IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

REPORTABLE
Case No: 13044/08

In the matter between:

MUNNIK BASSON DAGAMA INCORPORATED **Applicant**

and

TRAFFIC ENVIRONMENT SERVICES AND TECHNOLOGIES (PTY) LTD (Registration Number: 2000/12475/07) **Respondent**

Coram	:	**A. Schippers, AJ**
Judgment by	:	**A. Schippers, AJ**
For the Applicant	:	**Adv P B J Farlam**
Instructed by	:	Brooks & Brand Incorporated 203 Jan Smuts Avenue, Parktown North Johannesburg P O Box 522284, Saxonwold, 2132 Tel: (011) 788 7707 Fax: (011) 788 7772 Ref: A Brooks/531 c/o CLIFFE DEKKER HOFMEYR INC. 11 Buitengracht Street, Cape Town P O Box 695, Cape Town Tel: (021) 405-6089 Fax: (021) 405-6112 Ref: D Pincus/mb/50046388
For the Respondent	:	**Adv D Van Reenen**
Instructed by	:	VAN NIEKERK GROENEWOUD VAN ZYL INC. 201 Tygerforum B 53 Willie van Schoor Drive Bellville Tel: (021) 915-4900 Fax: (021) 914-2999 (Ref: AJVG/ge/TES3/0001) c/o BALSILLIES STRAUSS DALY INC 2nd Floor 33 Church Street Cape Town
Date(s) of Hearing	:	**20 MAY 2009**
Judgment delivered on		**:4 JUNE 2009**

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JUDGMENT: THURSDAY 4 JUNE 2009

Schippers AJ:

[1] This is an application for the provisional winding-up of the respondent company. The basic facts are these. On 31 January 2003 the respondent entered into an agreement with the Beaufort West Municipality *("the Municipality")* in terms of which the Municipality appointed the respondent

to supply, install and maintain red traffic light and speed violation systems, issue traffic violation notices to offenders and collect traffic fines on its behalf *("the main agreement")*. On 29 June 2007 the applicant, a law firm specializing in debt collection, and the respondent, with the written consent of the Municipality, entered into an agency agreement. In terms of this agreement, the respondent appointed the applicant as an independent contractor, to undertake on its behalf the services required under the main agreement. The applicant would collect what is known as the *"old book"*, a collection of fines consisting of summonses issued for traffic offences but not served, as well as summonses served but not paid. The old book comprised 128 150 fines totalling R36 078 305.

[2] On 1 July 2007 the applicant started to collect the old book. The fines were collected as follows. A person paying a fine forming part of the old book would pay the Municipality. The Municipality would then reconcile the payments made and provide the respondent with the same payment schedule, together with a copy of the relevant bank statement reflecting payments made. The respondent, in turn, would pass this information to the applicant. The applicant would compile an invoice based on the information provided by the respondent. The invoice would show the time period, the specific fines paid (according to the case number) and the amount to which the applicant was entitled. The respondent would then

present this invoice to the Municipality together with the respondent's own invoice for payment.

[3] In December 2007 a dispute arose when the applicant invoiced the respondent in the sum of about R1.7 million in respect of fines collected for the period up to November 2007. The invoice was sent to the Municipality. The applicant's invoices clearly were incorrect. Between January and April 2008 a number of meetings were held between representatives of the applicant, the respondent and the Municipality on the one hand, and the applicant and the respondent, on the other. These meetings culminated in a memorandum of understanding (MOU) which the applicant and respondent concluded on 17 April 2008. In terms of the MOU, the parties agreed to certain actions and processes to ensure payment to the applicant of the amounts due as set out in the MOU. The parties however subsequently agreed to part ways and the applicant is no longer collecting the old book.

[4] The applicant claims that in terms of the MOU, the respondent is indebted to it in the following amounts: R73 595,00 payable on 18 April 2008; R39 562,00 payable on 30 May 2008; R132 212,64 payable by 31 July 2008; and R237 418,68 payable by 31 July 2008. The basis upon which the applicant relies for the respondent's winding-up is that it is unable to pay its debts.

[5] The respondent opposes the application. The grounds of opposition are outlined in the answering affidavit. In summary they are these. The respondent is not indebted to the applicant in the amounts claimed; the applicant has overcharged the respondent by at least R1 158 007,64 in respect of which the respondent intends to institute a counterclaim; and the applicant has brought this application with an ulterior motive to gain a commercial advantage, more specifically to take over the main agreement.

[6] It is convenient first to deal with the respondent's claim that the application was brought with an ulterior motive. This basis of this claim is twofold. The first is a statement in July 2008 by Mr. J. Booysen *("Booysen")*, the Beaufort West Municipal Manager, to the respondent's main deponent, Mr. Stevan Jeftha. Booysen apparently said that the applicant's Mr. S. Du Plessis had told him that the respondent was in financial difficulties and that the applicant would liquidate it. From this it is inferred that the applicant sought to cut out the respondent and take over the profitable collection of the old book. The second is what the respondent refers to as *"suspicious"* conduct on the part of Mr. Du Plessis in travelling to Beaufort West and making a donation of R10 400 to the Municipality for a mayoral golf day, some months before this event in November 2008. Unsurprisingly, the respondent did not press the ulterior motive argument.

The statement attributed to Booysen plainly, is inadmissible hearsay. The facts show that there was nothing suspicious or extraordinary about the Municipality's request by letter dated 29 July 2008, that the applicant sponsor the golf day, which it did.

Is the respondent indebted to the applicant?

[7] In the answering affidavit, the respondent disputes its indebtedness to the applicant. It contends that it was *"led to believe that it was indebted to the applicant in the amounts listed in the MOU"*. However, the papers disclose that this contention is insupportable, and that the respondent is indeed indebted to the applicant. Three examples will suffice. First, the MOU records that the respondent would pay an unpaid invoice in the sum of R73 595 by 18 April 2008. Mr. Van Reenen who appeared for the respondent correctly conceded that the applicant was a creditor of the respondent in the sum of R73 595, and said that the respondent tendered payment of this amount to the applicant. Despite this tender, the answering affidavit contains the startling statement that the amount of R73 595 *"which the applicant alleges is due to it formed part of the over-billing which the applicant was guilty of"*. Secondly, after the papers in this application were issued on 12 August 2008, the respondent, on 16 September 2008, paid the sum of R39 562 to the applicant. The MOU records that the applicant had paid this amount on behalf of the

respondent (presumably to creditors) during November 2007 and that it was payable on 30 May 2008. At no stage did the respondent dispute its indebtedness in this amount. Thirdly, after the application was launched, Mr. Bruce Jeftha, in an e-mail to the applicant on 18 August 2008, did not at all dispute the validity of the debt. He said:

> *"TEST is not in a position to pay any of the outstanding amounts, due to our poor financial position at present. We are however in a position to enter into negotiations with MBD regarding the outstanding the amounts, as we believe that we do have something to offer, which is worth looking at. Is there any possibility of setting up a meeting between our two parties to discuss the possibilities, or is this matter beyond an amicable resolution?"*.

[8] The above examples plainly demonstrate the respondent's indebtedness to the applicant. In any event, for purposes of this application, the respondent's admission that it owes the applicant R73 595 is sufficient for the granting of a provisional winding-up order.

Is the company unable to pay its debts?

[9] Section 344(f) of the Company's Act 61 of 1973 *("the Companies Act")* provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345. Commercial insolvency is expressly recognised in the Companies Act as a circumstance which

would entitle a court to make a winding-up order.[1] In terms of section 345(1) a company is deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum not less than R100 then due, has served on a company a demand requiring it to pay the sum so due.

[10] The proper approach in deciding the question whether a company should be wound up on the ground of commercial insolvency, is whether the company is unable to pay its debts in the sense of being unable to meet the current demands upon it, more specifically, its day to day liabilities in the ordinary course of its business.[2]

[11] The standard of proof required in an opposed application for a provisional order of winding-up has been settled in *Kalil v Decotex*.[3] The applicant must establish a *prima facie* case i.e. it must show that on a consideration of all the affidavits, the requirements for the granting of a provisional order for winding-up have been established on a balance of probabilities. In that event, the provisional order should normally be granted and the court should not acceed to an application by the respondent that the matter be referred to the hearing of *viva voce* evidence, save in exceptional circumstances.[4]

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1 *Ex parte De Villiers and Another NNO: in re Carbon Developments (Pty) Ltd (in liquidation)* 1993 (1) SA 493 (A) at 502D.
2 *Rosenbach & Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597C-D.
3 *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A).
4 *Kalil* n 1 at 979 B.

[12] The following facts upon which the applicant relies to show that the respondent is unable to pay its debts are either common ground or uncontroverted.

(1) On 23 October 2007 Ms. J. Collison *("Collison")*, a director of the respondent, sent an e-mail to the applicant showing its cash flow projections for November and December 2007. The November 2007 projection reflects a negative cash flow in excess of R500 000, and the December 2007 projection, a negative cash flow in excess of R100 000.

(2) On 7 November 2007 the applicant, at the request of the respondent, paid the amounts of R3 180,60; R19 384,25; R4 308,84 and R6 094,76 to the respondent's creditors which it was unable to pay.

(3) On 4 July 2008 Mr. C De Villiers *("De Villiers")*, the applicant's employee, telephoned Collison regarding payments which were due and payable to the applicant. That discussion was confirmed in an e-mail on 7 July 2008, which reads as follows:

> *"Further to our chat on Friday, please confirm payment will be made today as expected following our discussion.*
> *Please also confirm the amount, although we are expecting R92 612, being:*
> - *R69 077 (Inv 9912 less credit for short payment of VAT by BWest)*

- *R15 019 (Inv 10301 already adjusted for short payment of VAT)*
- *R8 517 (Inv 10302 10301 already adjusted for short payment of VAT)"*

On 7 July 2008 Collison sent the following e-mail in reply:

I have put through the two smaller payments just this morning. Our company is going through a slow period (as we do every year this time). We would ask that you please be patient with us, as we do understand and appreciate that you and other creditors need to be paid. We will do our best to settle all outstanding invoices as soon as possible."

(4) On 16 July 2008 De Villiers sent an e-mail to Collison asking whether the respondent's cheque had cleared and whether it could pay that day. Collison replied as follows on 17 July 2008:

"Yes, it has cleared but we are unable to pay you the entire amount. Is there any way we can make arrangements for us to make a partial payment?"

(5) On 17 July 2008 De Villiers sent a further e-mail advising that the applicant had expected full payment of the amount on invoice 9912 (R73 595) some time ago, and asked that the respondent pay the maximum amount it could that day. Collison responded in an e-mail in which she apologised for the delay in the payment of invoice 9912 and said that they were waiting for a cheque to be cleared.

(6) On 22 July 2008 Collison sent an e-mail to De Villiers in which she said this.

> *"T.E.S.T is in a financial predicament and we are making provisions so that u + other creditors can be paid. T.E.S.T is aware of the problems this causes u + the shareholders. We are applying our utmost attention to resolve the matter…"*

(7) On 23 July 2008 the applicant sent a letter to the respondent reminding it that the amounts referred to in clauses 1.1 and 1.2 of the MOU were due and payable by 31 July 2008. The applicant asked the respondent to confirm by 4pm on 25 July 2008 that it would pay these amounts. The respondent did not reply to this letter.

(8) As stated above, on 18 August 2008 the respondent informed the applicant that it was not able to pay any of the outstanding amounts due to its poor financial position, and asked that the parties enter into negotiations regarding those amounts.

[13] The respondent admits the facts in (2), (4), (5) and (7) above. It inexplicably failed to disclose the facts stated in (8). For the rest, the respondent admits that Collison had provided the applicant with negative cash flow projections in amounts in excess of R500 000 and R100 000 for November and December 2007, respectively. But it says that its income for those two months were R404 375 and R475 710, respectively. It has

not however attached any documents in support of this; does not indicate what its liabilities were for that period; and in fact gives no indication whether or not it was able to meet its liabilities during that period. As to Collison's unequivocal statements that the respondent was in a financial predicament and had not paid the applicant and other creditors, the respondent's version is that Collison *"mistakenly believed"* that the relevant amounts were due to the applicant. This version cannot be right for essentially two reasons. First, Collison's statements that the applicant was in a financial predicament related specifically to invoice 9912 in the sum of R73 595 – which the respondent admits is owing to the applicant. Secondly, Collison's stated unequivocally that the applicant was unable to pay its other creditors. This clearly is an indication that the respondent *prima facie* is unable to meet its day to day liabilities.

[14] Moreover, the respondent's version that it was misled into believing that the amounts under the MOU were due and payable, is improbable in the light of the facts and circumstances leading up to the conclusion of the MOU. After it was established that the applicant's November invoices were incorrect, on 17 January 2008 a meeting was held between the applicant, the respondent and the Municipality in Beaufort West. The issue was not resolved and discussions were continued the next day. A further meeting was held between the applicant and the respondent in Cape Town on 29 January 2008 to discuss inter alia the November

invoices. Four of the respondent's directors, including Mr. Stevan Jeftha and Mr. Bruce Jeftha attended that meeting. On 12 February 2008 a meeting was held between the applicant and the respondent at which the respondent provided the applicant with its invoices relating to the old book. The parties met again on 13 February 2008. At this meeting the applicant provided the results of its own reconciliation to Mr. Stevan Jeftha and Mr. Bruce Jeftha. On 14 February 2008 the applicant's representatives met with Mr. O Daniels of the respondent and the Municipality to finalize reconciliation of the November invoices. On 15 February 2008 the representatives of the applicant met with Mr. Stevan Jeftha, Collison and Mr. Lionel Jeftha to discuss the applicant's reconciliation of the November invoices. The final findings in relation to the reconciliation of the November invoices were discussed at a meeting between the applicant and the respondent on 17 April 2008. The parties then concluded the MOU. Mr. Stevan Jeftha (a director of the respondent) and Mr. Bruce Jeftha signed it. Given these circumstances, it is inconceivable that the respondent was misled into believing that the amounts were due and payable under the MOU.

[15] The allegation that the respondent was misled is furthermore at odds with Mr. Bruce Jeftha's e-mail on 18 August 2008 (copied to Collison and Mr. Stevan Jeftha) in two respects. First, he stated that the respondent was not in a position to pay the outstanding amounts and asked that the

parties enter into negotiations concerning these amounts. Secondly, there was not even a suggestion in the e-mail that the respondent had been misled into signing the MOU. On the contrary, the respondent enquired about the amounts which the applicant had collected under paragraph 1.3 of the MOU, and what additional amounts had been collected on the old book since the signing of the MOU.

[16] What all of this shows, *prima facie,* is that the respondent, on its own showing, is unable to pay the amounts owed to the applicant; that it did not effect payments in accordance with the MOU; and that it is also unable to pay debts due to other creditors.

[17] But the respondent contends that its assets far exceed its liabilities. It says that in 2008 the Municipality has renewed its contract for five years and that it on average it receives R5 million per year from this contract; that it has fixed and mobile cameras valued at nearly R2 million; that collections under the old book are worth about R16 million; and that it is awaiting payment by the Municipality of approximately R600 000, and payment of a further amount of R800 000 after an audit. It also contends that it has a counterclaim in the sum of at least R1 518 007,64.

[18] The respondent's claim that its assets exceed its liabilities is not demonstrated on the papers. Apart from Mr. Stevan Jeftha's say-so, there

is nothing in the answering affidavit to show on what basis the respondent's assets have been valued. Worse, the answering affidavit contains no details of the respondent's liabilities. It simply states that the respondent's *"monthly expenses are fairly modest and consist of rent, printing charges and salaries for staff"*. Then it is said that the fixed monthly expenses are about R200 000. In the result, this Court has not been placed in a position to determine the correctness or otherwise of the respondent's allegation that its assets far exceed its liabilities.

[19] In addition, it seems to me that most of the respondent's assets, if not all, are necessary to conduct its business. The respondent's contract with the Municipality and consequently the collections under the old book valued at R16 million, is the heart of its business. A critical part of the respondent's business is the supply, installation and maintenance of red traffic light and speed violation systems, for which cameras are essential. If these assets were to be realised, the respondent would either cease to exist as a business, or be so crippled that it could not reasonably carry on that business.[5]

[20] The applicant's case however, is that the respondent is commercially insolvent i.e. it cannot meet current demands. In this regard, the following quote referred to in *Collison*[6] bears repetition:

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5 *Irrvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 239B-C.

6 *In re HC Collison Ltd* 23 SC 721 at 724.

> *"The particular indications of insolvency mentioned in paras (a), (b) and (c) are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings In the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up"*

[21] As was held by this Court in *Absa Bank*[7], it matters not that the company's assets, fairly valued, far exceed its liabilities: once a court finds that a company cannot meet its current demands and remain buoyant, it is entitled to, and should, find that the company is unable to pay its debts.

[22] What remains then, is the respondent's intended counterclaim. Inasmuch as the applicant does not dispute its indebtedness to the respondent, it bears the *onus* of showing why the court should not exercise its discretion to grant a winding-up order.[8] The counterclaim is founded on certain work and analysis done by Mr. Darries *("Darries")* a consultant with an accountancy background, who determined that the applicant had overcharged the respondent in an amount of R1 158 007,64. The first difficulty facing the respondent is that the findings by Darries are inconsistent with the MOU. The MOU is the product of negotiations

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7 *Absa Bank Ltd v Rhebokskloof* 1993 (4) SA 436 (C) at 440 F-H.

8 *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C).

between the parties, in terms of which they agreed on a process to ensure payment to the applicant of the amounts set out in the MOU. There is no explanation in the answering papers why the respondent was allegedly misled into concluding the MOU. Indeed, the facts point the other way. In the circumstances, the alleged counterclaim constitutes nothing more than the opinion of an outside party that the amounts owing in terms of the MOU are not due. As such it is irrelevant. The second difficulty is that there is nothing in the answering affidavit to show the methodology, working assumptions and calculations used by Darries. It is thus impossible to determine whether or not the intended counterclaim is *bona fide*. It follows that the respondent has not discharged the *onus* resting on it.

[23] An applicant who shows that it has a claim in the requisite sum and who shows that the respondent must be deemed to be unable to pay its debts, has a cogent case for a provisional order of liquidation.[9] That, in my view, is the case here.

[24] In the circumstances, the applicant *prima facie* has a right to the provisional order which it seeks. What I have said regarding the respondent's inability to pay its debts is clearly not decisive of the situation which might arise on the return day of the rule which I propose to issue. The respondent may place further facts before the court hearing the

[9] *Ebrahim (Pty) Ltd v Pakistan Bus Services (Pty) Ltd* 1964 (4) SA 146 (N) at 147H.

matter which may persuade that court to take a different view. However, at this stage I am satisfied that the applicant has made out a case for a provisional order.

[25] There will be an order in the following terms:

(1) The respondent is provisionally wound-up.

(2) A rule *nisi* is issued calling upon all persons to appear and show cause, if any, to this Court on or before 10h00 on Tuesday 28 July 2009, why the respondent should not be finally wound-up, and why the costs of this application should not be costs in the winding-up.

(3) This order shall be served as follows:

(a) by the Sheriff at the registered office of the respondent;

(b) by the Sheriff on the respondent's employees at its place of business, as well as on any registered trade union representing those employees;

(c) by registered mail to all known creditors of the respondent with claims in excess of R5,000.00;

(d) on the South African Revenue Services; and

(e) by one publication in each of the Cape Times and *"Die Burger"* newspapers.

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SCHIPPERS AJ