REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 383/98

In the matter between:

CHARLES RICHARD JOHNSON
Appellant

and

HIROTEC (PTY) LTD
Respondent

CORAM: MARAIS, SCHUTZ JJA and MELUNSKY AJA

HEARD: 5 SEPTEMBER 2000

DELIVERED: 22 SEPTEMBER

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Winding-up of company unable to pay debts - factors to be considered - whether provisional order required

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JUDGMENT

MELUNSKY AJA:

[1] In the Transvaal Provincial Division Van der Merwe J dismissed with costs an application for the winding-up of the respondent company. Upon petition to the Chief Justice the appellant, a shareholder and director of the respondent and the unsuccessful applicant in the court *a quo,* was granted leave to appeal to this Court against the judgment and order of the learned judge.

[2] The respondent has an authorised share capital of 100 shares of no par value of which 50 shares have been issued. Apart from the appellant Mr Fredi Hejsani is the only shareholder and director. He holds 38 shares as against the twelve held by the appellant. The respondent commenced trading in 1991 and initially carried on business in two fields - the sale and installation of controlled air and air-conditioning equipment and the installation of specialised flooring for computer rooms and offices. The appellant ran the air-conditioning business and Hejsani the flooring sphere. In November 1996 the appellant left the employ of the respondent and joined another concern dealing in air-conditioning equipment. Since then the respondent's field of activity has been limited to the flooring business.

[3] The winding-up application was launched in September 1997 on three grounds: that the respondent was unable to pay its debts; that at least 75% of the issued share capital had been lost or had become useless for its business; and that it was just and equitable to wind up the company. In this Court the appellant's counsel relied on the first ground only.

[4] The appellant is a creditor of the respondent in an amount of R40 000 which represents his salary for the months of July to October 1996. Hejsani, who deposed to the main opposing affidavit, denied that the appellant was employed by the respondent or that he was entitled to a salary. He said that any "drawings" which he and the appellant made were regarded as "a pre-payment of expected dividends", that payments were made to the members out of profits and in their capacity as shareholders, and that as the company had made a net loss for the financial year ended 28 February 1997 the appellant was not entitled to any payment. Hejsani's version was rejected by the court *a quo* and in this Court counsel for the respondent, quite correctly, did not attempt to persuade us that the learned judge had erred in that respect. In short, therefore, the appellant is a creditor of the respondent for R40 000 which, together with *mora* interest *ex re*, is due and payable. The amount remains unpaid and Hejsani has furnished a disingenuous explanation for the respondent's failure to discharge the debt. These facts, counsel for the respondent submitted, are insufficient to enable this Court to conclude that the respondent is unable to pay

its debts in terms of s 344(f) read with s 345 of the Companies Act 61 of 1973 ("the Act"). He urged us to consider all of the surrounding facts and to have regard to the "full financial picture" of the respondent. In view of counsel's submission and the conclusions reached by the learned judge *a quo*, I will leave aside whether on the facts of the present case the appellant is entitled to a winding-up order *ex debito justitiae* (cf *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662F).

[5] In the court *a quo* the learned judge had regard to the respondent's financial statements for the year ended 28 February 1997, which, although only in draft form, were accepted as an accurate reflection of the company's position. The statements reveal that the respondent had incurred a loss of R64 000 for the financial year in question, that the turnover had almost halved (R1.2 million for 1997 compared with R2.2 million for 1996) and that the net current assets had decreased from R268 000 to R166 000. According to the statements the insolvent was factually insolvent to the extent of R39 000, a figure which, moreover, does not take into account the appellant's claim of R40 000. It is to be observed that the respondent's opposing affidavits were filed in October 1997 and that the matter was eventually heard by the court *a quo* in February 1998. Since the end of 1996 the company was under the *de facto* control of Hejsani and it is probable that he would have produced financial figures, even in a draft form, for the period subsequent to 1 March 1997 had there been a significant improvement in the respondent's fortunes since that date. He did not do so and apparently considered it to be sufficient to say that the respondent's "targeted" turnover for the 1998 financial year was R1.4 million, that it "appeared" that the target would be met and, if so, that the company would made a "comfortable 16% profit". What Hejsani did produce were the respondent's bank statements from 1 March to 30 September 1997 which showed a credit balance of R140 000 on the last-mentioned date. The favourable balance was largely due to two cheque deposits of R66 000 and R94 000 made on that very day, which, as the appellant pointed out, was one week after service of the winding-up application on the respondent. It is, however, not necessary to speculate on the purpose of the deposits or the source of the funds, for the bank statements are not a comprehensive reflection of the respondent's financial position. What may perhaps be asked is why the respondent did not pay the appellant's claim of R40 000 if it had R140 000 available and no other pressing debts.

[6] What should be made of the fact that the respondent's liabilities exceeded the value of its assets as at 28 February 1997? This appeal is, of course, concerned with what is often referred to as "commercial insolvency", i.e. a company's inability to pay its debts in the sense of being unable to meet current demands (*Ex parte de Villiers and Another NNO : In re Carbon Developments (Pty) Ltd (in liquidation)* 1993 (1) SA 493 (A) at 502 C-D; see, too, *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 596 F - 597

H and *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440 F-I). This is not to say that factual insolvency is irrelevant in deciding whether a company should be wound up in terms of s 344(f) of the Act. Factual insolvency may, in an appropriate case, be indicative of the company's inability to pay its debts and, as Goldstone JA pointed out in *Ex parte de Villiers* at 502 E, it would clearly be a relevant and material factor in deciding whether a court should exercise its discretion to grant a winding-up order. The significance to be attached to a company's factual insolvency obviously depends upon the circumstances of the particular case. There are many variables and it is not necessary, or even possible, to list them all. What is of importance in this case is the marked deterioration of the respondent's position from the 1996 to the 1997 financial years, coupled with a lack of liquidity at the end of the 1997 financial year. At that stage the bank balance stood at a mere R728 and current liabilities exceeded the amount due by debtors. The respondent's financial statements, therefore, do not further its case. On the contrary the position that is revealed supports the view that the company, apart from being factually insolvent, is commercially insolvent as well.

[7] Van der Merwe J appears to have been influenced to dismiss the application by the fact that the respondent's bankers expressed satisfaction with the manner in which the respondent had conducted its account. It may be noted that the respondent's overdraft, which amounted to R500 000, was converted in December 1993 into a long term loan, bearing interest at 3.5% above the bank's prime lending rate and repayable at R5 000 per month. The bank was, however, secured by means of a notarial bond over the respondent's movable assets, a cession of book debts and personal suretyships of the appellant, Hejsani and a certain Keusekamp. The bank appears to have been reasonably well protected and too much significance should not be attached to its expression of satisfaction with the way in which the respondent conducted its account.

[8] The learned judge *a quo* simply held that on all the facts before him he could not conclude that the respondent was unable to meet its debts as they fell due. In arriving at this decision he had no regard to the appellant's unpaid claim, which was clearly of crucial importance, or to the respondent's false denial of its indebtedness. In my view the failure to pay the appellant's claim, the false denial of liability and the factual insolvency of the respondent all point inexorably to its inability to pay its debts. I add that there are no facts which would justify this Court in exercising its discretion not to wind up the company. It follows, therefore, that the appeal should succeed.

[9] The remaining question is whether this Court should issue a provisional or a final order of winding-up. The Act does not require a final order to be preceded by a provisional order, but in *Kalil v Decotex (Pty)Ltd and Another* 1988 (1) SA 943 (A) at 976 A-B, Corbett JA referred to the practice, which he regarded as well-established, of granting a provisional order of winding-up and

a rule *nisi* calling upon persons concerned to show cause why a final order should not be granted. From the information given to us by counsel it would seem that there is no longer a uniform practice in this regard throughout the country. According to the Practice Manual of the Transvaal Provincial Division, a judge of that Division appears to have a wide discretion to grant a provisional or a final winding-up order, as the case may require, and is under no constraint to issue a provisional order as a matter of course. This Court should ordinarily apply the rules of practice of the division from which the appeal emanates and, adopting this principle, there is no reason why, in an appropriate case, this Court should not grant a final order. This is such a case. The respondent opposed the grant of a winding-up order in the court *a quo* and in this Court. The issues have been fully ventilated and the respondent has put nothing forward to persuade us that further relevant facts would be forthcoming if a rule *nisi* were issued.

[10] The following order is therefore made:

1. The appeal is allowed;

2. The judgment of the court *a quo* is set aside;

3. The respondent is placed under a final order of winding-up;

4. The appellant's costs in the court *a quo* and on appeal are to be costs in the winding-up.

L S MELUNSKY
ACTING JUDGE OF APPEAL

CONCUR:
MARAIS JA
SCHUTZ JA