



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 28604/21

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
17 February 2022

SIGNATURE

In the matter between:

MARCUS M FARMING CC

Applicant

and

EAGLES VALLEY POULTRY (PTY) LTD

Respondent

JUDGMENT

LAZARUS AJ

1. This is an application for the winding up of the respondent on the basis that it is unable to pay a debt allegedly owed to the applicant in respect of the occupation and use of the applicant's property.
2. The respondent opposes the application on two grounds:
 - 2.1. First, it disputes being indebted to the applicant in the amount claimed or at all.
 - 2.2. Second, it denies that it is either factually or commercially insolvent.
3. The basis for the respondent's denial of its indebtedness to the applicant was set out in an email from the respondent's attorney to the applicant's attorney evidently sent before receipt of the applicant's application. This letter also provided financial information demonstrating the respondent's factual and commercial solvency.
4. The respondent's answering affidavit further substantiated the basis for the denial of its indebtedness to the applicant and provided further evidence demonstrating its factual and commercial insolvency.
5. Notwithstanding this, the applicant's persisted with the application and filed a replying affidavit still seeking the winding up of the respondent.

6. Two days prior to the hearing of this matter, the applicants uploaded onto Caselines two draft orders. The first persisted with the relief originally sought (i.e., the winding up of the respondent). The second was framed as an alternative order and sought the postponement of the application *sine die* and payment of the debt into the trust account of the applicant's attorney pending the final outcome of the application.
7. During argument, the applicant's attorney (who appeared on behalf of the applicant) stated that after receipt of the answering affidavit, he had advised his client not to proceed with the winding up application but rather to request payment of the debt into his account pending finalisation of application.
8. Albeit rather late in the day, the advice not to proceed with the liquidation application was sound. It is well established that a liquidation application is not appropriate when a debt is disputed on reasonable and *bona fide* grounds. Notwithstanding the applicant's attorney's submissions to the contrary at the hearing, no evidence was presented to demonstrate that the respondents defence was unreasonable or *mala fide*. On this basis alone, the application for the winding up of the respondent must fail.
9. So too must the applicant's claim in its alternative proposed order for a directive that the amount of the debt should be paid into the applicant's attorney's trust account pending finalisation of this application. Since the debt is disputed on reasonable and *bona fide* grounds it cannot be just or equitable for such an order to be made.

10. The applicant's application must also fail in the absence of any evidence that the respondent is insolvent. On the contrary, the evidence clearly demonstrates that the respondent is both factually and commercially solvent. This was in fact conceded by the applicant's attorney at the hearing.
11. This brings me to the question of costs.
12. The respondent submits that the applicant should be liable for the costs on a scale as between attorney and client.
13. There is merit in this submission. As alluded to above, the applicant was made aware that the respondent disputed the debt alleged to be owing by it and explained the basis for the dispute before the application was launched. There also could never have been any reasonable basis for the belief that the respondent was either factually or commercially insolvent. Even if there remained some doubt at the time the application was launched, there was no reasonable basis for the doubt to have persisted after the respondent filed its answering affidavit. Despite this, the applicant persisted with the application and only presented the draft order for alternative relief two days prior to the hearing, the basis for which relief is not substantiated in the papers before me. This conduct justifies a punitive costs order against the applicant.
14. The respondent further submits that the conduct of the applicant's attorney, in advising the applicant to launch and persist with the application despite

being aware (or, with the exercise of reasonable professional care, ought to have been aware) that the application was doomed to failure from the outset, ought to be sanctioned with a cost order *de bonis propriis*.

15. Costs orders *de bonis propriis* are not easily awarded. To justify such an order, the conduct complained of must be *mala fides*, negligent or unreasonable.¹ It has also been stated that such costs are awarded for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that his clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context.² Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care.³
16. In the present matter, while it may be argued that the applicant's attorney was unreasonable or even negligent in persisting with this application for the winding up of the respondent when he was aware or ought reasonably to have been aware that the application had no prospects of success, I am not satisfied that there is sufficient evidence that his conduct was so severe

¹ Vermaak's Executor v Vermaak's Heirs 1909 TS 679 at 691.

² Lushaba v MEC for Health, Gauteng 2015 (3) SA 616 (GJ) quoting from

³ Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP)

as to deserve the censure of this court in the form of a costs order *de bonis propriis*.

17. In the result, I make the following order:

17.1. The application is dismissed with costs on a scale as between attorney and client.



**LAZARUS AJ
ACTING JUDGE OF THE
HIGH COURT, GAUTENG
DIVISION PRETORIA**

For the Applicant: S M Ndobe
Instructed by Ndobe Incorporated Attorneys

For the Respondent: Adv F Terblanche SC
Heads of argument prepared by Adv J Vorster
Instructed by Strydom & Bredenkamp Incorporated