

SOUTH AFRICA / JUDGMENT

Engen Petroleum Limited v Plastic Brown Containers (Pty) Ltd (11693/2014) [2016] ZAKZDHC 20 (10 May 2016)

[2016] ZAKZDHC 20**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Mbatha

CASE / FILE NUMBER

11693/2014

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Source record**IN****HIGH COURT OF SOUTH AFRICA****KWAZULU-NATAL****LOCAL DIVISION, DURBAN****CASE****NO: 11693/2014****DATE:**

10 MAY 2016

ENGEN

PETROLEUM

LIMITED.....APPLICANT

And

PLASTIC

BROWN CONTAINERS (PTY)

LTD.....RESPONDENT

JUDGEMENT

Delivered: 10 May 2016

MBATHA J:

Introduction:

- [1] This is an application for the final winding up of the respondent. The application is opposed by those representing the respondent. On the 15th of September 2015, Seegobin J granted a provisional order winding up the respondent, which application was also opposed.

Factual

Background

- [2] The application for the liquidation of the respondent arose as a result the applicant's claim for goods sold and delivered to the respondent for an amount of R513 000, which remained unsatisfied. The respondent was a cash customer of the applicant and was allocated customer account number 10077812. A special procedure was followed for purchasing goods from the applicant. The respondent would place orders telephonically to the applicant. The whole process would then be captured in an electronic management system of the applicant, which calculated the amount of the order and then issued a unique order number for that particular order. The details thereof would be then communicated to the respondent who would in turn make payment in advance and provide proof of payment to the applicant's credit controller. The credit controller would then authorise the release of the paid up goods from the applicant's warehouse. This authorisation would simultaneously raise an invoice by a system known as SAP and an instruction to the applicant's logistic and transport service provider, Ensign Shipping & Logistics, to release the goods to the respondent. The respondent would then either elect to collect the goods or the applicant would deliver the goods at the designated address.
- [3] The applicant avers that during February 2014 it dismissed one of its employees, Goodman Morapane, a Sales Manager, for attempting to perpetrate a fraud against the applicant for the benefit of the respondent. On or about January 2013 to March 2013, the respondent, with the assistance of Morapane, was able to obtain the release of lubricants to the value of R513 000 without making any form of payment to the applicant.
- [4] Morapane manipulated the applicant's system by instructing one of the applicant's employees at its depot, Synod Ngubane, to bypass the applicant's electronic computer management system by manually authorising the release of the goods from an Ensign warehouse on the pretext that the respondent's customer account number was still in the process of being opened, hence it could not be captured on the electronic system. Morapane had informed Ngubane that upon the allocation of the customer account number the transaction would be captured on the SAP electronic system and the respondent would be invoiced. The very same goods were collected by the respondent from Ensign, which signed for them, but were never paid for them. Morapane continued with the same modus operandi a number of times.

- [5] According to the applicant, in December, being its financial year end, its stock on hand is balanced and any missing stock would have been discovered by the applicant. On the 19th of December 2013, Morapane gave Ngubane the respondent's customer account number and order numbers to raise an invoice for the respondent in respect of the goods already collected by the respondent. This ensured that the applicant's stock balanced.

The delivery notes were attached to the founding affidavit indicating the various collections of ordered goods from the applicant by the respondent in annexure D1 to D6 of the founding affidavit.

- [6] The invoice raised by Morapane, dated the 19th of September 2013, was sent by post for payment to the respondent but no payment was forthcoming from the respondent. The invoice was also not disputed by the respondent. This finally led to the applicant forwarding a formal letter of demand to the respondent on the 22nd of July 2014. The debt remained unpaid with the result that the applicant deemed the respondent in law to be unable to pay its debt and brought the application for the provisional liquidation of the respondent.
- [7] The respondent's defence is that it had no dealings with the applicant concerning the claim of R513 000. It denies that it is indebted to the applicant and that it is unable to pay its debts. It also denies any illicit or collusive dealings with Morapane. It avers that there were bona fide dealings between itself and Morapane's Close Corporation, Golden Rewards, which had invoiced it for R550 620 for goods sold and delivered. It avers that it settled the entire amount due to Golden Rewards, save for R120 000 which was set off as a result of goods sold by the respondent to Golden Rewards.

The Law

- [8] It is trite that for a final winding up order, the applicant must show on a balance of probabilities that the debt is not bona fide disputed on reasonable grounds. The question which needs to be determined first is whether the applicant is a creditor of the respondent. Section 345(1)(a) of the old Companies Act[1] requires that a statutory letter of demand be sent to collect the outstanding debt. When a company receives such a statutory demand,

its options are limited to settling the amount owed, giving security for the claim to the satisfaction of the creditor or showing on balance of probabilities that the alleged indebtedness is disputed on bona fide and reasonable grounds. Furthermore, if the company neglects to adequately respond to the Section 345(1)(a) letter of demand, it runs the risk of being deemed to be unable to pay its debts and ultimately face a liquidation on its deemed insolvency.

- [9] If the company elects to dispute the alleged indebtedness, it must send a detailed response within the three weeks referred to in Section 345(1)(a) regarding the basis upon which the alleged liability to pay is disputed. It is therefore imperative upon the respondent:

'to allege facts which, if proved at a trial, would constitute a good defence to the claims against the company'.[2]

The onus rests on the applicant to show that on a balance of probabilities that the debt is not bona fide disputed on reasonable grounds.[3]

Application of the Law to the Facts

- [10] The first question that needs to be determined is whether the applicant is a creditor or not. On this aspect the applicant has relied on *Clifford v Farinha*[4] where the court held that a delictual action can give rise to a civil liability. In *Colrod Motors (Pty) Ltd v Bhula*[5] the court held that a claim for a specific amount of money wrongfully and unlawfully misappropriated by the defendant from the plaintiff is liquidated within the meaning of Rule 32 of the Uniform Rules of Court. The court was also referred on *International Hardware Corporation (Rhod.) (Pvt). Ltd v Appleton*[6] where it was decided that provided the damages for theft are for a fixed, certain and definite amount, a claim therefore could properly be termed on liquidated demand. The same principles should apply to this claim which I find to be liquidated, though the sale of goods arises from a collusion between the respondent and Morapane. I am satisfied that it has been proved that the applicant is a creditor to the respondent. The collusion resulted in a sale of goods for a fixed and certain amount of money. The goods belonged to the applicant and they were not paid for by the respondent.
- [11] The respondent had raised a defence that it was never a creditor, within the meaning of Section 346(1)(b) of the Companies Act of 1973.[7] It is my view that the applicant has shown on a balance of probabilities that it was a creditor of the respondent, irrespective that the original agreement between them was that the respondent had to purchase goods on a cash basis. Annexures D1 to D6 to the founding affidavit indicate that on various occasions various goods were collected by the driver of the respondent from the applicant's Ensign warehouse. The dates of the delivery notes indicate that the deliveries occurred during the period when Morapane gave instructions to Ngubane to override the electronic system. The delivery notes are addressed not only to the respondent but to Zimoplast as well. It is clear to this court that the Zimoplast name was conveniently used by Morapane and the respondent to conceal the unauthorised credit purchase by the respondent. There is no reasonable explanation given by the respondent why they collected a delivery specified for Zimoplast. Furthermore, Section 346 (1) (b) of the Act does not say that liability arises only on contract, it is sufficient that it is proved that the applicant is a creditor.
- [12] The defence raised by the respondent that it only conducted business with Golden Rewards owned by Morapane, a full time employee of the respondent, is not acceptable. It could also not explain how it came about that Morapane's company had to use the applicant's warehouse for delivery of the goods purchased from another entity.
- [13] The very same Morapane has invoiced them for goods purchased on credit from the applicant as per invoice dated the 19th of December 2013. Morapane unilaterally produced the invoice, without the knowledge of the senior management, showing the respondent's

indebtedness to the applicant for R513 000. The respondent has failed to explain why Morapane, with whom they have a business

relationship, would invoice them again for the same goods which they have paid his company. It is clear to this court that Morapane had knowledge of the supply of the goods delivered to the respondent. I therefore find that irrespective of how it had acquired the goods, it received the goods, which it had not paid for. I am satisfied that the applicant has shown that it is a creditor as required in terms of the law.

[14] The second question which arises is whether the respondent was unable to pay its debts when it received a demand in terms of Section 345(1)(a) of the Act. It is common cause that the respondent failed to give a detailed response disputing its liability to the applicant. The respondent had never been given a credit account by the applicant and one would have expected them to immediately dispute their indebtedness to the applicant by stating that it has always paid cash to the applicant. When the invoice was sent to the respondent, it elicited no response, irrespective of the huge amount that was claimed from it. Instead, different versions were given to Longo, the forensic analyst of the applicant. Initially, Mohamed, a member of the respondent, disputed that goods had been purchased from the applicant, later on this changed and he? stated that they had been paid for. Proof of such payment was never forthcoming from the respondent. The engagement with the directors or managers of the respondent regarding the issue of payment started from February 2014 up to April 2014, but no proof of payment was given to the applicant.

[15] On the 9th of May 2014 various telephonic conversations were conducted with Mohamed and confirmed in an email to him. This also did not elicit

any response from either Mohamed or Aziz, who had also been engaged by the applicant's officials. Another email dated the 21st of May 2014 was addressed to the respondent's, but it was not responded too.

[16] On the 26th of May 2014 Salem on behalf of the applicant addressed an email to the respondent, to which Aziz responded by stating that he will

respond during the course of the week and thanked her for her patience and understanding. The response never came. Aziz finally

responded on the 5th of June 2014 by referring the applicants to their attorneys, Shabeer Joosab Attorneys.

[17] The applicant extensively tried to engage with their attorney as from the 11th of June 2014, but the attorney? never responded to its correspondence and telephone calls in which it requested proof of payment. Joosab never disputed the applicant's claim and never produced proof of payment from his clients either.

- [18] The conduct of the officials of the respondent is not consistent with the conduct of people who do not owe funds to the applicant. It could not have taken five months to categorically state that payment had been made and provide proof of payment. At this stage there was also no denial of the existence of the debt.
- [19] A letter of demand was sent to the respondent on the 2nd of June 2014, thereafter a period of three weeks elapsed before the launching of this application and the respondent has failed to make payment to the applicant.
- [20] In my consideration of whether the applicant has discharged the onus on a balance of probabilities, I have holistically considered all the facts in this matter. The respondent has tried to raise factual

disputes, which I find to be not fundamental factual disputes. In that regard I have borne in mind what was stated in *Mohamed v Malik*[8] that viva voce evidence can only be allowed in exceptional cases. Furthermore, the factual disputes must be bona fide and genuine. The version given by the respondent is completely in conflict with the principles of bona fides as it is not a probable version. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another*[9] the court endorsed the principle held in *Truth Verification Centre CC v PSE Truth Defection CC & Others*[10] that a 'common sense and robust approach' in relation to the resolution of disputed issues on paper, where a respondent

contends himself with bald and hollow denials of factual matter confronting him must be adopted. It went on further to state that the court should be prepared to undertake an objective analysis of such disputes when required to do so. In the event that there are disputes of fact, the court is not permitted to determine the balance of probabilities on the affidavits but must apply the Plascon-Evans rule.[11]

- [21] I am satisfied that the applicant has discharged the evidentiary burden resting upon it. The non-responsive attitude of the respondent to the calls for payment leaves a lot to be desired. It was only when the applicant brought the application for provisional liquidation that it expressly stated for the first time that it had dealings with Morapane. If payment had been made to his entity, this should have been disclosed timeously to the applicant.

- [22] The respondent's defence is untenable in the following respects:

- It produced proof of payment which is suspect in that the invoices from Morapane were not prepared in accordance with normal business practice and tax legislation. The invoices were all transmitted at the same time to the respondent;
- The said invoices show that payments of about R50 000 or more were even paid to Golden Rewards prior to any purchase being made from them. These sales were conducted six months or so ahead, but the transmission of the invoices was conveniently sent en masse on the 13th of June 2013;

- The delivery notes were conveniently made out to another company when the goods were collected at the applicant's Ensign warehouse by the driver of the respondent in its own motor vehicle. Nowhere has the respondent shown that he was unauthorised to collect goods on behalf of Zimoplast;
- The respondent has not shown why the goods were not collected at the place of business of Golden Rewards but at the applicant's depot;
- The respondent knew that Morapane was employed as Marketing Retail Manager for the applicant and yet conveniently accepted that he could run an entity in competition to his principals;
- The last nail in the coffin was that Morapane himself issued the invoice of 19th of December 2013 to the respondent for goods sold and delivered for the amount of R513 000. This shows that Morapane had knowledge

of the orders, which confirmed the sale from the applicant.

[23] I am satisfied that the respondent has failed to discharge the evidentiary burden resting upon it. The non-responsive attitude of the respondent to the call for payment says a lot. It later on claims to have paid but failed to produce proof of payment. Conveniently, when the applicant brings this application, the respondent claims to have paid another entity, with proof of payment which is suspect. If such payment had been made to that entity, this should have been disclosed timeously to the applicant. The respondent relies on various authorities including *Helderberg Laboratories CC & others v Sola Technologies (Pty) Ltd*[12] where the court held that the applicant on the return date must prove on a balance of probabilities that it has the necessary locus standi as a creditor. The court held further on the facts that the first to fourth respondents had discharged the evidential burden of showing that they discounted the balance owing of the respondents' claim on bona fide and reasonable grounds. In that regard the respondent had failed to show or prove on a balance of probabilities that it was a creditor of the appellants. In that case the respondent had sought the winding-up on the basis of their inability to pay its debts as contemplated by section 344(f) of the Act. That case was different from the facts of this case as the appellants admitted

their indebtedness to the respondent, but contended that due to the failure of the respondent to make all the necessary accounting

information available to them, they were unable to calculate the exact amount due by each one of them to the respondent. In that case the respondents had discharged the evidential burden of showing that they disputed the balance of the applicants' claim on bona fide and reasonable grounds. Therefore the respondent had failed to prove that it was a creditor to the respondents.

[24] The South African Revenue Services ('SARS') has taken judgment against the respondent. It is also not only SARS whose debt has not been settled, but various creditors' claims have arisen as fully stated in the affidavit filed by the provisional liquidator. There is no evidence placed before this court which indicates any form of solvency on the part of the respondent. Even the assets in its possession belong to a third party and this has not been disproved by the respondent.

Conclusion:

[25] I have already alluded to what Section 345(1)(a) of the Act states about a company that is deemed to be unable to pay its debts. There is also a technical provision in Section 345(1)(c) that a company is deemed unable to pay its debts if this it is proved to the satisfaction of the court. I am satisfied that the applicant has proved to the satisfaction of this court that the respondent is unable to pay its current debts, prospective debts and contingent liability.

[26] I therefore find in favour of the applicant.

I make the following order:

- (a) That the provisional order granted by this court on the 15th of September 2015, be hereby confirmed.
- (b) That the costs hereof be in liquidation.

MBATHA J

Date of hearing : 26 April 2016

Date delivered : 10 May 2016

Appearances:

For the Applicant m: Adv. AWM Harcourt SC

Adv SK Dayal

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For the Respondents : Adv AE Potgieter SC

Instructed by : SHABEER JOOSAB ATTORNEYS

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Overport

- [1] Companies Act 61 of 1973
- [2] Hülse-Reutter and another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998
- (2) SA 208 (C) at 220A
- [3] Orestisolve (Pty) Ltd t/a Essa Investments NDFT Investment Holding (Pty) Ltd and another 2015 (4) SA 449 (WCC) paras 7-13
- [4] 1988
- (4) SA 315 (W)
- [5] 1976
- (3) SA 836 (W)
- [6] 1971
- (1) SA 404 (R)
- [7] Companies Act 61 of 1973
- [8] 1930 TPD 615
- [9] 2011
- (1) SA 8 (SCA)
- [10] 1998
- (2) SA 689 (W)
- [11] As formulated in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)
- [12] 2008
- (2) SA 627 (C)

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