THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 97/04
Reportable

In the matter between :

EXPORT HARNESS SUPPLIES (PTY) LIMITED APPELLANT

and

PASDEC AUTOMOTIVE
TECHNOLOGIES (PTY) LIMITED RESPONDENT

CORAM : MPATI DP, BRAND, CLOETE, HEHER JJA, MAYA AJA

HEARD : 10 MARCH 2005

DELIVERED : 29 MARCH 2005

Summary: Liquidation – final order sought – approach to disputes of fact – s 22 of the Supreme Court Act, 59 of 1959 – in absence of an appeal, affidavit cannot be tendered where refused by a lower court.

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The respondent as the applicant instituted liquidation proceedings in the High Court, Johannesburg, against two respondents. The appellant was the second respondent. The application against the first respondent was abandoned when the replying affidavit was delivered. It would be convenient to refer to the parties as in the court of first instance.

[2] The application against the second respondent was dismissed by the court of first instance (Marais J) but a final order liquidating the second respondent was granted on appeal by a majority of the full court (Blieden J, Goldblatt J concurring and Goldstein J dissenting). The full order reads as follows:

'(a) The appeal is upheld with costs, including the costs of two counsel.

(b) The appellant is ordered to pay the costs of the application for condonation including the respondents' costs of opposing such application.

(c) The order of the court *a quo* is set aside and is substituted by the following order:

"A final winding-up order is made against the second respondent."'

The second respondent has appealed against the order of the full court with the special leave of this court.

[3] The matter is complex from both a legal and a factual point of view. It can, however, be disposed of fairly simply.

[4] At the outset it would be convenient to refer to what this court recently held in *Paarwater v South Sahara Investments (Pty) Limited* (SCA case number 091/2004 in which judgment was handed down on 3 March 2005) and to deal with an agreement reached between the parties when the matter was heard by the full court. In *Paarwater* this court emphasized that whereas a prima facie case sufficed for the grant of a provisional order, the grant of a final order required proof on a balance of probabilities. The agreement was recorded as follows in the judgment of the majority of the full court:

> 'The parties in this appeal were agreed that taking all the facts into account, little purpose would be served by a provisional order rather than a final order being granted at this stage. If the appellant is entitled to an order such order should be a final order.'

The agreement obviously cannot be construed as meaning that if the applicant discharged the onus for a provisional order, but not the onus for a final order, a final order should nevertheless be granted; and the applicant's counsel freely conceded as much. The agreement must be interpreted as meaning that neither party wished to place further

evidence before the court and that the appeal should accordingly be dealt with on the basis that the applicant was seeking a final order. In *Paarwater* this court said in para 4:

'An analysis of all of the facts which were before the court *a quo* when the appellant sought a final order reveals that there were serious disputes in regard to the essential matters that the appellant was required to satisfy the court upon in order to establish that it was "just and equitable" to wind up the respondent. Furthermore it is important to note that the applicant, who bore the onus, as I have previously mentioned, did not seek an order referring such disputes for the hearing of oral evidence as he might have done (cf *Kalil* and *Emphy and Another v Pacer Properties (Pty) Ltd*). In the circumstances the following test enunciated by Corbett JA in the oft referred decision of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* is of application:

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E – G, to be: '… where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order … Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as

admitted.' … It seems to me, however, that this formulation of the general rule, particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order … In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact … Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…".'

In this matter, too, there are fundamental disputes of fact which cannot be resolved on the papers.

[5] In the founding affidavit the applicant alleged that the second respondent had not complied with a demand made in terms of s 345(1)(a) of the Companies Act, 61 of 1973 ('the Act'). Section 345(1), to the extent relevant, provides:

'(1) A company … shall be deemed to be unable to pay its debts if –

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum of not less than one hundred rand then due –

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due…

…

and the company … has for two weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor…

…

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.'

The applicant also alleged that it would be just and equitable for the second respondent to be wound up in terms of s 344(h) of the Act.

[6] The case based on s 345(1)(a) was doomed to failure inasmuch as the demand contemplated in that section was not addressed to the second respondent. It was addressed to another company, the first respondent. Faced with this difficulty, the applicant argued that it had made out a case that the second respondent was in fact unable to pay its debts as contemplated in s 345(1)(c) of the Act.

[7] The majority of the full court, on the urging of the applicant, had regard to what Mr Annandale, the sole director and member of the second respondent, had said in the answering affidavit delivered on behalf of the second respondent. According to Annandale, the second

respondent was not indebted to the applicant; on the contrary, the applicant was indebted to the second respondent in an amount of R401 135,82. In support of this allegation, Annandale annexed a schedule, which had been prepared by an accountant, Mr Aucamp, on the basis of information provided to him by Annandale. In that schedule was an amount of R1 139 196,47 which Annandale averred was owing by the second respondent to its customer, Delphi Packard Electric Systems ('Delphi') and for which the applicant was, according to Annandale, in turn liable to reimburse the second respondent. No attempt was made by Annandale to substantiate this alleged indebtedness. If it is left out of account the second respondent is, on its own calculations, indebted to the applicant in an amount of R738 060,65. That was the approach of the majority of the full court. Accepting the correctness of this approach, the question arises whether the majority of the full court was correct in finding that the applicant had established that the second respondent was unable to pay that amount.

[8] Of course a court may in a particular case draw an inference as to the insolvency of a debtor if the debt claimed is not disputed by the debtor on substantial grounds in liquidation proceedings. The crucial question is whether this was such a case. The majority of the full court

reasoned:

‘It is further relevant that Annandale in the answering affidavit he deposed to on behalf of both respondents spends a great deal of time and effort in his attempt to attack the “*debt*” relied upon by the appellant. However not one word is said by him in regard to the second respondent’s ability to pay any debts. Not one word is said about the second respondent’s financial position. The only reasonable conclusion one can therefore come to on the papers before the court is that if a debt of sufficient size is proved, the second respondent was not in a position to pay what it owed and which was due and payable.

In a case such as the present one where a debt has been disputed by the second respondent on grounds which are shown not to be bona fide, I am of the view that a court is entitled to hold that section 345(1)(c) has been complied with, no proof to the contrary having been provided. This is a risk all companies who put up non bona fide defences in order to avoid paying their debts face.’

There was, however, no allegation whatever in the founding affidavit that the second respondent was unable to pay the debt claimed by the applicant, as Goldstein J pointed out. A concerted attempt was made by the applicant’s counsel, who referred to several passages in the founding affidavit, to demonstrate the contrary. The high water mark was the following passage:

‘I believe that ANNANDALE has so arranged the affairs of [the second respondent] and EXPORT HARNESS SUPPLIES INTERNATIONAL that they will be unable to

pay [the applicant] any sums owing in that such accounts as exist will have been depleted and the location of the funds will not be capable of being ascertained, save in the case of a winding-up of the companies and a full and detailed investigation by a duly appointed liquidator.'

This passage does not, however, contain an allegation that the second respondent is unable to pay its debts. It amounts to speculation which was based on bank records of the second respondent. Annandale gave a brief explanation of the entries in question in rebuttal of the inference the applicant sought to draw and the applicant did not seek a referral to evidence to show that the second respondent could not pay its debts –whether because of the alleged dishonesty of Annandale or otherwise.

[9] In fact, far from alleging that the second respondent could not pay its debts, the applicant candidly admitted in the founding affidavit that it was 'unaware of the financial situation' of the second respondent. The only allegation made by the applicant in its founding affidavit in support of its main claim was, as one would expect under these circumstances, that the second respondent did not respond to a notice in terms of s 345(1)(a). The applicant did claim in its founding affidavit that it was entitled *ex debito justitiae* to an order liquidating the second respondent inasmuch as the latter had not disputed the debt claimed on substantial

grounds but had merely denied it without giving reasons; but in order to obtain such an order, the applicant was obliged to make out a case that the second respondent was unable to pay its debts. It was nowhere alleged that such an inference should be drawn from the second respondent's bare denial, at that stage, of the debt claimed. The applicant expressly relied on s 345(1)(a) and not s 345(1)(c). There was a short answer to that case, and Annandale gave it. Annandale cannot be criticized for failing to deal with the financial situation of the second respondent to meet an allegation which was not made.

[10] As I have said, the applicant relied on the second respondent's calculations which, if the unsubstantiated Delphi claim is left out of account, would leave a balance owing by the second respondent of less than R740 000 ─ not the more than R6 million claimed by the applicant. There are, however, no concrete facts to suggest that the second respondent would be unable to pay this much smaller amount from the more than R6 million which the applicant says the second respondent should have received from Delphi.

[11] In all the circumstances of this particular case it would be unsafe to infer that the second respondent is unable to pay its debts. I accordingly

conclude that the applicant did not make out a case for the final liquidation of the second respondent on that basis.

[12] The alternative basis upon which the applicant sought the liquidation of the second respondent was that such an order would be just and equitable. Little emphasis was placed on this ground by the applicant's counsel, either in the heads of argument filed or in oral argument.

[13] The allegations made by the applicant in support of its case on the alternative basis were summarised in the heads of argument filed by the applicant's counsel as those 'contained in the founding affidavit relating to the [applicant's] status as the beneficial shareholder of the [second respondent], Annandale's hijacking of the [second respondent's] business, the dishonest and corrupt conduct of the [second respondent's] business, and the VAT fraud alleged in the replying affidavit in response to Aucamp's schedule annexed to the answering affidavit'. It is not necessary to consider whether the allegations, if proved, could justify an order that it would be just and equitable for the second respondent to be wound up.

[14] The allegations contained in the founding affidavit were disputed

by Annandale and his version cannot be rejected as so far-fetched or clearly untenable that the court would be justified in rejecting them merely on the papers; nor was the contrary argued on behalf of the applicant. Accordingly the applicant has not discharged the onus for a final order of liquidation based on those allegations. Indeed, Goldstein J considered the allegations in the founding affidavit individually and came to the conclusion that, assuming the relevance of the contentions advanced, not even a prima facie case was made out; and no attempt was made to demonstrate why the learned judge was incorrect in his analysis.

[15] The allegations in the replying affidavit in regard to the VAT fraud were made in the context of the indebtedness which the applicant alleged was owed to it, not in support of the applicant's case that it would be just and equitable for the second respondent to be liquidated. The applicant's counsel readily and correctly conceded that in the circumstances were this court to take these allegations into account (assuming their legal relevance) for this latter purpose, the second respondent could well be prejudiced, for the obvious reason that the second respondent may have sought to file a further affidavit to deal with them had it been alerted to this possibility. It follows that the second

basis on which the applicant sought the liquidation of the second respondent cannot succeed either.

[16] There is one further matter which requires consideration. The second respondent sought to place further evidence before this court in terms of s 22 of the Supreme Court Act, 59 of 1959. The evidence was contained in an affidavit. It must be accepted that the affidavit was tendered to the court of first instance and that that court refused to receive it. The second respondent's legal representatives aver that they have no recollection of this, but a contemporaneous note made by an articled clerk in the employ of the applicant's attorneys establishes that it did occur. In the absence of an appeal against the decision of the court of first instance, this court cannot be asked to receive the affidavit in terms of s 22. The applicant employed two counsel to argue the appeal, which the complexity of the appeal warranted; and because of the significance of the evidence which the second respondent sought to place before this court, it was a wise and reasonable precaution for the applicant to employ two counsel to oppose the application as well. Accordingly the fees of two counsel should be allowed for the application, as counsel for the second respondent conceded.

[17] Counsel for the second respondent asked for an order that the costs of the application for special leave to appeal from the decision of the full court be paid by the applicant. Such an order is unnecessary. Those costs were made costs in the appeal by the order of this court given on 11 February 2004.

[18] The following order is made:

1. The second respondent's application in terms of s 22 of the Supreme Court Act is dismissed with costs, including the costs of two counsel.

2. The appeal is upheld, with costs. Paragraphs (a) and (c) of the order made by the court *a quo* are set aside and the following order is substituted:

'The appeal is dismissed, with costs.'

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T D CLOETE
JUDGE OF APPEAL

Concur: Mpati DP
Brand JA
Heher JA
Maya AJA