IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 9257/2011

DATE: 19 SEPTEMBER 2011

In the matter between:

GABRIEL JACOBUS VENTER	Applicant
and	
JACOBUS JOHANNES STEPHANUS NEL	1st Respondent
DANIEL TERBLANCHE N.O.	2nd Respondent
RENE WILLOUGBY N.O.	3rd Respondent
UNIVERSAL PULSE TRADING 45 (PTY) LTD	4th Respondent
ABSA BANK LIMITED	5th Respondent
THE MASTER OF THE HIGH COURT	6th Respondent

J U D G M E N T

ERASMUS, J:

I am not going to give full reasons for the judgment. I am asked to deal with two matters that are both under the same case number 9257/2011. Firstly, there is an application for a final winding up order of the fourth respondent and then there

is an application by the applicant brought under a separate notice of motion, but under the same case number, for the rule to be discharged to a provisional order that was issued on 11 May this year to be discharged.

This matter has an unfortunate history. On 3 May this year, under case number 8460/11, the applicant, Mr Nel, brought an application for a provisional winding up order of the respondent, Universal Pulse Trading 45 (Pty) Limited before me in 3rd Division. I dismissed the application. Some of the reasons that came to be after argument of counsel, was that I had dealt with the *bona fides* of the applicant in the matter, more particularly in that the matter was brought as if it was an arms' length application. On a proper analysis of the papers, it was clear that that was not so.

There were indications of a friendly letter that was written between the applicant and the person who was portrayed as the director of the respondent company. One week later an application was brought on papers that were very similar to the application before me, before Van Staden, AJ, who granted a provisional winding up order. At the appearance of 3 May, counsel now for the applicant under the second matter, Advocate Zazeraj, was present in court and his colleague, who appeared for the applicant at that instance, was aware of that.

The papers that served before Van Staden, AJ had two distinct features that was different. Firstly it was pointed out that the applicant and the director of the respondent company was in a relationship and secondly, the so called friendly letter was absent from the papers. Even though the advocate that appeared on the 11th had alerted the court to a previous application, there was not a full disclosure to the court. It was further worrisome on the matter before me on 3 May, as to whether the debt in fact arose on the director's personal account or whether it was for the company. No supporting documents were presented. No supporting documents were presented in the second case either.

It transpired afterwards that this director, Ms Aneen Estelle Mosca, was in fact sequestrated some few months before that, where the same attorney who moved the liquidation application, was also the attorney who appeared for the same applicant in the sequestration applications. In that application. For example, there were indications of debts that related to her in her personal capacity, but also the property that was the only asset of this company, was there stated to be the property of Ms Mosca. None of these facts were disclosed to the court.

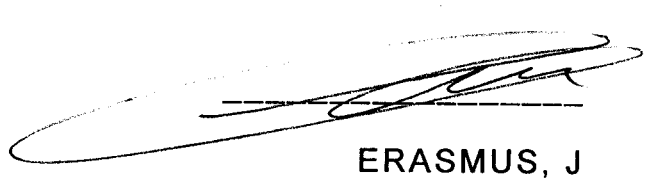
I am not going to deal with any negative inferences to be

drawn as to the conduct of the attorneys or counsel in this matter at this stage. It is not relevant for purposes of what I am finding. In my view the non-disclosure and the manner in which the applicant portrayed the matter on the papers, must cause doubt as to his *bona fides* and whether in fact he had an enforceable debt to be creditor, therefore, he would not have had *locus standi*.

What is worrisome, however, that there was a different attorney appearing in a matter where Absa Bank was in litigation with the applicant, Mr Venter and this company before another court on the same day the second application was brought. It seems that Ms Mosca, the director in the respondent company, as well as the applicant, Mr Nel, must have been aware of that application. From the affidavit of the attorney, Mr Terblanche, they did not inform him of that, he only found out afterwards. That would have been an important factor to bring to the court's attention, *inter alia*, but primarily because of the fact that I cannot find, on the papers before me because of all the questions that arise, the applicant in the liquidation application failed to prove its *locus standi* and, therefore, the provisional liquidation should be discharged.

The only matter that follow from that is the intervention of Mr Venter in taking the application further and the costs that arise

from that. It is clear from all the facts available to me, that had Mr Nel and Ms Mosca, to a certain extent, have played open cards and have placed all the facts, also as to how the debt arose and to whom the indebtedness was, all of this would not have been necessary. They conducted them in such a way, in my view, that it would be appropriate not to have Mr Venter, the second applicant, if I can call him that, to be out of pocket in any way. Hence, I will order that all costs that were incurred in this matter, in as far as it relates to Mr Venter's engagement therein, be paid by the applicant, Mr Nel, on an attorney and client scale. That is the order of the court.



ERASMUS, J