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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 8906/15

In the matter between:

STUART CHARLES DACOMB **APPLICANT**

and

GREEN HEAT (PTY) LTD **RESPONDENT**

JUDGMENT

Delivered on: 16/03/2018

MNGADI AJ

[1] The applicant seeks a final winding-up order of the respondent on the basis that the respondent was unable to pay its debts within the meaning of s 345(1) (a), read with s 344(f) of the Companies Act 61 of 1973(the old Act). The application is opposed by the respondent. The applicant is an adult male chartered accountant. The respondent

is a company duly registered and incorporated under the company laws of the Republic of South Africa.

[2] The applicant based its application on four categories of debts. He claimed that the respondent is indebted to him and that due demand having been made pursuant to the provisions of s 345 of the old Act read with the provisions of s 9 of Schedule 5 of the Companies Act 71 of 2008 (the new Act) and there was no response to the demand within the prescribed time limits or at all.

The positions of the parties

[3] The applicant states that the first category of indebtedness is unpaid salary in the total sum of R170 000. He averred that he joined the respondent on the basis that he would receive 50% shareholding in the respondent. His monthly salary was not paid in full, it being agreed that the arrears in his salary will be off-set against the purchase price of the shares. He attended to prepare the respondent's books of accounts from 2008 and once he completed the accounts to 2014 he was told that the offer of 50% shareholding was no longer available and he had to leave the respondent. On 12 January 2015 he sent to the respondent an e-mail with schedules indicating arrear salary and refund of expenses due to him.

[4] The second category of indebtedness, claims the applicant, relates to payment of expenses incurred by him on behalf of the respondent when he used his Nissan bakkie to effect deliveries and they total R24 419-34. He avers that as a shareholder he used his personal vehicle to deliver goods. The costs of delivery were to be off-set against the purchase price of the shares. In the e-mail of 12 January 2015 (referred to above) he stated that 'my bakkie was also used to deliver goods again I did not charge GH at the time because of cash flow problems and it could be sorted when the shares were valued'

[5] The applicant avers that the next category of indebtedness relates to repayment of expenses made by him in respect of cell phone debits on behalf of the respondent in the

total sum of R7 095-00. In the schedule attached to the 12 January 2015 e-mail it is titled 'Floral Image Costs, Costs incurred since 2012. It lists the following; Printing paper for R300-00; Ink cartridges in the sum of R2 190-00; use of internet for R3 000-00; and use of phone for R300-00. He states that due to the respondent's poor financial position he paid his own cell phone costs. The costs were by agreement to be set off-against the purchase price of the shares.

[6] The applicant avers that the last category of indebtedness is the payment of monies due to him and retained by the respondent and the balance is the sum of R6 388-28. He explains that Builders Warehouse paid to the respondent for flooring supplied by him. He asked the respondent to pay the monies received to various entities and the amount outstanding not paid over is R6 388-28 that must paid to him.

[7] The applicant states that in the e-mail of 13 January 2015 in response to his e-mail of 12 January 2015 mentioned above, Mrs. Barret, respondent's managing director, on behalf of the respondent stated as follows (own numbering):

'1. Firstly, I need to check if you have taken the backups of all Green heat transactions to Comput 8, including what is in your PC,so that I can follow what you have done over the years relative to Green heat South Africa's accounts.

2. I am needing the audit trail file for Feb 2014 accounts, plus your last set of management accounts that you did (June 2014) I am trying to establish the discrepancies in the accounts that I submitted to Merchant West. The ones I pulled off Pastel, which you then informed me were totally incorrect.

3. This is very urgent, as you are aware, I am unable to do factoring of my Shoprite deliveries, leaving us with no cash flow, as much as I would like to pay catch up with your salary and your expense claims, I am in no position to do so.

4. Please, therefore, send through the info urgently. If you have sent stuff to me relative to these requests, please give me the dates, so I can do search'.

The applicant avers that the statement in para 3 of the e-mail is a statement which is clearly an act of insolvency in terms of s 8(g) of the Insolvency Act 24 of 1936, as amended, as read with s 344(h) of the old Act still applicable pursuant to the new Act.

Alternatively, claims the applicant, the e-mail indicates that the respondent is unable to pay its debts pursuant to s 344 (f) and, in addition, it indicates that it is just and equitable that the respondent should be wound-up in terms of s 344 (h) of the old Act.

[8] In addition, the applicant avers that a s 345 demand having been sent, and three weeks having elapsed, and the respondent having failed to respond to the demand, the respondent is deemed to be unable to pay its debts as envisaged in s 345 of the old Act read with the provisions of the new Act.

[9] The respondent in opposing the application relies on the affidavit of Adrianne Margaret Barret, its shareholder and managing director. The respondent denies that it is either insolvent or in insolvent circumstances. It denies that it owes the applicant any monies as alleged or at all. It denies that any monies whatever remain due to the applicant in respect of short-paid and/or unpaid salaries and in respect of monies received from Builders Warehouse. It denies that it is liable to reimburse the applicant for delivery costs by the Nissan bakkie, if any. Further, it denies that it is liable to reimburse the applicant cellular telephone costs, if any were incurred. It denies that there is a shortfall in respected of monies received from Builders Warehouse that ought to be refunded to the applicant. It alleges that in fact in respect of salaries and the Builders Warehouse the applicant was over-paid.

[10] Mrs. Barret stated that at the time she sent the e-mail of 13 January 2015 she was under the mistaken but bona fide belief that monies were due to the applicant for short - paid/unpaid salary and for certain repayments of monies by the respondent. In the past such monies had been owed to the applicant and she was not without reconciliation to know whether there were still monies owed or not. She stated that now having done the reconciliation (schedule attached to her affidavit) no monies were owed to the applicant, in fact there had been over payments in the total sum just over R19 000. In December 2014 in respect of salaries there was an over payment of R5 000 and an over-payment of R14 155-70 in respect of monies received from Builders Warehouse.

[11] The respondent denied that that the applicant was ever a shareholder of the respondent. It denied that the applicant used his Nissan bakkie to make deliveries for the respondent and Mrs. Barret denied that she confirmed in the 13 January 2015 e-mail that such reimbursement of such expenses was due to the applicant. When she used 'expenses claims' she did not mean any expenses relating to the use of the Nissan bakkie or in respect of cellular telephone usage. She was referring to a claim for payment of monies received from Builders Warehouse. She stated that there was never any agreement to pay the applicant for cellular telephone costs and it was never agreed that such costs would be set off against the purchase price of shares. She stated that whilst the demand may have been sent to the registered office of the respondent, such communication never came to her attention or that of her husband, and that in any case the demand is improper, and it cannot be relied upon because no monies were owed to the applicant.

[12] Mrs. Barret stated the applicant's claim of R24 419-34 for the use of the Nissan bakkie and R7 095-00 for the cellular telephone expense totals R31 514-34 whereas the total over-payment is R19 155-70. The difference is R12 358-64, the payment of which the respondent secures by paying the said sum to its attorneys to be kept in trust pending the action instituted within ten days from date of finalization of the winding up application or as ordered by the court. Mrs. Barret concluded that the respondent is not insolvent. The applicant has ulterior motives in seeking to liquidate the respondent. He had instituted an action against her and her husband which they opposed.

[13] The applicant in reply averred that the respondent is factually insolvent as well as commercially insolvent. He has no ulterior motive. The respondent owes him the money as claimed. He has not claimed any salaries for the months of October, November, December 2014 and January 2015 because during that period he was assisting the applicant on part-time basis. The salary reconciliation of the respondent ignores his claims for salary from 1 March 2014 to 31 January 2015. The salaries for March 2014 to September 2014 at R25 0000 per month adds up to R175 000.

The applicant relying on various communication, stated that he remained employed full time by the respondent up and including September 2014.

[14] The applicant stated that he instituted the action against the Mrs. Barret and her husband because they acknowledged their indebtedness in an acknowledgement of debt and subsequently claimed duress. He stated that reference to those proceedings is irrelevant for purposes of the application. He disputed the respondent's reconciliation relating to the Builders Warehouse stating that items that ought not to have been included have been included and that the respondent has conveniently ignored previous reconciliation. He agreed that he was never a shareholder of the respondent. He was offered shares and the offer was subsequently withdrawn. The unpaid salaries accrued from November 2011 to 30 September 2014.

Applicable legal principles

[15] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. When a final winding-up order is opposed, the applicant bears the onus of proving on a balance of probabilities that he is a creditor of the respondent and that the respondent is unable to pay its debts. In the case of disputes of fact, the *Plascon-Evans* rule applies. See *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017); *Paarwater v South Sahara Investments (Pty) Ltd* [2005] ALLSA 185 (185 (SCA) at 186-187; *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) at 285-286.

[16] Once the respondent's indebtedness to the applicant for a winding up order has, prima facie, been established, the onus is on the respondent to show that indebtedness is disputed on bona fide and reasonable grounds. The respondent is required to allege facts which, if proved at the trial, would constitute a defense to the applicant's claim. See *Afgri* par 17; *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 at 980; *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) S 781 C at 788-789. *Hulse-Reuter v Heg Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 C at 219 -220.

[17] The court has a discretion to grant a winding up order, irrespective of the grounds on which such an order is sought. The discretion is a judicial discretion to be exercised on judicial grounds. Generally, an unpaid creditor has a right, *ex debito justitia*, to a winding up order against the respondent that has not discharged its debt. The discretion of a court to refuse to grant a winding up order where an unpaid creditor applies therefor is a very narrow one that is rarely exercised and in special or unusual circumstances only. See *Afgri* par12.

Did the applicant put up a new case in reply?

[18] The respondent argues that in the replying affidavit, and for the first time, the applicant contends that he is owed salary, not for the period from November 2011 to February 2014 as claimed in the founding affidavit, but for the period from March 2014 to September 2014. This constitutes an entirely new claim. The respondent, it is argued, in the reply is for the first time faced with a new claim. He did not have the opportunity to deal with the new claim in the answering affidavit. The applicant is bound by the claim he sought to make out in the founding affidavit. The new claim should not be taken into consideration at all.

[19] The applicant responds that the respondent raised in the answering affidavit a special defense of a mistaken bona fide belief. It could not have been expected of the applicant to deal with the special defense in the founding affidavit and the only route open to the applicant is to deal with the issue raised in reply.

[20] The respondent is not correct that in reply the applicant claimed to be owed salary from March to September 2014. The applicant in reply par 7.2 stated 'My claim therefore is for unpaid salaries from November 2011 up to and including 30 September 2014.

[21] It is trite that the applicant must make his case in the founding affidavit and not in reply. The relief sought has to be supported by averments set out in the founding affidavit. If it becomes necessary to raise new facts, the applicant may do so with the

leave of the court, by filling supplementary affidavit which may entitle the respondent to respond to the new averments made. In motion proceeding the affidavits set out the cases of the respective parties. It is part of the fairness of the hearing that the rules prescribed for the litigants are complied with. See *Hano Trading CC v JR 209 Investments (Pty) Ltd & another* 2013 (1) SA 161 (SCA) ; *Khunou & others v M Fihrer & Son (Pty) Ltd & others* 1982 (3) SA 353 (W) at 355G-356C.

[21] Mrs. Barret in the answering affidavit stated that when she sent the 13 January 2015 e-mail she was under the mistaken but bona fide belief that monies were due to the applicant by the respondent for short-paid/unpaid salary and certain expense claims. She went on to attach a reconciliation schedule covering the period from November 2011 to 13 December 2014. The applicant had in his e-mail of 12 January 2015 attached schedules setting out the details of his claims. Therefore, at least, when deposing to the founding affidavit the applicant could not have known that the details of his claims were disputed. When it was conveyed in the answering affidavit that they were disputed and the basis thereof, the applicant was entitled in reply to deal with the issues raised in the answering affidavit. Although it is not eloquently set out, the applicant in the replying affidavit, as I understand his case, is merely saying that the respondent falsely claims that payments for salaries due after February 2014 were payments for arrear salaries accrued up to February 2014. He has not deviated from the founding affidavit but has sought to clarify the response in the answering affidavit.

[22] The respondent if the applicant was skewing the facts in relating to the reason for the monthly payments made after February 2014 was entitled, with the leave of the court, to address the issue in a supplementary affidavit. In terms of the *Plascon-Evans* rule the issue would have been decided as set out by the respondent. The court is entitled in deciding whether the issue raised is a new issue or not to consider actual and potential prejudice to the litigants. It cannot lightly be ruled that the applicant has raised a new issue and therefore it should not be considered. The issue raised could be a relevant issue that is important for a proper consideration of the applicant's case and to exclude consideration of the issue may result in the applicant being denied a proper

hearing. In my view, the applicant has not set out a new a case in reply and the replying affidavit ought to be taken into consideration.

Facts proved

[23] The applicant claims refund of expenses for use of the Nissan bakkie and the cellular phone. He avers that the expenses were incurred for the respondent and that he understood that these expenses will be set-off against the purchase price of the shares. The applicant does not claim that before the expenses were incurred there was an agreement with the respondent how he will be reimbursed for the expenses. The applicant seeks to rely on the 13 January 2015 e-mail as forming the basis that he is entitled to be reimbursed for these expenses. In his e-mail to the respondent of 12 January 2015 he was putting in claims for the use of the bakkie and to be refunded cocts for cellular telephone use. The respondent had never accepted liability for these costs. He put in claims and without the respondent accepting the claims, they are not debts but remains claims. In my view, the 13 Jan e-mail neither accepts liability nor denies liability for the expenses. The respondent was not required to take a decision on the issue there and then. Her explanation that she was still going to investigate the issues raised is not of such a nature that it can summarily be rejected out of hand. In terms of the *Plascon -Evans* rule the matter must be decided on the version of the respondent. In my view, the applicant has failed to prove on the balance of probabilities that the reimbursement for expenses constitute a debt and that in that regard he is a creditor.

[24] On the issue of Builders Warehouse, it is disputed whether there were any monies still outstanding to be paid over to the applicant. In the founding affidavit the applicant stated the issue as if it had no controversy around it. The arrangement was that the respondent received monies from Builders Warehouse due to the applicant. The applicant instructed that the monies due to him be paid to certain entities. The applicant avers that there is a balance of these monies that was not paid over to any entities and that balance must be paid over to him. The respondent claims, furnishing

details, that in fact it paid over more than the monies received from Builders Warehouse. The applicant also sought reliance on the 13 January 2015 e-mail. The remarks made above to the issue of reimbursements equally applies to this issue. Again, in terms of the *Plascon-Evans* rule, the issue must be determined as stated by the respondent. In my view, the applicant has failed to prove on the balance of probabilities that there were monies still outstanding to be paid over to him. He has failed to prove a debt in this regard and therefore that he was a creditor of the respondent.

[25] The applicant set out in the founding affidavit the claim for arrear salary. He furnished a schedule indicating how the arrear salary accrued. In the 13 January 2015 e-mail Mrs. Barret undertook to attend to the payment of arrear salary once the cash flow problem of the respondent has been sorted out. Unlike the claim for reimbursement of expense claims, there was no question of the applicant being entitled to a salary. In the schedule to the 12 Jan e-mail the applicant indicated that he was claiming arrear salary accrued during the period November 2011 to February 2014. In his e-mail of 12 Jan the applicant stated clearly that he was demanding payment of accrued salary. In my view, at this stage the unpaid salary for the period in question was a debt.

[26] The applicant having established that the arrear salary was a debt, the 13 January 2015 e-mail confirmed liability for the debt and undertook to settle it. The onus is then on the respondent to prove on the balance of probabilities that the debt was paid, compromised or settled, or that the question of whether the debt was paid constitute a dispute of indebtedness which is bona fide and founded on reasonable grounds. See *Gap Merchant Recycling CC v Goal Reach Trading* CC 2016 (1) SA 261 (WCC).

[27] The respondent to show that the arrear salary was settled in full provided a reconciliation schedule recording monthly payments after February 2014. In reply the applicant stated that those payments were for salaries accrued after February 2014. The respondent had no response. In my view, the respondent has failed to prove that

the arrear salary was settled or that the issue of whether the arrear salary was settled is a dispute in regard to which there is a bona fide dispute on reasonable grounds.

[28] On 12 May 2015 the sheriff on behalf of the applicant served a demand under s 345 of the old Act on the respondent's registered address. It is common cause that there has been no payment or securing or compromising of the debt within the prescribed period or at all. Therefore, the respondent is deemed to be unable to pay its debts. The inability to pay the debt shows that the respondent is insolvent. Having considered all the circumstances, it does not appear to me that this is a matter wherein the court can exercise its discretion not to grant the winding-up order of the respondent.

[29] In the circumstances, the provisional winding-up order issued on 14 October 2016 and amended on 6 December 2016 falls to be confirmed with costs.

Order

1. The provisional winding-up of the respondent issued on 14 October 2016 and amended on 6 December 2016 is confirmed with costs. The respondent is finally wound-up.

2. The costs are to be costs in liquidation of the respondent and to include costs occasioned by the employment of Senior counsel and Junior counsel

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MNGADI, AJ

APPEARANCES

Case Number	:	8906/2015
For the Applicant	:	Adv. G D Harpur SC with D Tobias
Instructed by	:	Messrs. Lindsay & Lindsay Inc. Cowies Hill
For the respondents	:	Adv. J C King SC
Instructed by	:	Messrs. Edward Nathan Sonnenbergs Inc. Umhlanga
Matter argued on	:	9 March 2018
Judgement delivered on	:	16 March 2018