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

Case no: 9550/2010

J F HILLEBRAND (SOUTH AFRICA) (PTY) LTD **Applicant**

v

SILVER SOLUTIONS 1688 CC t/a GLOBAL COMMODOTIES **Respondent**
(Registration number: CK 1998/09904/07)

JUDGMENT HANDED DOWN THIS MONDAY, 22 NOVEMBER 2010

CLEAVER J

[1] This is an application for the winding-up of a close corporation. In the notice of motion a final order of winding-up is sought, the alternative prayer being for a provisional winding-up order. The applicant alleges that the respondent is unable to pay its debts. This averment is based inter alia on the respondent's failure to effect payment of an amount claimed by means of a statutory demand on the respondent in terms of s 69 of the Close Corporations Act 69 of 1984 ("the Act") on 9 March 2010.

[2] The respondent's case is that two days before the application for winding-up was brought, the amount alleged by the applicant to be owing to it was paid into the trust account of the its attorneys to secure any amount which might be found to be owing by it to the applicant, pending the resolution of disputes between the parties in respect of the amount claimed by the applicant.

[3] The claims of the applicant against the respondent stem from a sublease between the applicant as sublessor and the respondent as sublessee of certain storage facilities in Paarden Eiland. Although the terms of the sublease were not recorded in writing, the reasons for this not being relevant for the purposes of this judgment, it is common cause that the sublease was for a period of one year from December 2008 to November 2009. The amount claimed by the applicant is made up as follows:

Outstanding rental account	R92 099.57
Outstanding electricity account	R37 892.53
Outstanding freight forwarding account	R15 921.43
Outstanding damages / repairs account	R10 975.47
	R156 899.00

[4] The averment by the applicant that the respondent had failed to respond to demands made on it for payment is not entirely accurate. While it is so that payment was not made upon demand, the papers reveal that in response to a letter of demand of 4 February 2010 addressed by the applicant's attorneys to the respondent to make payment of the sum of R152 298.42, the respondent's deponent spoke telephonically to the financial manager of the applicant and raised his concern that he required all relevant invoices and source documents from the applicant to enable him to reconcile the statements which he had received. These averments on behalf of the respondent are borne out in an e-mail which was addressed to the applicant on 16 February 2010. The receipt by the respondent of the statutory demand in terms of the act which was forwarded to the respondent on 9 March 2010 elicited a similar response, for the respondent's attorneys requested a comprehensive breakdown of the amount claimed. By this stage the applicant's attorneys had taken up the attitude that the respondent was simply trying to delay payment of a debt which it knew and had acknowledged to be due. The respondent was accordingly informed that the applicant would be proceeding with a liquidation application which would be served shortly. Further letters followed from the respondent's attorneys to the applicant's attorneys, the last of which contained the following paragraphs which were relied upon by the applicant's counsel to support his submission that the respondent was unable to pay its debts.

'We have obtained instructions from our client who advises that he is willing, in the interim, to settle part of the account in dispute in the amount of R92 099.57 in respect of arrear rent payable as per the reconciliation statement provided by your client. The remainder of the account will then be settled after due consideration of the municipal statements for electricity and the corresponding quotations for logistic services rendered by your client.

Our instructions are that the above amount of R92 099.57 is to be paid in three equal monthly instalments directly into your client's bank account.'

[5] On 12 May 2010 the respondent's offer was rejected in a letter from the applicant's attorneys which concluded with an intimation that a winding-up application would be set down for hearing on Friday, 14 May 2010. An unissued copy of the application was enclosed and the issued version thereof was served on the respondent on the afternoon of 12 May.

[6] On 12 May 2010 the full amount alleged to be owing to the applicant, namely R156 889 was paid into the trust account of the respondent's attorneys pending resolution of the disputes between the parties. On 13 May 2010 a member of the respondent's attorneys telephonically informed the applicant's attorney of the payment that had been received and the basis on which the funds were being held in trust, namely to serve as security for any amounts found to be due to the applicant.

[7] The respondent's deponent says that when he reconciled the documentation which he had received from the applicant with the respondent's records, he ascertained that as a result of an oversight, payment of the rental for September 2009 had not been made. He also ascertained that the applicant had allocated payments which had been remitted in respect of rental to other amounts claimed by the applicant. The respondent holds the view that the applicant was not entitled to allocate these payments to any other accounts. His reconciliation revealed that R51 783.44 was outstanding in respect of rental and not R92 099.57 as set out in the founding papers; and also that R752.40 remained due by the respondent in respect of services rendered to it by the applicant. On 25 May 2010 the respondent's attorneys advised the applicant's attorneys of the reconciliation and that the amount which the respondent admitted to be outstanding would be paid to the applicant. Details of the respondent's defences in respect of the outstanding amount claimed were also made known to the applicant's attorney who was reminded that in terms of the draft sublease, provision had been made for arbitration in the event of disputes arising between the parties. The applicant was requested to follow this route in order to settle the outstanding issues, but this suggestion was rejected. On the following day, 26 May 2010, the sum of R52 535.84 (being the sum of R51 783.44 and R752.40) was paid unconditionally to the applicant's attorney, with an indication as to how the amount was made up.

[8] Counsel were agreed that with the payment of rental made on 26 May 2010, and on the basis that the payments which the respondent had made were to be allocated to the rental, all rental due by the respondent for the period of the lease had been paid in full. The balance claimed is in dispute. A portion of the disputed balance is an amount claimed for damages which it is clear can not be utilised as a basis upon which to bring a winding-up claim. As for the remaining amounts claimed by the applicant, it is not necessary for the purposes of the judgment to detail the reasons the respondent furnishes for placing these claims in dispute. I am satisfied that the respondent has raised a genuine and bona fide dispute in respect of these claims and counsel for the applicant did not address me at all on this aspect. In the circumstances it is clear that the amount held in trust for which an undertaking has been furnished that payment will be made in respect of any amounts found to be due and owing to the applicant secures the balance of the amount claimed by the applicant.

[9] In countering the allegations that the respondent is not able to pay its debt, the respondent points out that

1) It has a credit of some R191 000 in its bank account.
2) It has monthly sales in excess of R400 000.
3) It is owed approximately R450 000, payment of which is expected soon.
4) It has easily realisable assets worth some R250 000.

[10] Notwithstanding the fact that the applicant's attorneys were informed on the day before the hearing that a sum equivalent to the amount claimed from the respondent had been paid in to the trust account of the respondent's attorneys and that payment of all amounts for which the applicant admitted liability had been made by 26 May 2010, counsel for the applicant submitted that the applicant was still entitled to an order for the winding-up of the respondent. Surprisingly, in view of the fact that the main prayer in the notice of motion was for a final winding-up order, he submitted that it was necessary only for the applicant to satisfy the requirements for a provisional order in order. The reason advanced was that it is the practice in this division to grant provisional winding-up orders before final orders are granted. It is so that it is the practice in this division for applicants to apply for provisional orders for winding-up, but I know of no practice whereby a provisional order is automatically granted when the applicant has applied for

a final order. The fact is that the respondent came to court to deal with an application for a final order and in any event, as pointed out by the respondent's counsel, there is nothing more which can be said for either the applicant or the respondent at this stage and no purpose would be served by treating the application as one for a provisional order.

[11] As far as the merits are concerned, the applicant's case is that I should find that the correspondence between the parties revealed that the respondent had adopted delaying tactics in order to avoid making payment and that from the letter which I referred to in para 4, it was clear that the respondent was unable to pay its debts. In the light thereof I was invited to have no regard to the respondent's attempts to establish a dispute in respect of the applicant's remaining claims. This submission is difficult to understand since no submissions were advanced on behalf of the applicant to counter the basis on which the respondent set out its dispute in respect of the outstanding claims. In any event, the inference which applicant's counsel wishes me to draw from the offer contained in the letter referred to is not the only inference which can be drawn. The letter can also be seen as an attempt to settle the outstanding issues. I have already recorded that I am satisfied that the respondent raised a genuine and bona fide dispute in respect of the outstanding claims.

[12] Ultimately, applicant's counsel was left with only one ground on which to base his submission that a winding-up order should be granted. This was that since the respondent had made no tender in respect of the applicant's costs either when the amount in question was paid into the trust account of its attorneys or thereafter, the applicant was obliged to continue with the application for winding-up.

[13] In my view the applicant's conduct militates against this submission. To start with the application of which the respondent was given less than 48 hours notice, contained no averment whatsoever as to why the application was to be treated as one of urgency, nor did it contain a prayer for condonation in respect of the applicant's failure to comply with the rules of court. The fact that an application for winding-up may be regarded as urgent or semi-urgent does not relieve an applicant of complying with the settled rule of practice that a case for urgency must be made out in terms in the papers and that an

appropriate application must be made for condonation in respect of non-compliance with the relevant rules if these are not observed. Failure to make out a case of urgency will normally result in the matter being removed from the roll. In this case however the respondent had been placed on terms to file its answering affidavit by 27 May 2010. In its answer, which was filed on 28 May, the point was taken that no grounds of urgency had been made out, and in addition, the merits of the application were also dealt with. The applicant persisted with the application thereafter by filing a reply and before me persisted with the submission that the applicant was entitled to a winding-up order. A similar situation arose in the *Kalley Flooring* case. In that matter, the liquidation of Kalley Flooring Co (Pty) Ltd had been sought on the basis that it could not pay its debts. A dispute was raised in respect of the amount claimed and in addition the company furnished its balance sheet from which it was clear that it was in a sound financial position. The following extracts from the judgment are apposite to the case before me.

'It seems to me that, once the balance sheets and the financial position of the company were disclosed, President Carpet Manufacturers Ltd (the applicant) *must have realised that there was no question that Kalley Flooring could not pay and hence no need to secure its alleged rights. The question then is, why did it persist in opposing the interdict and filing all these affidavits indicating that it was entitled to proceed with the application for liquidation of the company?'* [1]

and

'After the affidavit setting out the financial position of Kalley Flooring was filed, it is clear that President Carpet Manufacturers Ltd persisted when it knew or ought to have known that Kalley Flooring was not insolvent and that the application for liquidation would not be granted. If thereafter it persisted because it merely wanted to recover its costs, then it was a simple matter to say so and it would have limited the relief prayed accordingly. In that event I might have had a certain amount of sympathy. But it persisted with the main application and it seems to me that it persisted solely to embarrass Kalley Flooring and, in doing so, it was abusing the process of Court.' [2]

I hold a similar view in respect of the applicant's conduct in this matter.

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[1] *Kalley Flooring v President Carpeting Ltd* 1982 (4) SA 681 (CPD) at 683E-F.

[2] *Kalley Flooring* (*supra*) at 683H-684A; and quoted with approval in *Alton Coach Africa CC v Datcentre Motors t/a CMH Commercial* 2007 (6) SA 154 at 165E-I.

[14] Since it is clear that the applicant has failed to substantiate its claim that the respondent is unable to pay its debts, the application must fail.

[15] On behalf of the applicant it was submitted that in the event of the application being dismissed, the applicant should be awarded its costs up to and including the filing of the respondent's answering affidavit. In my view the applicant's conduct in continuing with the application when it was clear that it was bound to fail, coupled with the fact that the application was defective in respect of the urgency aspect, is sufficient to disallow an order for costs to which the applicant might otherwise have been entitled. In dealing with the question of costs, regard must also be had to two interlocutory applications which were dealt with prior to the hearing. When the matter was called in the course of the motion court roll on 14 May 2010, there was no appearance for the respondent and a provisional order of liquidation was taken. Counsel for the applicant had been told to expect an appearance on behalf of the respondent and indeed the name of the respondent's counsel had been furnished to him, hut when there was no appearance for the respondent, he moved for the provisional order. However, when it became apparent shortly thereafter that counsel had been briefed for the respondent, both counsel attended on the judge who had granted the order and by agreement the order was rescinded and a timetable for the filing of affidavits was agreed upon. The fact is that notice of opposition had been served on the applicant's attorneys on 13 May 2010 and this should have been brought to the attention of the presiding judge when the matter was called. Had this been done, the judge would not have granted the provisional order. Counsel for the applicant advised me that he was unaware of the fact that opposition had been noted, but his attention should have been drawn to this by his instructing attorneys. In the circumstances I consider that the respondent is entitled to the costs incurred in having the provisional order rescinded. The matter was thereafter set down for hearing on 10 June 2010, but on 8 June 2010 an application was enrolled for hearing on 10 June in which leave was sought to postpone the hearing to the semi-urgent roll on 17 November 2010. Leave was also sought for the applicant to file its replying affidavit on or before 15 June 2010. The postponement was sought because the applicant's financial manager had left South Africa for Dubai on 30 May 2010 and was therefore not able to attest to the applicant's replying affidavit when the respondent's answering affidavit was delivered on 28 May 2010. It would seem that the gentleman in question

returned to South Africa only on 7 June, thus prompting the request contained in the notice of motion. The respondent, while filing an affidavit in answer to the application, did not oppose the application for condonation or the application for the postponement of the trial. The affidavit was furnished in order to deal with certain allegations made in the founding affidavit for the postponement. Counsel for the applicant conceded that the respondent was entitled to its wasted costs for the day, as the applicant had sought an indulgence, but submitted that such costs ought not to include the costs of counsel in respect of matters relating to the application for the postponement. I do not agree. In my view, all costs incurred by the respondent as a result of the application for postponement and condonation should be borne by the applicant.

[16] The application is accordingly dismissed with costs which costs are to include all costs incurred by the respondent on 14 May 2010 and on 10 June 2010.

R B CLEAVER