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

Case No 8659/2010

In the matter between:

BRADLEY BODSWORTH Applicant

and

CAPE LUXURY GROUP (PTY) LTD First Respondent

Court:	Cloete, AJ
Heard:	Decided on basis of record and written submissions
Delivered:	10 February 2011

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] The applicant launched an application for liquidation on 29 April 2010, with the papers being served on respondent on 30 April 2010. The basis of the application for liquidation was that respondent was unable to pay its debts in terms of Section 344 (f) of the Companies Act 61 of 1973 ("the Act") and that it was just and equitable for the respondent to be wound up in terms of Section 344 (h) of the Act. The application was set down for hearing on 6 May 2010.

[2] The respondent opposed the application which was then postponed until 3 June 2010. On 14 May 2010 the respondent delivered an answering affidavit and thereafter delivered a supplementary answering affidavit on 25 May 2010. The applicant did not deliver a replying affidavit.

[3] It is common cause that the debt was discharged on approximately 24 May 2010.

[4] On 3 June 2010, and by agreement between the parties, the applicant withdrew the application for liquidation. The parties further agreed that: *"The determination of liability for interest and the costs of the application is postponed to the semi-urgent roll for hearing on* ***TUESDAY, 16 NOVEMBER 2010.***"

[5] The matter came before me on 16 November 2010. After it became apparent that the notice of withdrawal as attorneys of record by the respondent's attorneys which was delivered on 17 June 2010 did not comply with the provisions of rule 16 of the rules of court, I further postponed the hearing on the outstanding issues to 3 December 2010, and directed that a copy of the notice of withdrawal together with a copy of my order be served

on the respondent, and that the respondent's attention be drawn to the provisions of rule 16(4), with the costs of the application to stand over further.

[6] I was thereafter approached in chambers by counsel for the applicant and respondent. Counsel informed me that the parties had agreed that I would determine the outstanding issues (ie liability for interest and costs) without hearing oral argument. Accordingly, the outstanding issues are to be determined on the basis of the record together with the parties' respective heads of argument.

[7] Respondent subsequently delivered heads of argument on 9 December 2010.

[8] It is trite that in order to obtain a provisional order of liquidation the applicant must make out a *prima facie* case for the grant of such an order. In the instant matter the applicant had to establish, *prima facie*, that he had *locus standi* in the sense that he was a creditor of the respondent: See section 346 (1) (b) of the Act. It follows that in order to be a creditor, the applicant had to set out a *prima facie* case that the debt allegedly owed to him was due and payable by the respondent.

[9] Although there was some debate on the papers as to whether the respondent was correctly cited in the application, from the heads of argument filed on behalf of the respondent it is apparent that the three main issues to be determined by me are (a) whether the debt was due and payable; (b) whether interest should be awarded; and (c) whether applicant has abused the process of court.

WHETHER THE DEBT WAS DUE AND PAYABLE

[10] The application's capital claim related to the refund of a deposit of R30 000 paid by him to the respondent in respect of a rental vehicle hired by him from the respondent. The applicant's submission is that, despite the

respondent's earlier protestations, it is now common cause that the debt was owing and that it had remained unpaid for a period of many months. The respondent received various demands for payment from the applicant, none of which evoked payment. In the circumstances, the applicant was entitled to bring an application for liquidation. The applicant further submits that there is no reason why, therefore, that the applicant (as the successful party) ought not to be awarded his costs, as well as interest that has accrued on the capital sum. The applicant points out that whilst it is unusual for the issue of interest to be determined in what commenced as a liquidation application, the parties formally agreed that such liability may be determined by this court.

[11] In his founding affidavit, the applicant alleged that the amount became due upon return by him of the vehicle which he had rented from the respondent. In the face of the respondent's contention in its answering affidavit that the applicant was informed in the reservation form for the vehicle that *"A minimum period of thirty days may be required before your excess deposit is released"* the applicant now argues that, for present purposes, the respondent's version may be accepted. The applicant however interprets the relevant portion of the reservation form to mean that "*it would take at least up to 30 days for the deposit to be refunded*".

[12] The applicant contends that the repayment of the deposit would have been due on 12 August 2009, the vehicle having been returned on 12 July 2009. The applicant thus claims that he is entitled to interest at the rate of 15.5% per annum on R30 000 calculated from 13 August 2009 to the date of payment, being 24 May 2010.

[13] The respondent however points out that the clear wording of the reservation form, namely *"A minimum period of thirty days may be required before your excess deposit is released"* must mean that there is no provision as to when the deposit would be repayable after the thirty day period (and thus, certainly, not within the thirty day period).

[14] The respondent has set out the rule applicable to agreements in which no specific time for performance was contemplated. In *Breytenbach v van Wijk* 1923 AD 541 at 549, the court stated as follows: *"Immediate performance having being impossible and not contemplated, and no date for transfer having being fixed by the contract, the respondent, if he considered sufficient time had elapsed to enable him, on that ground, to procure his own release should have taken steps... to place the appellant in mora by demanding that transfer should be passed on or before a specified date, reasonable under the circumstances."*

[15] The following appears from the papers:

15.1 The rental vehicle was returned by the applicant to the respondent on 12 July 2009;

15.2 Approximately a month after the vehicle had been returned the applicant made enquiries regarding the repayment of the deposit of R30 000. In the ensuing period of approximately one and a half months (ie during the period August 2009 until early October 2009) there were ongoing communications between the applicant and one Yariv Shmaryahu who acted on behalf of the respondent. In its answering affidavit the respondent set out the procedure involved in attempting to establish whether a refund of a deposit had been credited to a client's credit card and stated that *"as I explained to applicant on numerous occasions, our company... uses an FNB terminal. Applicant had used an American Express Card which operates under the auspices of Nedbank. Accordingly the flow of funds is from FNB through to Amex (via Nedbank). In theory it should be a simple process but experience has shown that it is more often than not a tortuous process"*;

15.3 As from 6 October 2009 all forms of communication from the applicant to the respondent ceased. The respondent states that it thus assumed that the credit (ie refund of the deposit) had eventually reflected on the applicant's American Express Card;

15.4 The respondent heard nothing further from the applicant until 19 April 2010 when the applicant's attorneys addressed a letter to the respondent demanding payment by not later than 21 April 2010. On 29 April 2010 the respondent's attorneys addressed a telefax to the applicant's attorneys in which they advised, *inter alia*, that *"We are currently taking instructions from our client and shall revert to you shortly... In the interim, our omission to deal with the content of your letter must not be construed by your client to be an admission by our client as to the correctness to thereof ";*

15.5 On the same date the applicant launched the liquidation application and served it on the respondent on the following day, being 30 April 2010.

[16] I agree with respondent's counsel that (a) the applicant's letter of demand (through his attorneys) dated 19 April 2010 did not provide a reasonable period for payment, particularly having regard to the difficulties experienced by the respondent with credit card companies (as set out in respondent's answering affidavit, to which the applicant chose not to reply); and further the fact that no communication whatsoever was received by the respondent from the applicant for a period in excess of six months prior to such letter of demand.

[17] Further, not only was the letter of demand factually inaccurate in a material respect in that it stated that the deposit was to be refunded upon the return of the rental vehicle, the letter did not state that any demand had previously been made upon the respondent regarding repayment of the deposit. Accordingly, the applicant's letter of demand did not serve to place the respondent *in mora*, as the period of time prescribed by the applicant was simply too short.

[18] Accordingly, the application for liquidation was launched at a stage when the debt was not due and payable (bearing in mind that no time limit for performance had been agreed upon) and the applicant was not in a position to invoke the provisions of Section 344 (f) of the Act for the winding-up order.

INTEREST

[19] The agreement concluded between the parties is silent on the issue of interest being payable on the deposit.

[20] As the applicant failed to place the respondent *in mora*, no interest is payable on the debt. Further, the applicant instituted proceedings for the winding-up of the respondent and has (correctly) not claimed any relief regarding payment of interest on the debt allegedly due, being the R30 000 rental deposit.

[21] Further, there is nothing in the order of 3 June 2010 which indicates to me that the respondent in any way conceded that, in principle, it might be liable for interest notwithstanding the agreement between the parties that the liability for interest would be determined by a court in due course.

[22] To my mind, the applicant is not entitled to interest on his claim.

LIABILITY FOR COSTS, AND WHETHER THE APPLICANT HAS ABUSED THE PROCESS OF COURT

[23] It is trite that a court has a wide discretion when making an order for costs, and what form such order should take. The applicant submits that in the instant matter this court should exercise its discretion in his favour, on the basis that he was justified in bringing the application and the outcome of the application has been successful for him. The applicant further submits that the respondent is not entitled to hide behind its own inability to manage its creditors and *"to try and foist its bureaucratic bungling onto the Applicant. In the absence of payment, the applicant was entitled to bring the application"*.

[24] The respondent argues that the applicant purported to launch the application for the winding-up of the respondent on an urgent basis, and that in so doing, he displayed a flagrant disregard for the rules of this court, not

only because he failed to include a prayer that the matter be heard as one of urgency in terms of the provisions rule 6 (12) but that he also failed to set out any factual basis whatsoever for urgency in his founding affidavit.

[25] The respondent also points out that the applicant's letter of demand (through his attorneys) stated that *"We have been instructed to proceed further against you without further notice to you."* This was then followed by the following statement: *"This may include an application for...liquidation...on the grounds that you are unable to pay your debt."* The respondent submits that the latter statement is nothing other than a veiled threat.

[26] In these circumstances, one must question whether the sole or predominant motive or purpose of the application was something other than the *bona fide* bringing about of the company's liquidation for its own sake. It seems that the application may well have been motivated by an attempt on the part of the applicant to enforce payment of a debt on very short notice and in circumstances in which, prior to the factually inaccurate letter of demand from the applicant's attorneys of record dated 19 April 2010, there had been no communication between the parties for the preceding six months.

[27] The respondent argues that the applicant was aware that his attempt to enforce payment would *"clearly would have been bona fida disputed"* and that, as a result, the applicant's conduct in launching the application in the manner in which he did amounts to an abuse of the process of court.

[28] Whilst it is so that an application for liquidation is not a process that is instituted in order to secure the payment of a debt but to bring about a *concursus creditorum (Prudential Shippers SA Ltd the Tempest Clothing Co (Pty) Ltd 1976 (2) SA 856 (W) at 864 H-865 A)*, I am not persuaded that the application constituted an abuse of the process of this court such as to justify a punitive costs order in favour of the respondent. Ill-advised it may well

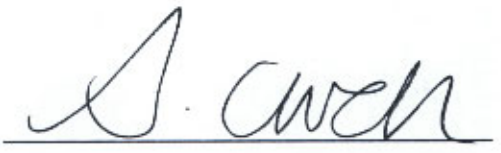
have been but the respondent was indeed somewhat lax in ensuring that it had fulfilled its obligation to the applicant.

[29] However, for the reasons set out above, the applicant launched this application prematurely, and it could have been avoided had the applicant, through his attorneys, correctly placed the respondent *in mora*. In these circumstances, I do not believe that the applicant is entitled to his costs.

[30] I accordingly make the following order:

30.1 The applicant is not entitled to interest on the capital sum of R30 000;

30.2 There shall be no order as to costs.



J I CLOETE