
SOUTH AFRICA / JUDGMENT

EVZ Industriële Dienste 2 CC v Early Moon Trading 361 CC (92335/15) [2020] ZAGPPHC 606 (18 November 2020) [2020] ZAGPPHC 606

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

92335/15

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 92335/15

EVZ INDUSTRIËLE DIENSTE 2 CC

Registration no 2005/029101/23

APPLICANT

And

EARLY MOON TRADING 361CC

RESPONDENT

DATE OF HEARING: The matter was enrolled for hearing on 11 SEPTEMBER 2020, dealt with or determined on papers tiled of record and written argument filed on behalf of the parties, without appearance and oral argument.

LEAVE TO APPEAL-JUDGMENT

KHUMALO J

Introduction

[1] The Applicant seeks leave to appeal to the Full Bench of the above honourable court against the whole judgment and order of this court delivered on 28 February 2020, in terms of which the court found that the Applicant failed to establish a case for the winding up of the Respondent and refused the Applicant's application for the winding up of the Respondent.

[2] The Applicant seeks to appeal on the basis that the court erred in finding that: [2.1] the debt is not due and payable;

[2.2] the Respondent's dispute of the debt is bona fide and based on reasonable grounds;

[2.3] the Applicant confirmed that the debt is only due and payable once the litigation between Misty Blue and the Tshwane Municipality has been finalised;

[2.4] Finding that the Respondent has placed evidence before the court that it paid money into its attorney's trust account in terms of an undertaking;

As a result finding that the Application for the winding up of the Respondent is refused and making no order as to costs.

[3] According to s 17 (1) of the Superior Court Act 10 of 2013, the threshold for granting leave is where the court believes that the appeal would have reasonable prospects of success. Previously the test was defined to mean that there is a reasonable prospect of another court coming to a different conclusion: see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The test attained a statutory force with the enactment of s17 (1). The section compels the use of the word 'would' instead of "might" in deciding whether to grant or refuse leave to appeal. The Land Claims Court's in its unreported decision *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC), held, albeit obiter, that the wording of the subsection raised the bar of the test that now has to be applied to any application for leave to appeal. In *Notshokovu v S* {157/15} [2016] ZASCA 112 (20 September 2016) at paragraph 2 it was confirmed that an Appellant faces a higher and stringent threshold in terms of the Act.

[4] In *Democratic Alliance v President of the Republic of South Africa and Others* (2124/ 2020) [2020] ZAGPPHC 326 (29 July 2020) at par [4] - [5] the Full Court held as follows:

"The test as now set out in s17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion. See, for example, *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343 H. The fact that the Superior Courts Act now employs the word 'would' as opposed to 'might' serves to emphasise this point. As enunciated by the Supreme Court of Appeal in *Smith v S* 2012

(1) SACR 567 (SCA) at para 7;

'More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must In other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

This dictum serves to emphasise a vital point: Leave to appeal is not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful."

[5] In MEC for Health, Eastern Cape v Mkhitha and Another {1221/2015(2015] ZASCA 176(25 November 2016) it was held as follows at par [17]:

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic

chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

Ad: Finding that the debt is not due and payable.

[6] The first ground relied upon by the Applicant is that the court wrongly found that the debt is not due and payable. I find no merit in this assertion as the following was pointed out in the Judgment, that:

[6.1] The Respondent alleged that even though the amount was due in terms of the contractual agreement (which was partly oral and partly written according to the Applicant), the parties agreed to delay payment thereof, arguing therefore that it was not as yet payable.

[7] The finding of the court was therefore not that the amount is not due and payable but that even though the amount is due there is a bona fide dispute whether it was payable see [9] and (10), [11] and (27).

Ad: Finding that Respondent's dispute of debt is bona fide and based on reasonable grounds.

[8] The second ground also has no merit, taking into consideration that the Respondent opposed the Applicant's Application on the following two grounds:

[8.1] alleging that it was not insolvent, and as a result it would pay the amount it deems to be due but not yet payable into its attorney's trust account, to put the allegation that it is insolvent to rest.

[8.1.1] The Applicant response was to seek proof of payment and an undertaking from the attorneys that they will not dispose or repay the money until litigation has been finalised.

[8.2] alleging that the parties had agreed that the money owed to the Applicant will be disposed after finalisation of the litigation proceedings between Misty Blue and Tshwane Municipality on the payments made on the work that was done by the Applicant

subcontracted by Misty Blue.

[8.2.1] In the judgment, the disputation of the existence of such an agreement by the Applicant in its Replying Affidavit, is acknowledged. However, since the Applicant was seeking a final order of sequestration, the Plascon-Evans rule applied. The issue was to be determined on the Respondent's allegation. The court correctly concluded from the correspondence that followed the s 345 demand (it should be noted that Applicant failed in its Founding Affidavit to acknowledge this correspondence, stating that there was no response to s 345) that, on a balance of probabilities the allegation of the existence of such an agreement is not far-fetched, and as a result found the allegations by the Respondent as disputed by the Applicant to form a bona fide dispute. See [27] of the

Judgment.

Ad. Finding that the Applicant confirmed that the debt is only due and payable once the litigation between Misty Blue and the Tshwane

Municipality has been finalised;

[8.3] On reading the content of the Replying affidavit in which the Applicant had stated that it requested proof of payment and an undertaking that the attorneys would not dispose of the monies paid into their trust account or repay it until the litigation has been finalised, and the Applicant's letter dated 12 September 2020 in reply to Respondent's response to the s 345 demand, the court found the letter to seemingly confirm the delay in disposing or repaying the money until finalisation of the litigation as also alleged by the Respondent; see paragraph [31]. The Applicant had in the same letter threatened to proceed with liquidation application unless it was in receipt of the undertaking and proof of payment made into the Respondent's attorneys' trust account. Which meant on receipt of proof of payment and an Undertaking, Applicant was not going to proceed with liquidation proceedings. The money was however, to be disposed after finalisation of the litigation. At the time of the Applicant's letter, no other litigation was pending or awaiting finalisation except the Misty Blue arbitration. It was therefore logically concluded that on a balance of probabilities "reference to "until litigation is finalised" is to the Misty Blue and Tshwane litigation.

[8.4] Furthermore in the instruction to its attorneys immediately on receipt of the s 345 demand, the Respondent acknowledged liability albeit to a lesser amount and also indicated that it will pay when Misty Blue litigation is decided in its favour. It is admitted that what was conveyed by the Respondent's attorneys in the letter dated 11 September 2020 was instead that the Respondent was going to pay the amount into the attorneys' trust account as security and Respondent's denial of the correctness of the debt amount as claimed by the Applicant and that it is due and payable. However, it does not negate the fact that when considering the documents filed of record, a dispute on the exact amount of the debt due and when it was to be payable exists. The letter alludes to paying the amount when the Misty Blue litigation is decided upon. a

bona fide dispute existed.

[8.5] The Applicant is referred to paragraphs [17]- (22) of the judgement, on the principles applicable in s 345 winding up applications. Where there is unconvincing evidence or a dispute about whether the amount alleged to be owing is payable, it would be inappropriate to order a final liquidation of the company or to declare the company insolvent as sought by the Applicant. It was also not for this court to determine whose version is correct or if debt claimed is due and payable. The matter could either be sent to trial with liquidation proceedings postponed or where the Applicant was aware of such a dispute, the Application can be dismissed; See paragraphs [21] and

[24] - [27] of the Judgment.

[8.6] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-Evans rule (Paarwater v South Sahara Investments (Pty) Ltd (2005] 4 All SA 185 (SCA) para 4; Badge & Others NNO v Midnight Storm Investments 265 Pty Ltd & Another 2012 (2) SA 28 (GSJ) para 14).

[9] In respect of the whether or not there was evidence placed before the court that the Respondent paid the money into its attorney's trust account in terms of an undertaking, see paragraphs [15] and [17].

[10] The Applicant was aware of the Respondent's disputation of the amount which was raised in response to the s 345 demand but proceeded with an Application for a final liquidation order, hence the Application was dismissed.

[11] The Applicant has failed to reach the threshold as per s 17 (1) for leave to be granted.

The following order is therefore made:

1. The Application for leave is refused. with costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

On behalf of Applicant: AJ WESSELS

Instructed by:

Strydom & Bredenkamp Inc

Ref: Mr H Strydom/HE0242

Tel: 012 460-1930

Fax: 012 460 8565

On behalf of Respondent:

Instructed by: VENN MULLER ATTORNEYS

Ref: Ms S Van Rooyen/11744

Tel: 012 346 0934

Fax: 012 346 0867

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