court file

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 14425/2007

DATE: 6 NOVEMBER 1008

In the matter between:

UNIPALM INVESTMENT HOLDINGS LTD APPLICANT

and

BTH KONSTRUKSIE BK RESPONDENT

JUDGMENT

DAVIS, J:

Applicant seeks the winding up of respondent's close corporation, which was incorporated in terms of the Close Corporations Act 69/1984. The provisions of the Companies Act, Act 61/1973 are applicable to these applications, save where excluded by the Close Corporations Act.

The respondent has been the subject of a provisional order of liquidation and in effect the provisions to which I have made reference, are now applicable in order to determine whether a final order of liquidation should be granted. In essence the applicant's case is that it is owed significant amounts of money which have not been repaid to it. The thrust of applicant's

case is captured in the founding affidavit deposed to by Mr Hoskins on behalf of the applicant in which the following appears:

> "To the best of my knowledge and belief, respondent's financial position as at 30 August 2007 is as set out hereunder:
>
> 29.1 Assets. The respondent has no assets of any value.
>
> 29.2 Liabilities. The respondent is indebted to applicant in a sum in excess of R1.7 million."

In essence applicant contends that these monies were paid over to respondent pursuant to two contracts or more accurately, an agreement and an addendum to the agreement. In the principal agreement it was entered between applicant and respondent, together with Mr Hilton (the clear force behind the opposition to this application) and Mr Orrie, which was entered into on 1 April 2004. The applicant made certain undertakings to respondent, including the procuring of the issue of guarantees (clause 4), and that it would undertake to provide to respondent by way of a loan, 100% of the capital requirements of the respondent which was set in the amount of approximately R1 million (clause 7 of the agreement).

Furthermore in the addendum to the agreement, there is an indication of further funds which were made available by applicant to the respondent, in essence as the respondent required more capital. In this particular regard the addendum, again entered into between applicant, respondent, Mr Hilton and Mr Orrie, on 30 September 2004, corded:

> "The capital requirements for the completion of various contracts have increased." (At clause 3.1).

In the founding affidavit it is averred that applicant had given respondent 30 days notice pursuant to the contract to which I have made reference to repay the sum of R1 million. The 30 day period expired and it was averred further that the respondent had not paid any of the amount to apt. The support for this averment is to be found in the attachment to the founding affidavit, being a letter from applicant's attorneys, which was addressed to respondent for the attention of Mr Hendricks and Mr Hilton, dated 27 August 2004 in which the following appears:

> "It is our instructions to demand, as we hereby do, in terms of the provisions of clause 7.2.2 of the said agreement, repayment of the loan in the sum of R1 million... to Unipalm on or before 1 October

2004."

In the first of the answering affidavits, Mr Hilton says, in relation to these averments:

> "Behalwe om te erken dat respondent nie die bedrag van R1 miljoen aan die applikant betaal het nie, word die inhoud hiervan ontken."

As with much of this case, the denials are couched with exquisite enigma, so that it becomes exceedingly difficult to know quite what is being denied and why. I presume, as Mr Coetzee, who appeared on behalf of the respondent, urged me that I should infer that somehow the Letter of Demand was never received, certainly not by Mr Hilton. I leave the matter there, because it is probably not on its own a determinative case.

Turning to the question as to whether these amounts are indeed owed by respondent to applicant, Mr Coetzee submitted that an examination of the papers read as a whole, leads to a conclusion that respondent does not owe applicant any money. To the contrary it may well be that applicant owes respondent certain amounts, to which I shall make reference presently. The substantiation for the primary defence, therefore, namely that applicant is not owed money and is not in a position of

being a creditor, which has *locus standi* to bring this application, based on the following. It is common cause that R400 000 of the amount alleged to be owing by respondent to applicant, was repaid to the applicant. And such sum, therefore, can not be taken into account with regard to the computation as to whether funds are owed to applicant.

Mr Coetzee further submitted that a further R600 000 of the applicable amount could not be taken into account either with regard to the computation of any alleged liability owed by respondent to applicant. The reason for this submission was briefly that applicant had sought to claim some 49% of the R600 000 from the Mr Hilton personally by way of a default judgment. Therefore, without unnecessary examination of the default judgment proceedings, the thrust of Mr Coetzee's submission was that if applicant considered that ultimately the R600 000 was owed by Mr Hilton personally and not by respondent, it was now no longer open for the applicant to make use of that alleged debt to justify its argument that it was a credit.

Furthermore Mr Coetzee submitted that in so far as the balance of the alleged debt was concerned, that is the balance of R1 million, it was clear that significant sums of money had been repaid by the respondent to the applicant, which justified

the inference that the balance of R1 million had also been repaid. In particular the following passage from the respondent's additional answering affidavit deposed to by Mr Hilton was critical to Mr Coetzee's submission:

> "Die balans van bogemelde deposito's ten bedrae van R17 240 333,97 was betalings ten opsigte van gemelde drie konstruksie kontrakte. Ek was in beheer van die fisiese uitvoering van gemelde konstruksie kontrakte en was veronderstel om 'n salaris van R30 000 per maand te ontvang. Behalwe dat ek vanaf November 2004 geen salaris ontvang het nie, het ek nie my volle salaris vir die periode Maart tot Oktober 2004 ontvang nie. Aanhangsel B2 is 'n opgawe van die betalings wat aan my gemaak was gedurende gemelde periode in die totale bedrag van R231 387,43. Behalwe gemelde betalings, het ek geen sent uit die vermelde bankrekening ontvang nie, behalwe bogemelde bedrag van R452 399,87 waarop applikant geen aanspraak hoegenaamd het nie, beloop die gewaarborgde wins op die inkomste wat vanaf Suid-Kaapstad ontvang is R4 310 083,49 synde 25% van die bedrag van R17 240 333,97. Toe die bankrekening deur applikant gesluit was op

2 Februarie 2006, het die kredietbalans op gemelde rekening R2 959,75, welke bedrag volgens die bankstate aan applikant se huidige prokureurs oorbetaal was. Applikant se bewering dat die volle inkomste uit die drie konstruksie kontrakte aangewend was om die uitgawes verbonde aan sodanige kontrakte betaal, is met eerbied belaglik."

To sum up, therefore, Mr Coetzee's argument was in effect that of the two million, R400 000 had been repaid (common cause), R600 000 or applicable percentage thereof had been pursued against Mr Hilton individually by way of a default judgement which, therefore, by reasoning, could not have been on applicant's own view an amount owed by respondent and the balance of the R1 million had manifestly been taken out of the profits which had been earned in the amount of R4 310 083,49 and accordingly the remaining part of the obligation had been discharged. On that basis, on the probabilities, reading the papers as they should have been, Mr Coetzee's essential argument was that those sums of money no longer constituted debts owing by respondent to applicant and accordingly there was no justification for granting the final order.

The proper approach in matters of this kind, not that they are always followed with meticulous precision that they ought to be, set out over 20 years ago by Corbett, J A, as he then was, in Plascon Evans Paints v Van Riebeeck Paints 1984(3) SA 630 (AD) at 634 H:

> "It is correct that where in proceedings of Notice of Motion disputes the fact (indistinct) affidavits. A final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which had been admitted by the respondent, together with the facts alleged by the respondent, justifies such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such an situation. In certain instances the denial by respondent of the facts alleged by the applicant, may not be such as to raise a real genuine or *bona fide* dispute of fact..... Moreover, there may be exceptions to this general rule, for example, where the allegations or denials of the respondent are so far fetched or clearly untenable, that the Court is justified in rejecting them merely on the papers."

In essence, respondent does not have a blank cheque to make any averment that he may dream up on papers. A Court has to interrogate the averments that it makes and test whether they are made *bona fide*, whether they are not so far fetched as to be untenable and, therefore, stand to be rejected.

In this particular case, without having to decide each and every point that has been taken by respondent, there are two responses that clearly seem to have remained unanswered, responses which were generated in the submissions of Mr Van Heerden, who appears on behalf of the applicant. Mr Van Heerden submitted that to the extent that R600 000 was owing to applicant, the only question for determination was the identity of the entity which owed applicant that sum. He submitted that simply because the applicant may well have employed an incorrect procedure in proceeding directly against Mr Hilton, did not constitute a complete defence as to whether the sum of R600 000 was paid pursuant to an agreement to which I've made reference and accordingly stood to be repaid.

It is clear on any reasonable inference that amounts were paid by applicant to respondent. It is clear that those amounts were paid because an agreement had been entered into, in which I might add Mr Hilton was a party, pursuant to which these amounts were paid over by applicant to respondent. The

foundational point is this, other than to suggest that applicant may have been unwise to proceed by way of default judgment against Mr Hilton, no other concrete basis put up by the respondent to suggest that the R600 000, (1) was not paid over, (2) was not owing to applicant, and (3) is, therefore, pursuant to the agreement, not owed by the respondent.

To the extent as is necessary to go further in order to establish that monies are owing, it is necessary then to turn to respondent's own version. In respondent's own version a schedule is set out of payments which were made by it to applicant. These amounts, inclusive of the R400 000 which is common cause was repaid by respondent to applicant, amount in total over the applicable period to R821 657,41. That clearly on its own, would indicate that further funds are still owing by respondent to applicant. No says Mr Coetzee. Why? Because these were amounts in which Mr Hilton was able to crawl through respondent's bank statements and identify payments that had been made by name to applicant. Therefore, given that there were a multitude of cash payments beyond these, Mr Coetzee would have the Court accept that it was a reasonable inference to conclude that the balance of the amounts would have been paid by way of cash payments.

It is a speculative approach. There is no basis for such a

conclusion. I should add until September 2004, Mr Hilton was an active member of respondent, although in defence he suggests that he took no interest at all in the financial affairs thereof. Maybe that is, but to suggest that without any further substantiation, additional amounts of funds were paid over by respondent to applicant beyond specific payments which were made and stated thereto, is to enter the realm of speculative inferential "reasoning", which falls directly within the exceptions set out by Corbett, J A in Plascon Evans.

Given the findings which I have come to, there is perhaps no reason to enter into any further analysis as to whether any profit was indeed made by respondent which would have justified the submission made of a profit beyond R4 million. It is, however, a submission that seems to fly directly in the fact of a letter generated by Mr Evans, acting on behalf of the City of Cape Town, in which he writes to respondent setting out the basis of a settlement of the relationship between the parties, which clearly indicates that to a very considerable degree the contracts which had been entered into, were never completed, but in fact was subject to a settlement.

As I have mentioned earlier, however, save to say that that evidence itself raises questions as to whether there was any proof of any profit having been made, which is central to the

balance of R1 million and whether it is owed or not, I do not need to determine this given the findings to which I have come.

There is then a further offence raised about claims that respondent has against applicant. As I have noted, applicant denies that respondent made any profit out of the contracts collectively. Mr Hilton's allegation of a guaranteed 25% on the profit on contracts, therefore, does not appear to have evidential substance attached thereto. As noted two of the contracts were cancelled. The probabilities certainly dictate on the evidence that no significant profits were generated there from.

Furthermore, applicant has put up evidence to suggest that respondent suffered losses in the contracts they concluded with the City of Cape Town and had to pay damages. The question of the profit, of course, is relevant to whatever claim respondent might have, but it appears that these claims are speculative and are not necessarily based on any significant fact. Furthermore, when Mr Hilton claims an amount of R452 397,87, it appears that that amount may well be owed to him, as is clearly provided for in clause 5 of the agreement to which I have made reference. That, therefore, is a claim which Mr Hilton must bring, it is neither liquidated nor does it fall within the scope of these proceedings and accordingly, it can

be ignored for the purposes of the computations which are necessary to justify a final application.

It is truly unclear to me why there has been such absolute tenacious, and in some cases almost emotional, opposition to this application, as was evident in the argument raised in court this morning. It is true, as is set out in Blackman et al commentary on the Companies Act at 14-87, that the procedure for winding up is not designed for the dissolution of disputes over the existence or non-existence of a debt and, therefore, winding up proceedings are not appropriate for that particular end.

But in this case one is faced with respondent, which on any version, can hardly be considered to be in the peak of health. Indeed there is an averment in the replying affidavit of Mr Hoskins which itself was answered by Mr Hilton, but without any comment in the following passage, in which the following the averment is made:

> "The respondent has ceased trading since December 2005 when the contracts with the City of Cape Town were terminated."

Certainly it would be a justifiable exercise in this Court's discretion to hold that as just and equitable to wind up this corporation. Courts have already accepted that the disappearance of the company's sub-(indistinct), a deadlock between members, are grounds for making such an order. See Rand Air (Pty) Ltd v Rae Vesture Investments (Pty) Ltd 1985(2) SA 345 (W) at 349 to 351. As the Court said in Moosa N.O. v Mavjee Bhawan (Pty) Ltd 1967(3) SA 131 (T), the just an et al requirement, requires that a Court:

> "...postulates on facts, but only a broad conclusion of law, justice and equity is a ground for winding up."

The fact is even an inquiry is even compounded by a further dispute as to precisely who are the members of this particular corporation. There is an argument raised by Mr Hilton that Mr Hendricks own 51% in the respondent. That notwithstanding that in sequestration proceedings on 13 October 2007, Mr Hilton recognised that the applicant, through Hendricks, had obtained 51% of the member's interest in respondent, in where he stated:

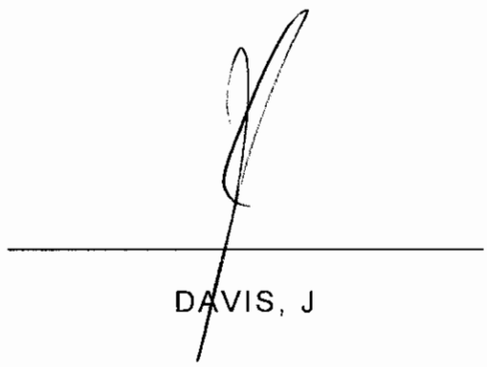
> "Applicant obtained 51% member's interest held on behalf of the applicant by Peter Hendricks. The

necessary CK2 forms having been duly completed to this effect, management and financial control was taken over by applicant."

Mr Coetzee submits somehow that I cannot take any account of that particular averment, because it was not to be employed within this context. Maybe so, but it raises doubts in the discretion of this Court as to quality of this particular kind of argument and the fact that it was Mr Hilton who had to sign the necessary CK2 forms to give effect to the registration of membership.

It is not in dispute that, it appears to me, is of substantial evidential weight sufficient to in effect to refuse to grant this application. This is a case which cries out for an independent liquidator to examine the full affairs of the respondent, which it appears to be undenied, no longer trades and to make a determination which would be in the best interest of all the competing stakeholders. The fact that every single possible objection to this application has been taken without, in many cases, much more evidence than a trawling through of all applicable cases, only compounds the difficulty experienced by this Court. In the final analysis, however, it is clear that this, on a certainly just and equitable basis, is an application that should be granted.

One further issue requires comment, namely the question of costs. On this point, given the confusion, I would have to agree with Mr Coetzee that it is respondent that has opposed this particular application and not Mr Hilton in his personal capacity and accordingly I cannot see any basis for an order other than that the *rule nisi* is confirmed. The respondent is declared to have been liquidated and the costs are to be costs pursuant to the course of the liquidation.



DAVIS, J