

SOUTH AFRICA / JUDGMENT

## D P I Plastics (Pty) Ltd v Ronnie Dennison Agencies (Pty) Ltd (10136/14) [2015] ZAGPPHC 766 (28 October 2015)

[2015] ZAGPPHC 766

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

10136/14

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 10136/14

28/10/2015

In

the matter between:

D  
P I PLASTICS (PTY)  
LTD  
APPLICANT  
and  
RONNIE  
DENNISON AGENCIES (PTY)  
LTD  
RESPONDENT

Coram:

HUGHES J

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**JUDGMENT**

Heard on: 11 June 2015

Delivered on: 28 October 2015

HUGHES J

[1] This is an application for the winding up of the respondent who failed to pay the applicant an amount of R6 848 337, 35 in respect of goods sold and delivered to the respondent on an open account between the parties. The aforesaid amount has been due and owing from August 2013.

[2] The debt owed by the respondent arises from the purchase of industrial piping by the respondent from the applicant. These pipes

were intended for onward sale to the respondent's Zambian customers. The respondent contends that the piping supplied by the applicant was defective as it cracked in transit and it burst in a linear fashion after installation.

[3] The respondent argues that the applicant admitted liability for the defective pipes and undertook to replace the defective piping.

According to the respondent, the applicant failed to honour the undertaking made. Whilst on the other hand, the applicant contends

that it did replace the "faulty piping" with better quality piping.

[4] The applicant argues that the costs of the defective material does not form part of the amount of R5 022 914, 64 claimed, which the respondent admits is owed to the applicant.

[5] The respondent deducted the disputed amount for the defective pipes from the amount claimed and conceded that it was indebted to the applicant in the amount claimed but due to the various disputes raised, the said amount was not due or payable. At paragraph 5.2 of the respondent's answering affidavit this is said:

"The Applicant is furthermore aware that the amount claimed is dispute (sic). I attach as WAG2 the Respondent's reconciliation of the account. In the premises, the Respondent maintains that it is indebted to the Applicant in the sum of R5 022 914.64 (five million and twenty two thousand nine hundred and fourteen rand and sixty four cents). In the premises, there is a dispute of the order of R1 825 million;"

[6] The respondent disputes the amount claimed and submits that the application is defective as it relies on disputed facts, with pending counter-claims looming and parallel sureties being sued.

[7] The applicant brings this winding up application under the auspices of section 345 of the Companies Act 61 of 1973 (the Act) and avers that the respondent is unable to pay its debt. The respondent is both factually and commercially insolvent.

[8] The determination as to whether the respondent is deemed to be unable to pay its debts is guided by section 345 of the Act, as set out here after:

#### 345 When company deemed unable to pay its debts

(1) A company or body corporate 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 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; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

[Para.

(b) substituted by s. 26 of Act 59 of 1978.]

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

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

[9] The application of the applicant is premised on section 344(f) read with section 345 of the Act. For easy reference section 344 is set out below:

#### 344 Circumstances in which company may be wound up by Court

A company may be wound up by the Court if-

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) the company commenced business before the Registrar certified that it was entitled to commence business;

- (c) the company has not commenced its business within a year from its incorporation, or has suspended its business for a whole year;
  - (d) in the case of a public company, the number of members has been reduced below seven;
  - (e) seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company;
  - (f) the company is unable to pay its debts as described in section 345;
  - (g) in the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
  - (h) it appears to the Court that it is just and equitable that the company should be wound up.
- [10] In this matter I am mindful of the fact that these proceedings embarked upon by the applicant must not be such that they seek to enforce the debt of the respondent. They should merely be such as to get the wheel rolling for the legal process to follow after the respondent has been wound up. This means that third parties ought to be considered as they are other creditors of the respondent. In

NAIDOO. v ABSA BANK LTD 2010

- (4) SA 597 (SCA), Cachalia JA stated the following at paragraph [4]:

"[4] Mr Reddy's submission, as I understand it, implicitly contains a concession that sequestration proceedings are not in and of themselves 'legal proceedings to enforce the agreement within the meaning of s 129(1)(b). That his concession is correct is clear from the recent judgment in Investec Bank Ltd and Another v Mutemeri and Another, where Trengove AJ concluded that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim, and sequestration is thus not a legal proceeding to enforce an agreement. He did so after carefully considering the authorities which have held that - 'sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have

the debtor declared insolvent' - they are not proceedings 'for the recovery of a debt'. The learned judge's reasoning accords with this court's description of a sequestration order as a species of execution, affecting not only the rights of the two litigants, but also of third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those

creditors' ordinary remedies and imposing disabilities on the insolvent - it is not an ordinary judgment entitling a creditor to

execute against a debtor."

- [11] In these proceedings, the respondent alleges that the applicant, in this instance, wishes to do exactly that, that is, enforce the debt due by the respondent. This, it contends, is demonstrated by the fact that in the face of the prospect of counter-claims and the fact that the applicant, itself, sued two sureties in parallel, the applicant still persists with the winding up proceedings.
- [12] The respondent further alleges that a dispute of fact is evident on the papers with regards to the quality of the pipes supplied by the applicant which the respondent distributed onwards to its Zambian customers which customers were sure to sue and one of which has sued the respondent as a result of the respondent's supply of defective pipes. This dispute of fact, so the contention goes, cannot be determined on the papers and this matter must be referred for oral evidence.
- [13] In *Export Harness Supplies (Pty) Limited v Pasdec Automotive Technologies (Pty) Limited* 2005 JDR 0304 (SCA), Cloeta JA quoted from *Paarwater v South Sahara Investments (Pty) Limited* (SCA case number 091/2004 in which judgment was handed down on 3 March

2005) with regards to circumstances where disputes

of fact existed in winding up proceedings:

"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..."

- [14] In the current application, can it be said that there are genuine and serious disputes of fact on the papers before me that cannot be resolved without oral evidence being adduced?
- [15] The respondent has made an unconditional tender of the amount of R1 664 207, 00, which the respondent believes is due and payable to the applicant and has also set out how the said amount is made up. In doing so, the respondent deducts three claims lodged by BNOP Agriculture Services Ltd (BNOP), which comprises of the allocation on annexure SRA2 put up by the applicant and invoices that are disputed. In this tender the respondent requested that the matter be referred to oral evidence to deal with the various claims and counter-claims.
- [16] The respondent filed a supplementary affidavit explaining that the aforesaid tender was made as a result of the supplementary affidavit of the applicant that referred to annexure SRA2 which set out a figure calculated by the applicant itself. This, together with the fact that two claims have been instituted against the respondent by BNOP arising directly from the same matter.
- [17] As at this stage, there is a dispute as to whether the applicant has in fact performed in terms of its undertaking to replace the pipes which it conceded were defective. It is evident from the two claims of BNOP that the dispute about the defective pipes is an issue that is alive and is directly linked to the non-payment which forms the foundation of the applicant's application for a winding up order.
- [18] With this knowledge at hand, what has the respondent done to institute its counter-claim?  
As at the time that this matter was  
  
before the court, the respondent had not issued or served its counter-claim. There is, however, the matter of the respondent serving a third party notice upon the applicant in the BNOP matter but this does not constitute a counter-claim. This, to my mind would  
  
have been an opportune time for the respondent to have served its counter-claim upon the applicant.
- [19] In these circumstances set out above, the respondent argues that the debt is not payable as there are disputes of facts before this court and this application amounts to an abuse of the court proceedings.

- [20] The applicant argues that in the BNOP matter, the applicant's claim, that it manufactured specific piping for the respondent in line with its specifications is substantiated by the founding papers of BNOP.
- [21] In light of the aforesaid, the applicant should appreciate that there is a dispute between itself and the respondent. However, does this dispute amount to a genuine and bona fide dispute?
- [22] The respondent has admitted that it is indebted to the applicant in the amount of R5 022 914, 64 and that the dispute is 'in the order of R1 825 million'. This would still render the respondent being indebted to the applicant in the amount it claims is due on the version of the respondent itself.
- [23] According to the SRA2 annexure, at best the applicant argues that in respect of the disputed piping, the total, as per the invoice for these pipes, is a maximum of R1 104 207, 39. If that amount is subtracted from that claimed by the applicant it results in a balance of R5 744 129, 96 (R6 848 337, 35 - R1 104 207, 39).
- [24] Thus on the respondent's version taking into account the dispute of the defective pipes, the respondent is still indebted to the applicant. I am mindful that the respondent has not taken the liberty to issue and serve its counter-claim in respect of these disputed pipes even after receipt of the BNOP summons.
- [25] In conclusion, with regards to the respondent's indebtedness, the applicant has shown that this court cannot place reliance on the respondent's contention that it has a genuine and bona fide counter-claim that ought to be referred to trial.
- [26] Has the applicant shown that the respondent is unable to pay for its debts? The respondent submitted 11 months of financial statements ending January 2014. From these statements, it is evident that the debt to the applicant was not taken into account which would naturally increase the respondent's liabilities. What is further evident is that the applicant has shown via the respondent's own financials that the respondent is commercially and factually unable to pay its debts as they become due.
- [27] The financials indicate that the current assets amount to R32 400 931, 78, while the current liabilities amount to R50 074 853, 38. The liabilities clearly exceed the assets. There is also the fact that the respondent states that it has retained income in the amount of R3 654 398, 11 together with the denial of the debt by the deponent of R6 848 337, 35. This clearly is an indicator that the debt was not taken into account in the current liabilities and as such, the amount would be greater if the debt is added.
- [28] In my view, the applicant has demonstrated that the debt is due and that the respondent is unable to pay its debts as they become due.

[29] The respondent has made a conditional tender subject to the matter being referred to oral evidence to deal with the various claims and counter-claims. In the circumstances with no genuine bona fide disputes or counter-claims before the court, the tender that is subject to a referral of the disputes is of no consequence or momentum.

[30] Consequently the following order is made:

[30.1] the respondent is placed under final winding up;

[30.2] the costs of the application are to be costs in the liquidation winding up.

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W. Huges

Judge of the High Court

Counsel for the Applicant: Adv. P. Ellis SC

Instructed by: Mawk W. Nixon Attorneys

Ref: NIXON/GW/MN2965

Counsel for the Respondent: Adv. C.D. Roux

Instructed by: R. C. Christie Incorporated

Ref: R C Christie/cd/W216

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