IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 23352/09

In the matter between:

VELOCITY FREIGHT SERVICES (PTY) LTD Applicant

v

DIGI PLASTIX (PTY) LTD Respondent

JUDGMENT DELIVERED ON THIS 2nd DAY OF AUGUST 2010

FORTUIN, J:

INTRODUCTION

[1] This is an application for the winding up of respondent on the basis that it is unable to pay its debts as and when they fall due. Applicant was placed under an order of provisional liquidation on 10 November 2009.

FACTS

[2] It is common cause that, during September 2007, Applicant rendered freight services to respondent in respect of a container of garlic imported from the Peoples Republic of China. Respondent entered into a draft agreement with BD Trading to act as its agent. The garlic was released from the port of Cape Town to Respondent's leased premises at the Epping Market. Subsequent to the sale of the garlic to Respondent's clients, the garlic

discoloured in such a way so as to result in most of the garlic being destroyed. An account of R295 364.14 was rendered to Respondent for the freight services. Respondent failed to make payment.

[3] Respondent denied that it is liable to Applicant on the following basis:

3.1 Applicant had a statutory and contractual obligation to ensure that the imported garlic was irradiated in terms of requirement set out by the Department of Agriculture;

3.2 Applicant intentionally, alternatively negligently, failed to comply with these obligations;

3.3 As a result of Applicant's actions, Respondent denies that an amount of R295 364.14 is owing, alternatively, Respondent has a counterclaim against Applicant for an amount of R444 901.40 in respect of damages.

[4] Respondent denied that it is commercially insolvent.

[5] From the papers, the following is evident:

5.1 Respondent, during January or February 2008, confirmed that he would be selling a property and would pay the account from the proceeds thereof;

5.2 Two cheques, both for the amount of R50 000, drawn by Respondent in favour of the Applicant, was dishonoured by the bank for lack of funds;

5.3 During February 2008, Respondent raised the issue of the quality of the garlic and asked for a discount of R150 000. Applicant denied being responsible for the quality of the goods, but agreed to a R75 000 discount, which discount was paid.

5.4 On or about 24 June 2009, Respondent acknowledged his indebtedness to Applicant;

5.5 The defence with regard to the irradiation of the garlic was raised for the first time in Respondent's answering affidavit.

THE ISSUES

[6] The issues to be determined in *casu* are the following:

6.1 Whether Applicant established that it is a creditor of Respondent *(locus standi)*;

6.2 whether Respondent is unable to pay its debts as and when they fall due; and

6.3 whether there was a statutory and contractual obligation on Applicant to ensure that the garlic was irradiated.

THE LAW

[7] Section 344 of the Companies Act 61 of 1973 ("the Act") determines the court's power to wind up a company. Section 344(f) in particular deals with situations where the company is unable to pay its debts as described in section 345 of the Act. The section lists three situations in which a company is "deemed" to be unable to pay its debts, i.e.

7.1 statutory demand;

7.2 *nulla bona*; and

7.3 the company proved to be unable to pay its debts.

[8] The law with regards to when a company is proved to be unable to pay its debts is contained in sec 345(1)(c). A company is unable to pay its debts when it is commercially insolvent. In **Koekemoer v Taylor & Steyn** 1981 (1) SA 267 (W) 271, Goldstone J said the following:

> "*For the purpose of s.345 of the Act, a company is one unable to pay its debts,* inter alia *if it is unable to meet current liabilities ... as they become due.*"

The law relating to the difference between "commercial" and "factual" insolvency is trite. It is undisputed that what is envisaged in sec 345 is commercial insolvency. The test to be applied by the court is very clearly laid down in the Act. The Act requires the court to take into account the contingent and prospective liabilities of the company. In this regard, see sec 345(2).

[9] The terms "contingent" and "prospective" liabilities are liabilities which by way of a legal obligation creates a right enforceable in a court of law. A company's inability to pay can be proved in any manner. Even a demand which does not comply with sec 345(1)(a) may be used as evidence that the company is unable to pay its debts. In **Kalk Bay Fisheries Ltd v United Restaurants Ltd** 1905 TH 22 it was held that the court was justified in regarding a company as being unable to pay its debts where, for e.g., it admitted that it could not pay, failed to make payments after agreeing to pay,

etc. A clear exception to this general rule is where a part of the amount claimed is disputed on substantial grounds.

APPLICATION OF FACTS TO THE LAW

[10] The fact that Applicant offered a discount for the quality of the garlic and the fact that Respondent accepted the discount of R75 000, which offer was made with the understanding that Applicant did not take responsibility for the quality of the garlic, i.e. negotiations between the parties with respect to the discount, points to the fact that Respondent accepted that Applicant had *locus standi* as his creditor.

[11] The next issue to be determined is whether there was a statuary or contractual obligation on Appellant to irradiate the garlic.

[12] During argument, when Mr Atkins, for Respondent, was asked to point out the statute which places such an obligation on Applicant, the court was referred to the Agricultural Pests Act 36 of 1983, and in particular sec 3 of the Act.

[13] Section 3 reads as follows:

> "***3. Importation of controlled goods.*** *– (1) Subject to the provisions of subsections (4), (5) and (6) no person shall import into the Republic –*

(a) any plant, pathogen, insect, exotic animal, growth medium, infectious thing, honey, beeswax or used apiary equipment;

(b) anything determined by the Minister by notice of the Gazette, except on the authority of a permit.

(2) A person importing controlled goods into the Republic on the authority of a permit-

(a) shall do so only through a prescribed port of entry, except where an executive officer has determined some other place;

(b) shall present them at that place to the executive officer concerned for such inspection as he deems necessary;

(c) shall not remove them from that place before the executive officer concerned has consented in writing thereto.

(3) An executive officer may, on application by a person importing controlled goods and against payment of the prescribed fees –

(a) carry out an inspection contemplated in subsection (2) (b) at a time other than during the official office hours of such executive officer; or

(b) perform any other function in respect of such controlled goods.

(4) The Minister may by notice in the Gazette determine that any controlled goods or class of controlled goods be imported into

the Republic without a permit, subject to conditions set out in that notice.

(5) The Minister may import into the Republic exotic animals of a specified kind or pathogens or insects of a kind not indigenous to the Republic, if he is of the opinion that the presence thereof in the Republic –

(a) is desirable in order to combat the occurrence of plants, pathogens, insects or exotic animals of a specified kind in the Republic;

(b) is otherwise in the interest of a specified branch of agriculture.

(6) The Minister may by notice in the Gazzette *determine controlled goods or a class of controlled goods in respect of which a permit for their importation into the Republic may not be issued."*

[14] A proper reading of this section shows that it does not relate to the irradiation of imported goods. It refers to the permit. The permit annexed to Respondent's answering affidavit as 'H52', mentions Respondent as the importer. The obligations placed by sec 3 of the Act, are therefore those of Respondent.

[15] At the end of the hearing of the matter, with the permission of the court, Respondent was allowed to place a Supplementary Note before the court, which, in short, attempts to amplify its argument on the statuary obligation placed on Applicant. In this Supplementary Note, another Act is quoted as

the relevant piece of legislation. This time, Respondent submitted that the statutory obligation is contained in the Customs and Excise Act No 91 of 1964 ("the customs and Excise Act").

[16] Sec 1 of the Customs and Excise Act defines "importer" as follows:

> "'***importer***' *includes any person who, at the time of importation –*
>
> *(a) owns any goods imported;*
>
> *(b) carries the risk of any goods imported;*
>
> *(c) represents that or acts as if he is the importer or owner of any goods imported;*
>
> *(d) actually brings any goods into the Republic;*
>
> *(e) is beneficially interested in any way whatever in any goods imported;*
>
> (f) *acts on behalf of any person referred to in paragraph (a), (b), (c), (d), or (e);*"

This section, similarly to section 3 of the Agricultural Pests Act, does not place any obligation on Applicant to irradiate the garlic.

[17] In its supplementary note, Respondent also referred to Annexure 'HS11', the *SARS Customs Release Notification*, which states that Applicant is the agent and BD Trading is the importer. In Respondent's answering affidavit, it states that *BD Trading* was its agent. Should Respondent argue that obligations are placed on the importer in terms of the SARS Customs Release notification, it is clear from annexure "HS11" that such obligation is

placed on BD Trading and not on Applicant. In any event, this annexure does not point to any obligation on Applicant to irradiate the garlic.

[18] It is indeed so that the correspondence as well as the conduct between the parties established that the amount was due and payable, e.g. between the period September 2007, when the goods were released to Respondent, to December 2009, when the answering affidavit was delivered. Respondent acknowledged its liability to Applicant.

[19] Whether Respondent is unable to pay its debts as and when they fall due, can be gathered from the conduct of Respondent prior to the issuing of the Notice of Motion, i.e.

19.1 Mr Suliman's telephone call in September 2007, indicating that he was experiencing cash flow problems;

19.2 Mr Suliman's undertaking during January/February 2008 that he will be paying the account from the proceeds of a house sale;

19.3 The fact that two cheques, drawn in favour of Applicant, was dishonoured for lack of funds; and

19.4 Mr Suliman's e-mail of 24 June 2009, indicating his indebtedness and his inability to pay.

[20] In bank statements annexed to Respondent's answering affidavit, as well as the averments with regards to assets, it does in fact indicate that Respondent, taking into account its contingent and prospective liabilities, is not able to pay its debts as and when they fall due. It is clear from the papers

that the account was due and that it remained unpaid, even after it was claimed. This court is therefore entitled to conclude that Respondent is unable to pay its debts in terms of section 344(f), read with section 345(1)(a) of the Companies Act 61 of 1973.

[21] The issue that needs to be decided is whether Respondent is entitled to, after acknowledging its indebtedness on numerous occasions, dispute its indebtedness only in its answering papers. In *casu,* Respondent, at all material times prior to issuing of the Notice of Motion, acknowledged his indebtedness. It can therefore be accepted that Respondent owed Applicant the amount for services rendered.

[22] Applying the test laid down in **Kalk Bay Fisheries Ltd v United Restaurants Ltd**, supra, this court is justified in regarding Respondent as being unable to pay its debts as and when they become due for the following reasons:

22.1 The undertaking by Mr Suliman to pay;

22.2 The returned cheques i.e. the failure to pay; and

22.3 The contingent and prospective liabilities gleaned from the bank statements.

[23] The next step this court will have to take is to determine whether the facts of this case make it an exception to the general rule, i.e. whether the amount claimed is disputed on substantial grounds.

[24] It is the finding of this court that the claim by Applicant is not disputed on substantial grounds as there was no statutory or contractual obligation on Applicant to irradiate the garlic. It is further the finding of this court that, in terms of section 345(1)(c) of the Act, and taking into account the contingent and prospective liabilities of Respondent, the company is unable to pay its debts as and when they fall due.

[25] In the circumstances, the application is granted.

25.1 The application is granted; and

25.2 Costs to be costs in the administration of Respondent's estate.

FORTUIN, J