IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20217/10

DATE: 24 MARCH 2011

In the matter between:

MELOMED HOSPITAL HOLDINGS LIMITED Applicant

and

DR ADRIAN BURGER INCORPORATED Respondent

J U D G M E N T

ALLIE, J:

My ruling is then as follows in this matter. I have looked at the papers as a whole and both in the founding papers and in the replying papers, I do not have before me, proof as to how the amount of the claim which applicant allege it has against respondent, is made up or comprised.

In paragraph 18, more pertinently in 18.1 of the founding affidavit, the applicant states that the respondent is indebted to it in a sum of R1,256,376.10, being in respect of monies lent and advanced by applicant to the respondent, at the latter's special instance and request for the period November 2009 to June 2010. And in paragraph 18.2, applicant states that

respondent is indebted to it in the amount of R2,736,000, being in respect of administration fees which have been charged by the applicant to the respondent for the period November 2009 to June 2010.

No documents were annexed in support of these allegations or to prove that these were indeed the amounts owed by respondent to applicant. Even in reply, applicant deals at length with proof that it had demanded other sums of money, at an earlier date, from the respondent, but no proof was presented to this court that applicant was indeed owed the sums alleged in paragraph 18. No written demand or oral demand, was made by applicant to respondent for these sums of money.

I have also not been placed in possession of any invoices or any correspondence in which applicant demands these sums of money from respondent. These sums of money have clearly been factored into the calculation as to what applicant alleges is the respondent's current financial position, to arrive at a deficit which applicant relies on to show that the company is unable to pay its debts. Clearly, to enable the applicant to allege that the company has this deficit, apart from these two amounts which the applicant claims is due to it by the respondent, there is also reference made to an amount of

some R1 363 000 which applicant alleges respondent owes the South African Revenue Service in unpaid Pay As You Earn. So that amount is also factored into the applicant's calculation of the respondent's current financial position,to arrive at a situation where it is alleged by applicant the liabilities of the respondent exceeds its assets and respondent is clearly unable to pay its debt.

When one then looks at the respondent's answering papers, one has a clear sense that the respondent is disputing both claims. The respondent is disputing the amount of the claim and the respondent is disputing the claim in its entirety as well. The respondent has clearly said, in its answering papers, that it believes that it does not owe the applicant this sum of money and it believes this because it says that the true substance of the agreement, the oral agreement between applicant and respondent, is of such a nature, that the applicant operated both financially and administratively, the business affairs of the respondent. Applicant paid the employees, including the medical doctor employees of the respondent, their salaries, and then kept the remainder of the funds for the payment of any other expenses incurred in the operating of the medical units and for itself.

Now, there appears to be a period in which the respondent had

not yet caused its bank account to be opened, and during that period a substantial amount of funds were allegedly paid into a bank account of another juristic entity, namely Cape Emergency Trauma Services, which the deponent to the respondent's affidavit alleged he had control over, namely in its abbreviated form, the CETS, bank account. I have seen the emails emanating from employees of the applicant, requesting payment of certain unpaid sums, which it is alleged is due to the applicant from the CETS account. However, that amount is clearly R698,000 and does not accord with the amounts that applicant claimed in its papers, as the amount due by respondent.

Now to the extent that respondent is in fact challenging the true substance of the arrangement, or agreement, between it and the applicant, & this is different to what applicant alleges, it raises a dispute which this court has to consider. This Court should decide whether it is something that respondent should be afforded an opportunity of having adjudicated at a trial in due course, or whether the dispute is of such a nature that it is neither *bona fide* nor reasonable. Now given the fact that the applicant makes out its case as to the nature of the oral agreement in very broad, general and vague terms, I cannot establish from these papers whether in fact the oral agreement between the parties, went further than what applicant alleges

or not. In paragraph 10 of the founding papers, the applicant states that the agreement's terms were as follows: respondent would provide medical services at the emergency service unit at three hospitals which are owned by subsidiaries of the applicant, and it then goes on to list the hospitals. The second term which is alleged by the applicant is that the respondent would procure properly qualified medical practitioners to render medical services on behalf of the respondent at the units. The third term alleged is that the respondent would manage the rendering of the medical services at the units. The fourth term alleged is that the applicant would attend to the administration relating to the operation of the units. The fifth and last term alleged is that the deponent of the respondent's affidavit, namely Dr Burger, would be paid a monthly salary of R90 000,00 by the respondent.

Now, those are the terms alleged in the founding papers. This clearly is contradicted by what is contained in the answering and replying papers inasmuch as in the answering papers, reference is made to the fact that the respondent would completely operate the medical services component of the units, and that the applicant would do everything else which would involve financial and administrative measures. It is also alleged that the respondent had signed a resolution authorising the applicant to operate the respondent's bank

account, which was opened in due course.

Then also in the replying affidavit, reference is made by the applicant to an administration fee and an agreement of an administration fee that respondent would pay to applicant in the amount of R100 000 per month. Clearly this is not what the allegations regarding the terms of the agreement contain in the founding affidavit. In the founding, there is no allegation that there was an agreement as to a specific amount of administration fee payable per month, nor that there was in fact an agreement to pay any administration fee at all. There is merely the bald allegation, which I have referred to earlier, in paragraph 18.2, that a certain R2,736,000 was in respect of administration fees.

Now clearly when one looks at these two claims, and one considers that it is alleged that monies were lent and advanced – and it is specifically alleged, at the instance or request of respondent – one would have expected at least some information in support of that, some proof that in fact the respondents had requested that the monies be lent and advanced. Instead in argument, there is an allegation made on behalf of the applicant, that the monies that were lent, were really in the form of some sort of injection of monies by the applicant into the business venture. Whether in fact the

respondent had agreed to such injection of monies being in the form of a loan or whether it was start up capital, whether it saw the applicant in fact as a partner in the business, whether it was in fact an agreement that they would share in the risk, or that applicant would bear the risk, are all the type of issues for a trial court to deal with in due course. I only have to satisfy myself at this stage, that in fact the respondent has discharged the *onus* of showing that the dispute it raises is *bona fide* and on reasonable grounds.

I am therefore satisfied that the disputes that the respondent raise at this stage, is clearly *bona fide* and on reasonable grounds, and it is not for this process of the court to be utilised to stymie or prevent what may well transpire to be a defence which is good in law. At this stage, all that I have to be satisfied with is that the dispute is *bona fide* and that the facts, if proved at a trial, could constitute a good defence to the claim. I do not have to find at this stage that the defence will be good in law at a trial in due course but merely that it would constitute a defence to the claim. The issues that have been raised, albeit not as eloquently put in the answering papers as one would have preferred to have it, certainly indicate that the respondent would have a defence to the allegations because the terms of the agreement are not sufficiently, clearly set out by the applicant in its papers, both

in the founding papers as well as in the replying papers. I have pointed out at least one contradiction between the founding and the replying papers, in relation to an administration fee.

I must point out that it would be a simple matter for the applicant, who itself is a company, to have produced at least some proof of the amounts it claims the respondent owes it, either in the form of an extract of financial records, or in the form of invoices. But I cannot establish that in fact these amounts were at all owing, although, as I have indicated before, there is in reply, an allegation that some R698,000 is owing by the respondents to the applicants, and my attention was drawn to email correspondence between Dr Burger and the applicants in this regard. Clearly at the stage when correspondence flowed between the parties, the lawyers were not involved. When this matter comes to trial eventually, I am sure that both parties would have adequate legal representation. The way the respondent has presented its dispute in its correspondence about the amount of the R698,000, may not have been put in the precise terms that a court of law would require, but it can certainly be raised as a defence in a plea when and if an action is instituted in regard to the R698,000. It is by no means clear to me from the correspondence, the emails emanating from the respondent,

that the respondent has agreed that that amount is in fact due and owing by it. In fact, the difficulty one has is that the amounts of money appear to have been paid into the account of a different juristic entity called CETS, and one has to draw a distinction between the fact that Dr Burger may be in control of the bank account with CETS, and the respondent, which is a separate juristic entity from Dr Burger himself.

So I cannot find that there is indebtedness on the part of the respondent, towards the applicant, even in that sum of some R698,000. On that basis, I cannot find that the company is unable to pay its debts.

Then turning to the argument raised on behalf of the applicant, dealing with the ground of winding up on the basis of it being just and equitable to do so, my attention was drawn to two aspects. One being the illegality of purpose principle, and the primary contention there being that the respondent, on its version, has alleged that the entire arrangement or agreement between the parties, was actually a device designed to circumvent the breach of the ethical rule of the Health Professional Council of South Africa, and therefore it has an illegal purpose and therefore the company should be wound up on that basis.

In that regard, I just need to refer to the commentary of

Henochsberg of the Companies Act, to page 701 in that regard, in Volume 1, and Henochsberg says as follows:

> "The expression 'just and equitable' is not to be interpreted so as to only include matters *ejusdem generis* the other grounds specified in the section... and cases there cited, especially Loch v John Blackwood Ltd [1924] AC 783 (PC). It confers upon the Court a wide discretionary power which must of course, be exercised judicially, taking into account all relevant circumstances, and where the applicant is a member, the provisions of Sections 347(2), 347(4)(b) and 354, where a voluntary winding up is in progress)must be taken into account..."

And then Henochsberg goes on to say, and I quote:

> "An applicant who relies on this ground must come to court with clean hands, i.e, he must not himself have been wrongfully responsible for, or have connived at bringing about, the state of affairs which he asserts, result in its being just and equitable to wind up the company..."

And reference is made to several cases, most notably the case

of APCO Africa Incorporated v APCO Worldwide (Pty) Limited [2008] 4 All SA (SCA) at paragraph 9.

And I must just mention here that I do not have to find, as a matter of fact, that the arrangement between the parties was a set up to prevent the application of the rule of the HPCSA, or whether it was set up in breach of the rule of the HPCSA. To the extent that both parties were aware of this rule, and in fact set up the company in such a manner that they would not be hit by the rule, I would say that there was collusion between them, but I do not find that there was any fraud. To the extent that applicant relies on an illegality of purpose argument, I am saying that these parties were both aware of this rule and they entered into this arrangement knowing that they could well be found to be in violation of that rule, even though that would be for a different forum to so determine. I am not persuaded that the illegality of purpose would be a ground open to this applicant in this matter.

In turning to the second basis upon which the applicant relies for its ground of just and equitable, it is the grounds of the disappearance of the sub-stratum of the company. In this regard one must be mindful of the fact that I do not have before me the memorandum of the respondent and I do not know, objectively, what its main objects are as stated in that

memorandum of the company. What I do have however, is the allegation, by the applicant, that the company was set up for the purpose of providing emergency medical services to three named hospitals, which is under the control of the applicant.

Then clearly it is in the nature of a company incorporated for the purposes of providing emergency medical services, that it may well be able to provide such emergency medical services at some later stage in the future, if it should find itself in a sufficient solvent position to do so, and it is not for this court to close the doors on the respondent. It may wish to so provide medical services. I am not persuaded that in fact its main objective has ceased to exist, as I have stated, because it, in the nature of this type of incorporation, to be able to provide a service. There is no indication that it cannot be utilised as a vehicle for the provision of such services in the future, provided that it is of course solvent. And to the extent that the applicants have not shown, in my view, that the company is unable to pay its debts, I am also not persuaded that it has also shown that the company is not in possession of sufficient funds to be able to pursue its main objects, albeit at different hospitals or institutions to those listed by applicant, as the ones that they were contracted initially to provide the service to.

So, all in all, I am of the view that the application has not proved its case. The application is in fact refused. And then I have to turn to the issue of costs, and I see that the costs of the 17th September stood over for determination today. And so, in my opinion, the costs must follow the cause. The application is then refused with costs, inclusive of the costs of 17 September 2010.

ALLIE, J