

SOUTH AFRICA / JUDGMENT

Moolmam v Nyati Meats CC and Another (35045/18) [2020] ZAGPPHC 368 (2 July 2020)

[2020] ZAGPPHC 368

COURT

North Gauteng High Court, Pretoria

BEFORE

TLHAPI V V

CASE / FILE NUMBER

35045/18

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

YES

CASE NUMBER:35045/18

2/7/20

In

the matter between: THEUNS
 JACOBUS MOOLMAN
 APPLICANT
 and
 NYATI
 MEATS CC
 FIRST RESPONDENT
 REGISTRATION
 NUMBER 2010/105242/23
 PETRUS
 JOHANNES ROSSOUW
 SECOND RESPONDENT

JUDGEMENT

TLHAPI J

- [1] This is an application seeking an order that the first respondent be liquidated and, that its affairs be wound up on grounds that the first respondent is unable to pay its debts and, that it would be just and equitable that it be wound up. Although the second respondent is the sole member of the first respondent, no order is sought against him, however, if he opposed the application a costs order would be sought against him.
- [2] The application is opposed by the first respondent and the second respondent who is sole member of the first respondent, objected to being cited in his personal capacity as second respondent in winding up proceedings of the first respondent and he indicated that a punitive costs order would be sought in this regard. There was also an application for condonation for the late filing of the answering affidavit which was not opposed.

BACKGROUND

- [3] The applicant states that during September 2015, on the farm Swartkoppies in Lydenburg and acting in his personal capacity, he concluded an oral agreement for the sale and delivery of livestock with the first respondent. The first respondent was represented by Mr Nicky Fourie ('Nicky Fourie'). A confirmatory affidavit from Nicky Fourie was annexed as "TM2". The applicant states that he was present with a Mr Grabler on the farm Saaihoek when delivery to the first respondent took place and, when the livestock were removed. There was another witness, Mr Boshoff, who was a neighbour who witnessed the entire process. Photos were taken of the first batch of livestock that was removed from the farm. Arrangements were made for the livestock to be collected from the applicant's farms and they were to be delivered to the first respondent's business address. Confirmatory affidavits of Mr Grabler and Mr Boshoff were annexed to the founding affidavit.

- [4] Nicky Fourie had regularly prior to this agreement represented both respondents, in buying livestock for the first respondent from the applicant. The livestock in this matter was sold for an amount of R689,400.06 made up as follows:

27 Cows, non-bearing at R4 200.00 per cow totalling R113 400.00;

80 Cows at R6 300.00 per cow totalling R504 000.00;

11 Bulls at R6 545.46 totalling R72 000.00;

- [5] It was agreed that payment would be made in three equal instalments, on the last day of the months of September, October and November of 2015. An email stating the terms of the agreement was sent on 30 January 2016 and confirmed by second respondent and such confirmation was accepted by the applicant as is indicated in e mails, both annexed as "TM3" and "TM4" respectively. On request of the second respondent, he annexed as "TM5", a copy of a proforma invoice which was sent to the first respondent's accountant, one Louise Maree and the second respondent was also copied. The first respondent has failed to make payment for such livestock.

- [6] The applicant stated that the first respondent has in correspondence with the second respondent admitted the terms of the agreement and indebtedness for the , the livestock so purchased. However, the second respondent's conduct was evasive in that he (i) undertook to pay on behalf of the first respondent provided the applicant gave his accountant certain papers (invoices); (ii) the second respondent alleged that certain monies were due to him from other sources and that applicant would be paid from such funds. It was clear that the first respondent had the benefit of the livestock and had generated income therefrom, paying other creditors

and not the applicant (iii) the first respondent did not have sufficient funds to pay for the purchase price and the second respondent later undertook to pay on behalf of the first respondent from funds he was expecting as creditor in another insolvent estate.

- [7] According to the applicant confirmation of the terms of the oral agreement were made after payment for the livestock became due and, while he was attempting to obtain payment from the first respondent. Both respondents never disputed the their obligation to pay for a period of more than a year. It was never his intention to carry the business for the first respondent. The applicant stated that he had been prejudiced by the first respondent's failure to pay. He was forced to prematurely cancel an insurance policy in order to meet his personal commitments.

- [8] According to the applicant the first respondent runs a butchery business and that it benefited from the agreement by using "underhanded business tactics". The first respondent was unwilling to provide an undertaking that it would pay. On the other hand it was also evident that other creditors obtained judgments against the first respondent for goods sold and delivered. The applicant contends that a liquidator had to be appointed in order to investigate the affairs of the first respondent.
- [9] On 3 February 2017 the first respondent through its attorneys, in a letter annexed as "TM10", denied the transaction; denied that it took delivery of the livestock; denied that it owed any monies to the applicant. The applicant stated that on 21 February 2017 a letter of demand in terms of section 345 of the Companies Act 61 of 1973 was dispatched and served on the first respondent at its registered address and, at the first respondent's main place of business. This was followed by a response from the first respondent's attorney dated 16 March 2017 which informed the applicant that, pursuing an application for liquidation where a claim was disputed
- was incompetent.
- [10] The applicant's attorney replied by letter dated 28 March 2017 contending that regard being had to evidence in the matter, the claim could not be disputed. The first respondent had also failed to indicate in what respect the claim was disputed. A letter followed from the first respondent's attorney dated 31 March 2017 stating that the applicant would be launching the application at own peril.
- [11] The second respondent deposed to the answering affidavit. He contended that the applicant failed to comply with section 345 of the Companies Act in that the letter of demand was not as is strictly required, served at the registered office of the first respondent. The applicant also failed to comply with section 346(4A) of the Companies Act which requires service upon the employees of the first respondent by effecting service on their trade union, whether or not he could establish such membership. Furthermore, the applicant had failed to prove that the first respondent was unable to pay its debts being the inability to pay its day-to-day liabilities
- [12] According to him there were several disputes of fact which could only be resolved in an action. He denied the he confirmed the terms of the alleged agreement and, it is denied that Nicky Fourie was appointed to act as agent or had authority to act on behalf of the first respondent to buy livestock and, it is denied that that livestock was received by the first respondent, which livestock are the subject of the alleged representation by Nicky Fourie. In an email dated 26 May 2016, "TMB" of the founding affidavit, the second respondent made the applicant aware that that he had not been involved in the transaction from the beginning and that he was just trying to help.

- [13] The reason for seeking a removal certificate and invoices from the applicant was to take the issue up with Nicky Fourie. The first respondent has never been provided with a removal certificate from the applicant to the first respondent and that annexure "TM5" did not constitute an invoice in respect of goods sold and delivered and, it lacked particulars on how the amount due was calculated and, as to when the amount was due or would be considered to be over due.
- [14] The second respondent contends that it was evident from the email dated 24 August 2016 annexed to the founding papers as annexure "TM4" that it pertained to other issues where it is stated by the applicant " ...dankie dat jy [en] Jacques Nicky se probleme nou moet oplos - ek sal Jou more skakel"
- [15] It was further contended that the application for the winding up lacks an allegation that the first respondent was in breach of the agreement and, that it received the livestock. It was contended that the first respondent is denied an opportunity to cross-examine the witnesses relied upon and to interrogate the photographs attached, and also the issue of whether the livestock was indeed been delivered to the first respondent and, the knowledge of such fact by the applicant.
- [16] The second respondent stated that the involvement of the first respondent's accountant in making monies due to the first respondent from creditors available for payment of the alleged debt was without merit and, so was the further allegation that the first respondent had derived benefit of the livestock for two years to pay its creditors. It was contended that the applicant lacked proof to substantiate such bold allegations. He stated that the applicant's reliance for payment from a dividend payable to the first respondent, out of the insolvent estate of one Mr Steyn was opportunistic.
- [17] In reply the applicant contended that the answering affidavit has to be robustly interpreted and, that the respondents defence amounted to a bare denial which failed to disclose any dispute of fact. The applicant stated that the respondent did not explain the version of the driver of the truck and the allegation that he tried to convince the said driver to change his evidence. The respondent failed to address the content of the email which gave details of the initial price of the livestock.
- [18] The explanation that he tried to assist the driver who was his employee out of a fraudulent transaction did not make sense in light of all the facts in the founding affidavit. Furthermore, the respondents distorted and misrepresented the version of the applicant relating to the assurance given by the respondent, on the promise allegedly made for diversion of monies payable to the applicant from an insolvent estate of a creditor of the first respondent. The applicant contends the application was properly served on the first respondent and a service affidavit was annexed and furthermore, that no order was sought against the second respondent therefore a punitive cost order against himself or his attorneys was in appropriate,

The issues to be determined

- [19] The issues to be determined according to the applicant were, "whether a valid agreement has been concluded between the parties; Whether the first respondent is unable to pay its debts; whether it is just and equitable to place the first respondent in liquidation."
- [20] At the commencement of the proceedings counsel for the applicant presented a draft order seeking an order that the matter be referred to trial, that the notice of motion stand as a simple summons, that the answering affidavit be regarded as a notice to defend and that the applicant file a declaration within fifteen (15) days of the grant of the order.

Prescription

- [21] It was contended by counsel for the applicant that the seeking of the order referring the matter to trial, was prompted by the issue of prescription raised for the first time in the supplementary heads of argument and had not been pleaded by the first respondent. I am in agreement with counsel that this should not have been raised on behalf of the first respondent for the first time in heads of argument, without having been pleaded as held in *Lane/ Breda NO v The Master of the High Court Kimberley and Others* (20537/2014)

[2015] ZASCA 166 where Swain JA at paragraph 22 stated:

"The need to allow a claimant an opportunity to raise the issue of delay or interruption of the running of prescription underlies the provisions of s17 of the Prescription Act 68 of 1969.....A party to litigation who invokes prescription must do so by way of a plea or special plea and not by way of an exception. The reason is that the plaintiff may have a valid answer..... which may be raised in replication."

- [22] In my view, an opportunity should be given to the litigant against whom prescription is raised to respond on whether the debt had prescribed. It should have been raised by the first respondent in the answering affidavit, and the applicant could have dealt with it in reply. Counsel for the respondent did not take up the issue of prescription any further.

A request for a referral to trial

- [23] The first respondent is a closed corporation therefore, an application for its winding up is brought in terms section 69 of the Closed Corporation Act 69 of 1984 read with subsection 344 (f) and 346 (1)(2)(3) and 4A of the Old Companies Act 61 of 1973, read with item 9 schedule 5 of the Companies Act 71 of 2008. In terms of section 346, the application is brought by a creditor on grounds that the corporation is unable to pay its debts and that it is just and equitable that the corporation be wound up.
- [24] In this instance the applicant had in terms of section 69 of the Closed Corporation Act to show that the first respondent was indebted to it in an amount of not less than R200.00. It is also a prerequisite of the Old Companies Act and even the Closed Corporation Act mentioned above that a demand is to be served at the registered office of the closed corporation. It was also stated in the answering affidavit that the applicant had not served

the demand at the registered office of the respondent. The letter of demand states that it would be served by sheriff and no return of service was filed. The affidavit of service by the attorney for the applicant only deals with the service of the application and not the letter of demand. In as far as service of the demand was not served as required the launch of this application would be irregular. Despite such finding by me I still deem it necessary to deal with

the other issues raised.

[25] The respondent disputed its indebtedness to the applicant. Counsel for the respondents contended that the request for referral to trial was incompetent in liquidations proceedings where by their very nature and as provided in section 346, the proceedings had to brought on motion and, that there was no room to convert such proceedings into an action by referring same to trial. Furthermore, he contended that the application to refer to trial was a concession by the applicant that there were disputes of fact which could not be resolved on paper and, in those circumstances the applicant should not have engaged liquidation proceedings to enforce a disputed debt.

[26] Counsel for the applicant relied on several cases and he contended that it was in the discretion of the court where such request had been made to refer the matter to evidence or trial. He also relied on Rule 6(5)(g) of the Uniform Rules of Court, which provide that where a matter could not properly be decided on affidavit the court in exercising its discretion could refer the matter to trial with appropriate directives and that was applicant requested.

[27] It is trite that an application to refer the application to trial or oral evidence arises where there are serious disputes of fact arising on paper which cannot be resolved and that such application should be made in limine. In *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at 290 D-E Harms DP at 290 D- E stated:

"Motion proceedings , unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determined probabilities

[28] In the unreported judgement in the appeal matter of *Absa Bank Limited v Molotsi Tebogo Tommy* Case number 15444/2010 (Gauteng Division. Johannesburg) (8 March 2016) at paragraph [25] where it was stated:

".. . An application for the hearing of oral evidence must, as a rule be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail."

- [29] Now these are liquidation proceedings and by their very nature the issue of a disputed indebtedness, does not play a role in the determination of whether the corporation is unable to pay its debts. I am in agreement with counsel for the respondent that where the debt is disputed on bona fide and reasonable grounds winding up proceedings should not be resorted to; *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348; *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (AD) at 980.
- [30] Can it be said in these circumstances that the indebtedness was disputed on bona fide and reasonable grounds? Counsel for the applicant contended that reference to the emails were a clear admission of indebtedness, in particular TM3 and TM4. These in my view were not the only documents referred to in the answering affidavit on which grounds the claim was disputed. Reference was also made to other factors relied upon to dispute indebtedness. For example, the receipt provided by the applicant was referred to and, the failure to provide a removal certificate and, a denial that the livestock was delivered to the respondents. Again, the lack of particularity on the receipt dated 1 February 2016 provided by the applicant was complained about in the answering affidavit. Although the applicant stated that no order is sought against the second respondent, the said document states that the livestock was sold to the second respondent and no mention is made of Nicky Fourie, who is alleged to have acted as an agent in respect of particular livestock on behalf of the first respondent. In my view these results in me finding that indeed there are factual disputes which could not be resolved in these liquidation proceedings.
- [31] The letter from the attorneys for the respondents dated 3 February 2017 denies knowledge of the transaction and a follow up letter dated 31 March 2017 which was before the application for liquidation was launched, made the applicant aware that there were factual disputes. The applicant complains in reply that no reasons were given why the indebtedness was disputed. In my view the respondent was not at that stage obliged to give reasons. The letter was emphatic in stating that the merits of the matter would not be debated, and that the launch of liquidation proceeding were at the applicant's 'own peril'. The bringing of motion proceedings with the probability that there would be a "protracted enquiry into disputed facts" is discouraged especially where such disputed facts should have been the subject of an action, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).
- [32] During the proceedings I drew counsels' attention to the matter of *Freshvest Investments Pty Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 Nov 2016). The court a quo had in this matter made a finding that there were bona fide disputes of fact on reasonable grounds and yet referred the matter to oral evidence. Where there was a finding that there were disputes of fact the application should have been dismissed because in essence liquidation proceedings were not designed to deal with the

enforcement of disputed claims. I am therefore of the view that the application to refer the matter to trial be refused and that the application for liquidation of the first respondent be dismissed. I am not inclined to grant punitive costs against the applicant.

[33] In the result the following order is given:

1. The application to refer the matter to trial is refused.
2. The application for the liquidation of the first respondent is dismissed with costs.
3. No order is made in respect of the second respondent.

TLHAPI V V

(JUDGE OF THE HIGH COURT)

ATTORNEYS FOR THE APPLICANT STARBUCK ATTORNEYS

REF: 00626/mh/V\ Van Rensburg

E-mail werner@vkbattorneys.co.za

COUNSEL FOR THE APPLICANT S J van Rensburg SC (Vista Law Chambers)

ATTORNEYS FOR THE RESPONDENT PRINSLOO BEKKER ATTORNEYS

REF: NYA1/2rws

012 348 3906

COUNSEL FOR THE RESPONDENT NG LOUW (Circle Chambers)

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