REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

Case no: 79545/17

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

22/03/2019
DATE

SIGNATURE

In the matter between:

KBD RETAIL PROPERTIES (PTY) LIMITED Applicant

and

THE SOUTH AFRICAN POST OFFICE SOC LIMITED Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] On 22 November 2017 the applicant instituted proceedings in which it sought the liquidation of the respondent on the ground that the respondent was unable to pay its creditors. The applicant alleged that the respondent had failed to comply with its commitments in terms of a settlement agreement the parties concluded on 11 September 2019. The applicant sought costs against the respondent.

[2] The application, however, became academic when on 22 December 2017 the respondent made payment to the applicant in the amount of R847, 164.02 (inclusive of legal costs), in full and final settlement.

[3] On 9 January 2018, the respondent filed its notice to oppose the liquidation application.

[4] On 31 January 2018 the applicant issued a notice of set-down on the respondent in which it indicated that even though the respondent had filed a notice to oppose, the matter was set down on the unopposed motion roll because it had become settled with regard to the capital amount of debt and that the only issue remaining was costs relating to the institution of the liquidation application.

[5] On 7 February 2017, filed its answering affidavit to the liquidation application. In its answering affidavit the respondent opposes the relief sought by the applicant on various grounds but mainly on the fact that the applicant referred to the provisions of the Insolvency Act[1] instead of the provisions of the Companies Act[2]. The respondent alleges that just on this error the applicant would not have succeeded in its application to have it wound up. Further, the respondent failed to seek condonation despite the fact that its notice to oppose and its answering affidavit were filed late.

[6] The indebtedness of the respondent which formed the basis for the application for its liquidation arose from the fact that the respondent as a tenant of the applicant had failed to keep up with its rental payments for the premises it rented from the applicant. The parties negotiated a settlement agreement which was concluded on 6 September 2017. In the settlement agreement the respondent undertook to make certain payments by certain dates and even agreed to the settlement agreement being made an order of court. Thereafter the respondent failed to make payment as agreed upon in the settlement agreement. On applicant demanding immediate payment, the respondent sent the applicant an email (dated 13 November 2017) in which it indicated that it was not able

[1] Act 24 of 1936.

[2] Act 61 of 1973.

to meet its obligations to the applicant and also seeking an indulgence to be given time.

[7] It was on the basis of the email that the applicant instituted the application for the liquidation of the respondent. The ground relied upon for the liquidation of the respondent was that the respondent had admitted that it was unable to pay its debt. However, as indicated above, the application was erroneously based on s 8(e) and (g) of the Insolvency Act which applies to natural persons instead of s 345(1)(c) of the Companies Act.

[8] S 345(1)(c) of the Companies Act provides that:

> "(1) A company or body corporate shall be deemed to be able to pay its debts if-
>
> (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts".

[9] It is the respondent's contention that the applicant would not have succeeded in its application because:

9.1 at the time the application was instituted, the applicant had no *locus standi* as it was not a creditor of the respondent;

9.2 the alleged debt owed by the respondent is not well supported;

9.3 the applicant had sought is liquidation based on provisions relating to a natural person.

[10] Even though the applicant had based its application on incorrect statutory basis, it is not in dispute that the respondent had admitted its inability to pay its debts and on that basis the court would have granted an order for its liquidation in terms of s 345(1)(c) of the Companies Act. In Business Partners Limited v Quick Leap Investments 221 (Pty) Ltd[3] the court held that:

> "In addition, as held in the case of *Kalk Bay Fisheries Ltd v United Restaurants Ltd* 1905 TH 22, a court might properly find that a company is unable to pay its debts where it had admitted to its creditors that it could not pay, had failed to adhere to an agreement with them to effect payment in monthly instalments, had failed to pay interest due on its debenture stock and there was no explanation by it for these failures".

[11] The general rule is that a successful litigant is entitled to his or her costs. In exercising its discretion in awarding costs, the court must exercise such discretion judicially, taking into account the facts before it.

[12] With regard to the issue of costs where the merits have been settled, the court in *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd*[4] held,

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[3] Unreported judgment, Case number 6168/2010, KZN High Court (26 November 2010) at para[16].
[4] 1996 (3) SA 693 (CPD) at 700G.

with reference to the decision in *Jenkins v SA Boiler Makers, Iron and Steel Workers and Ship Builders Society*[5], that:

> "In *Jenkins v SA Boiler Makers, Iron and Steel Workers and Ship Builders Society* 1946 WLD 15, the court held that when a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the court must, with the material at its disposal, make a proper allocation as to costs'.
>
> I would respectfully associate myself with the conclusion to which the court came, and more particularly with the approach adopted by Price J at 17 where he states that:
>
> > 'It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of a case in respect of which the merits had been disposed of by the acceptance of an offer, in order to decide questions of costs only'.

The learned Judge goes on to state:

> 'I cannot imagine a more futile form of procedure than the one which would require Courts of law to sit for hours, days, or perhaps weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded'.
>
> The learned Judge adds at 18 at:
> 'When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case is still to be decided within

[5] 1946 WLD 15.

the court must do its best with the material at its disposal to make a fair allocation of costs, and bring such legal principles as applicable to the situation".

[13] The applicant seeks the costs of bringing the liquidation application on the ground that it was unnecessary for the respondent to file a notice to oppose and its answering affidavit after it had paid its debt, which resulted in the applicant having to prepare and file a replying affidavit and argue the issue of costs.

[14] At the time of the hearing of this matter, there was no *lis* between the applicant and the respondent because the respondent had settled its indebtedness to the applicant. The respondent submissions with regard to why it choose to oppose the application for costs are made despite the fact that the respondent has paid in full its indebtedness to the applicant, which payment was not disclosed in its answering affidavit. The defendant does not proffer any explanation why, if it disputed its indebtedness to the applicant, it paid the debt in full and final settlement.

[15] The respondent's argument that the applicant should be ordered to pay the costs of the liquidation application cannot be sustained. As indicated above, purely on the basis that the respondent had disclosed to the applicant that it was unable to make due payment wen demanded, was sufficient cause for its liquidation. As correctly pointed out by counsel

for the applicant, the fact that the respondent is a state owned company does not qualify it to be treated differently from any other debtor when it comes to payment of its debts.

[16] I am satisfied that in view of the fact that the applicant would have succeeded in its application for the liquidation of the respondent and that when the respondent opposed that application the merits had been settled, that the applicant is entitled to the cost order it seeks. There is no reason why the applicant should not be compensated for incurring costs in having to engage in an unnecessarily opposed application.

[17] In the result, an order in terms of the draft order marked 'X' is granted.

N P MNGQIBISA-THUSI
Judge of the High Court

Appearance for applicant Adv R Ellis (instructed by PPM Attorneys) and for respondent Mr L Mbanjwa (instructed by L Mbanjwa Inc)