediately becomes reminded of the following formulation by Innes CJ in ***De Waal v Andrew Thienhaus*** 1907 TS 727 at 733:

"Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes".

It is common cause in the instant matter that the Applicant was faced with a situation that his debt (which the Respondent subsequently admitted was due and owing on 10 August 2008), was not paid. It is also common cause that the Applicant's fellow employee, one Sascha Globisch (Mr. Globisch), was in an equivalent position. When Mr Globisch confronted the Respondent about payment, he alleges that he was advised by the Respondent that it had no funds at that time with which it could pay the salary due to the former as it had paid other trade creditors, such as its liability in respect of its telephone account, that it was more important for the Respondent that these creditors be paid. I am mindful of the Respondent's denial of this aspect of the

Applicant's case. Whether or not this was true is irrelevant for purposes of determining the issue at hand.

[10] In my view, it was justifiable for the Applicant to draw the inference that the Respondent's failure to meet its salary obligations to him was for the same reason given to Mr Globisch. Mr Miller correctly questioned the Respondent's response to the allegation contained in Mr Globsch' Affidavit. It would be recalled that the Respondent denied that it ever discussed any financial issues with Mr Globisch and that whatever the latter alleged in this regard is fabrication which is motivated by malice on the part of Mr Globisch. In addition, the Respondent alleged that the real reason for its delay in making payment to Mr Globisch was because of an agreement concluded between the Respondent and Mr Globisch himself that the latter had a choice of receiving R2705.22 on 10 August or waiting until later in the month until the Respondent had received payment from its customers in respect of which Mr Globisch was due to earn commission, in which event Mr Globisch would receive a lump sum payment of R5725.49. It will be borne in mind that Mr Globisch disputed this version put forth by the Respondent in reply. According to Mr Globisch, the quantum of his salary and his financial position was such that he would never have agreed to a delay in receiving payment of his money until later in the month so that he could receive this payment together with the additional payment of the alleged commission. In Mr Miller's submission, the version presented by the Respondent in this regard "runs against grain of the common sense".

[11] It was pointed out on behalf of the Applicant that Annexure **"SG1"** to Mr Globisch's Affidavit in reply is a salary slip produced by the Respondent and is identical in form to the salary slips received by the Applicant, indicating that there was no commission due in respect of July salary. Therefore, in Mr Miller's submission, a document produced by the Respondent entirely contradicts the version put up by the same Respondent. I agree with this submission by Mr Miller. The Respondent's version is not only far-fetched but it is also untenable in the circumstances of this case. Suppose the Respondent was not serious and was merely making a joke of Mr Globisch when the latter was told there was no money for him, but that money had been used to honour certain important debts of the Respondent, then the latter engaged itself in a rather expensive joke. The probabilities do not favour the Respondent's version in this matter. This is further demonstrated *infra*.

[12] In the first instance, the Applicant alleged that in his understanding the tenth day of the month meant the tenth business day rather than the tenth calendar day. The Respondent subsequently admitted that it was guilty of an error in this regard. It is important to note that the Respondent in explaining its delay in making payment to Mr Globisch did not raise the same point. Why would the Respondent conclude an agreement with Mr Globisch on 10 August 2008 as regards the payment of the latter's salary if it did not think that its obligation to pay arose on the tenth calendar day of the month? This smacks of an untruth on the part of the Respondent. In the second instance, the Respondent alleged that payment was not made to the Applicant because there were difficulties experienced in setting up the Applicant as a beneficiary for purposes of making

an internet payment to the latter. I am not told in the Answering papers in respect of which account such difficulties were experienced. This alone brings about more questions than answers in this matter.

[13] On the other hand, given the fact that the Applicant had not been paid and had been informed by Mr Globisch that the Respondent had told the former that the Respondent did not have sufficient funds to pay Mr Globisch's salary, despite whatever the Respondent now explains, that does not take away the fact that the Applicant was justified in drawing an inference that the Respondent was unable to pay its debt. This was a reasonable inference in the circumstances to have been drawn by the Applicant. I hold, therefore, that the Applicant had all justification to have resorted to launching the present application. It is cause for concern that the Respondent attached to its Answering papers as Annexure **"SK6"**, a document that hardly tells the Court anything. This Annexure shows an opening balance of R60392.70 and a closing balance of R99626.36. The document speaks and says to the reader that there were certain unmentioned transactions during the period in question. The Respondent, for reasons best known to it opted to blank out information relating to such transactions from Annexure **"SK6"**. I have been asked to draw an inference unfavourable against the Respondent in this regard. It may well be that the information on Annexure **"SK6"** is blanked out because of its confidential nature. I do not think much purpose will be served by making an issue out this aspect.

[14] The Applicant is accused of abusing the process of Court. Before considering this accusation, it is perhaps appropriate that one first looks at the law ordinarily applied in determining whether an application amounts to an abuse of process. The authors of Meskin, *Insolvency Law and its Operation in Winding Up*, summarise the law applicable in this regard as follows:

"In addition to its statutory discretion when asked to grant a sequestration order, the court has an inherent jurisdiction to prevent abuse of its process. Therefore, although a case for sequestration may be capable of being established, a court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide achievement of the sequestration of the estate for its own sake".

The starting point was stated by Van Winsen J (as he then was) in ***Cohen v Mallinick*** 1957 (1) SA 615 (C) at 622H-623A as follows:

"evidence however of an uncompromising intention to insist upon the letter of one's rights, even if accompanied by some evidence of personal hostility, does not in my view establish the act that applicant's real intention was to harass respondent rather than to recover her money".

The following are instances where our Courts have found to have been the abuse of process: First and foremost, the enforcement of a debt that is disputed on *bona fide* and reasonable grounds. See: ***Badenhorst v Northern Construction Enterprises*** 1956 (2) SA 346 (T) at 347H-348B; ***Kalil v Dectex (Pty) Limited and Another*** 1988 (1) SA 943 (A) at 980.

The second such instance would be procuring of a suspension of legal proceedings by or against the debtor, the prevention of enforcement by the debtor of a legitimate claim against another.

See: ***Millward v Glazer*** 1950 (3) SA 547 (W).See also ***Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd*** 1980 (3) SA 253 (W) where a Court refused an application for sequestration because it had the effect of stifling an appeal. The third and possibly the last such instance is where the granting of a sequestration order would bring the administration of justice into disrepute. See: ***Standard Bank of SA Limited v Essop*** 1997 (4) SA 569 (D) and ***Lotter v Arlow and Another*** 2002 (6) SA 60 (T).

[15] It is needless to mention that none of the aforementioned instances previously pronounced upon by our Courts is present in the application brought by the Applicant in the instant matter. There is hardly any evidence of any ground which is remotely analogous thereto at all. The Respondent contended that the Applicant should have used another remedy, for an example, the issue of summons for purposes of collecting a debt owed to him. The alternative remedy, according to Ms Ipser, would have spared the Respondent the embarrassment of having to be faced with the winding up proceedings. It has been established that a creditor has an unfettered right to choose his form of execution, one of which is to wind up the debtor. See: ***Service Trade Supplies (Pty) Ltd v Dasco $ Sons (Pty) Ltd*** 1962 (3) SA 424 ( ) at 428C-D; ***Effune v Hancock*** 1923 (TPD) 355 at 364; ***Bylo v Rhosdesian Barter & Export (Pty) Ltd*** 1974 (1) SA 601 (R) at 602A-D.

Notably, where a creditor has a debt which a company cannot satisfy, the unpaid creditor is *ex debito justitiae* entitled to a winding up order. The creditor is not bound to give the debtor time to raise the funds necessary to make payment. See: ***Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*** 1993 (4) SA 436 (C) at 440H

-441B; ***Service Trade Supplies*** *supra* at 428D—E; ***Rosenbach*** *supra* at 597C—H; ***Coughlan v Ward & Son (Pty) Ltd*** 1931 NPD 153 at 153; ***Sammel v President Brand Gold Mining CO. Limited*** 1969 (3) 629 (A) at 622D-F.

[16] I agree that the quantum of the Applicant's claim did not disentitle him from bringing the present application. In terms of section 9 (1) of the Close Corporation Act this Applicant did meet the threshold and as such had the necessary *locus standi* to bring the present application against the Respondent. In my view, it is hardly helpful to belittle the amount of the debt owed to the Applicant by the Respondent. The Applicant as a student needed his money paid to him. It may appear to be an insignificant amount to the Respondent, but it is most certainly a lot of money owed to a student. I do not share the view that the application brought by the Applicant in the instant matter was frivolous. It would be wrong and unfair to overlook that Mr Globisch was informed that the Respondent could not pay his salary because it had insufficient funds to pay its employees as well as its trade creditors and that it was in the Respondent's interest to prefer the latter. I have dealt with this aspect earlier on in this Judgment and have demonstrated how far-fetched the Respondent's denial is. The Respondent's debt in respect of work done by the Applicant during July 2008 was due and payable by 10 August 2008. We now know that the Respondent (despite earlier denial and explanation) has admitted as much. By the time that the Applicant caused its letter of demand to be written to the Respondent on 20 August 2008, there was, even on the Respondent's own version, no dispute as regards the quantum of the sum payable to the Applicant.

[17] Importantly, the letter of demand referred to above, forewarned the Respondent that the Applicant might bring this application unless payment of his money was received by 22 August 2008. In the papers filed in this matter, the Respondent does not dispute the receipt of the letter of demand. The Applicant cannot be blamed for having opted for this remedy as a means of enforcing a debt owed to him. I am not persuaded that the launching of the application *per se* amounted to the Applicant engaging himself in an abuse of the Court's process. It is, in my view, only fair that the Applicant should recover his costs. What is also strange is that at the time that the Respondent paid the debt owed to the Applicant, it had not yet filed and served its Answering Affidavit. This in effect means that the costs at that moment were obviously minimal. The Respondent must have known that paying that amount owed to the Applicant necessarily meant that the Applicant had to withdraw the application. That withdrawal would come about not because the Applicant originally had no case against Respondent. The withdrawal was eminent because the payment of the debt had an effect of removing the cause for the application. In other words, as soon as the money owed was paid, the Applicant ceased to have *locus standi* in this application. This was known to the Respondent (a juristic person, who as such has legally viable advice at hand). The Respondent was also competently legally represented in the instant matter. Why proceed to file an Answering Affidavit? What has happened to the well-established practice that Attorneys communicate each time they proceed to take further steps? The filing of further papers in the instant matter after the payment had been made, merely served to increase the costs. In my view, the

Respondent could have handled this matter differently. I hold that the Respondent caused the escalation of costs in this regard.

[18] The argument as to who should pay the costs included the question of scale. Both counsel argued that their respective clients were entitled to be awarded costs on an Attorney and client scale. This is a punitive scale. The general rule is that the party which has achieved substantial success is entitled to its costs. This normally refers to party and party costs. It is trite that the Court is entrusted with a wide discretion in awarding costs but that the discretion must at all times be exercised judicially. When it comes to the question of an Attorney and client costs, one needs to consider the basis for awarding such costs as explained by Tindall JA in ***Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*** 1946 AD 597 at 607. Tindall JA gave the following formulation of note:

"The true explanation of awards of attorney and client costs…… seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of an order for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

It is of some importance to bear in mind that when a case has for all intents and purposes been settled, it remains undesirable to permit the question of costs to become an occasion for incurring further significant costs and to occupy the Court's time which could be better utilised in disposing of other litigation. See: ***Mashaone v Mashaone and Another*** 1962 (2) SA 684 (D) at

687G-H. There is, however, no justification in the instant matter to resort to an Attorney and client scale when awarding costs.

[19] **ORDER**

In the circumstances I make the following order:

(a) The application is refused and the Respondent shall pay costs hereof on the party and party scale.

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DLODLO, J