

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

CASE NO.: A428/11

In the matter between

**MELOMED HOSPITAL HOLDINGS LTD**

Appellant

versus

**Dr ADRIAN BURGER INCORPORATED**

Respondent

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**JUDGMENT DELIVERED ON 15 MARCH 2012**

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**SAMELA, J**

Introduction

[1] The Appellant appealed against the decision of the court a quo, which dismissed the Appellant's application for winding up of the Respondent, on the following grounds that:

- (a) the Appellant was an unpaid Respondent's creditor;
- (b) the Respondent was unable to pay its debt when they were due;  
and
- (c) it was just and equitable to wind up the Respondent as the Respondent was no longer operating, and its substratum had collapsed.

[2] The Respondent opposed the application on the basis that:

- (i) the Appellant lacked locus standi;

- (ii) the Respondent was not insolvent and;
- (iii) it was not just and equitable to wind up the Respondent.

[3] The following facts are common cause: an oral agreement was concluded between the Appellant and Dr Burger who represented the Respondent. The terms of this agreement provided, inter alia, that the Respondent would provide medical services at the emergency units in Bellville, Gatesville and Mitchell's Plain hospitals. The Respondent would procure doctors to render the said medical services on its behalf. The Respondent would manage the medical services, while the Appellant would manage the administration of the units. A salary of R90 000.00 per month had to be paid to Dr Burger.

The disputes between the parties were whether:

- (i) the Respondent was indebted to the Appellant for the sum of R1 256 376.10 in respect of monies lent and advanced;
- (ii) the Respondent was indebted to the Appellant for the sum of R2 736 000.00 in respect of administration fees; and
- (iii) the Respondent was commercially and factually insolvent.

[4] However at the appeal Mr Manca, who appeared on behalf of the Appellant, conceded that the key question was whether the Appellant had locus standi to bring an application for the Respondent's provisional liquidation. Absent the necessary locus standi, it was unnecessary for the court to decide the balance of the issues.

[5] Appellant based its issue for locus standi on the averment that it is a Respondent's creditor. As averred in the founding affidavit the Respondent is indebted to the Applicant as follows:

1. R1 256 376.10 being in respect of monies lent and advanced by the applicant to the respondent at the latter's special instance and request for the period November 2009 to June 2010;
2. R2 736 000.00 being in respect of administration fees which have been charged by the applicant to the respondent for the period November 2009 to June 2010 or stated in the funding affidavit. Respondent denied that any loan was made to it. It further denied that the Appellant was entitled to any administration fees.

[6] The Respondent admitted withdrawing approximately R1, 4 million and transferring it into the Respondent's attorney's trust. The Respondent explained that the money was for payment to SARS. To the extent that Respondent paid SARS, it would have a claim against Appellant. The Respondent further argued that it was merely an extension of Appellant's business in that the Appellant did both administrative and financial functions on Respondent's behalf.

[7] I agree with the Respondent's submission that the Appellant did not deny that it dealt with Respondent's administrative as well as the financial functions. Consequently, on the papers it cannot be said that Dr Burger had a role in the management or running of the Respondent. It appears to me that Dr Burger had no 'in depth knowledge' of the Respondent's financial position save for the R1, 4 million that was in Respondent's attorneys trust. It is common cause that the Appellant paid Respondent's expenses such as doctors salaries (to doctors employed by the Respondent), PAYE, collected fees from patients, dealt with the Respondent's bank and had full knowledge of payments made into the Respondent's bank account. Hence, it appear that the Appellant and Respondent were one and the same entity, notwithstanding their separate corporate entities.

- [8] The next issue concerns an e-mail string. The Appellant submitted that an e-mail string between it and Dr Burger clearly indicated that Dr Burger did not dispute the Respondent's obligation to make payment to the Appellant, regarding the monies expended by the Appellant on the Respondent's behalf.
- [9] The Respondent submitted that Dr Burger did not deny that money received from patients was paid directly into the banking account of Cape Emergency Trauma Services (PTY) Ltd 'CETS', a company used while Respondent was in the power of being refunded. Further, this money would then be transferred from the CETS account into that of the Appellant.
- [10] I am of the view that the Respondent is correct that it was common cause that monies received from the patients were paid into the CETS account, which in return paid over these monies to the Appellant. In my view, it follows from this evidence that the Appellant was a creditor of CETS not of the Respondent.
- [11] In addition, the Appellant submitted that the Respondent was indebted to it to the sum of R1 256 376.10 in respect of monies lent and advanced.
- [12] The Respondent pointed out that it was common cause for this purpose that:
- (a) the parties had agreed that the Appellant would run the Respondent entirely;
  - (b) all monies received from patients would be paid to the Appellant's account;
  - (c) Dr Burger and the doctors employed by the Respondent would be paid their salaries by the Appellant; and
  - (d) for all intents and purposes, except one, the Appellant and the Respondent were one entity despite their separate corporate identities.

The Respondent argued that it was not possible under this scheme, that any indebtedness could arise between the Appellant and the Respondent, regarding administration fees and loans of the existence of whichever claimed by the Appellant.


- [13] The Appellant did not attach any documentation in the form of invoices nor vouchers to indicate how it arrived at the figure of R1 256 376.10. I am of the view that without any documentation, I am unable to find that the Respondent owed the Appellant this amount of money. The evidence as a whole does not support the bold averment of indebtedness as claimed in the founding affidavit. I am of the view that the Appellant failed to indicate that it was the Respondent's creditor. Consequently, the Appellant lacked the necessary locus standi to bring a provisional liquidation application against the Respondent.
- [14] In the light of this finding, it is unnecessary to canvass any of the remaining disputes.
- [15] Viewed accordingly, the Appellant and Respondent were one entity, and their separate identities were only a sham. The parties agreed that the Appellant would run fully the Respondent that is, both administratively and financially, receiving all monies payable to the Respondent by patients and paid all the Respondent's expenses.

In the result, the Respondent reasonably and bona fide disputed the Appellant's claim. The Appellant failed to prove that it was a creditor in that it failed to indicate that the Respondent owed monies, by attaching relevant documentation to the papers.

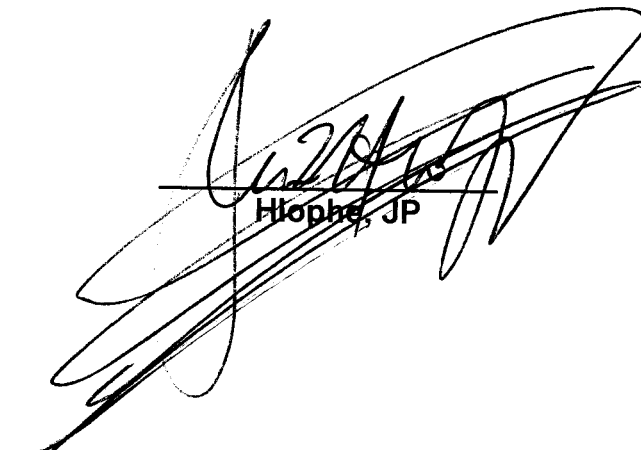
Accordingly, I find that the Appellant lacked locus standi to bring the provisional liquidation proceedings against the Respondent.

- [16] Therefore,


The appeal is dismissed with costs.

  
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Samela, J

I agree

  
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Hlophe, JP

I agree

  
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Davis, J