

IN THE APPEAL COURT OF LESOTHO

HELD AT MASERU

C OF A (CIV)18/2019

CCA/0015/2016

In the matter between:

ELDARO TRADING (PTY) LTD

1ST APPELLANT

THE A-CLASS (PTY) LTD

2ND APPELLANT

and

MERAKA LESOTHO (PTY) LTD

RESPONDENT

Coram: DAMASEB AJA,

CHINHENGO AJA

VAN DER WESTHUIZEN AJA

Enrolled: 20 May 2020

Delivered: 29 May 2020

SUMMARY

Appellant unsuccessful in High Court proceedings in which, with leave of court second appellant joined as party, sought liquidation

of respondent - Cross-appeal against order joinder of second appellant as a party filed;

On appeal cross-appeal allowed with costs and main appeal dismissed with costs -Appellant failing to establish respondent was commercially insolvent and unable to pay debts and not disclosing proceedings instituted on same cause of action in foreign court - Court disapproving of resort to liquidation proceedings in circumstances where objective is not bona fide need to place respondent under liquidation but to exercise pressure to secure payment of debt and as reaction against alleged improper termination of agreement previously entered between parties - High Court order affirmed bur altered to reflect decision on cross-appeal

CHINHENGU AJA:-

Introduction

1. The first appellant instituted proceedings in the High Court to place the respondent under liquidation in terms of s 125(1)(b) and 125(2)(a) and (b) of the Companies Act 2011

(No 18 of 2011). This was on 23 February 2016. On 17 March 2016, the second appellant applied to be joined in the proceedings as an intervening party. The judge *a quo* upheld the request. The second appellant thus became a co-applicant in the liquidation proceedings.

2. The record of proceedings shows that the application was heard on 1 November 2016. The presiding judge gave her decision in the form of an order, with no written reasons for it, over two years later on 15 March 2019. The order reads:

“(a) The application for intervention succeeds with costs as prayed and the A-Class is joined as the second applicant.

(b) The main application is dismissed with costs.”

3. The reasons for judgment were only made available to the parties after this Court, at the roll call held on 12 May 2020, invited counsel to address it on the absence of written reasons for judgment, and how this Court was to handle the appeal in those circumstances.

4. It is to be noted that a period of three years seven months passed before the written judgment was made available. There is no indication in the judgment of the date on which it

was written. A long delay in writing a judgment and handing it down disadvantages the parties immensely where an appeal has been noted. In this case the parties prepared the written heads of argument, including supplementary heads of argument, without the benefit of the reasons for the order made by the court *a quo*. If it actually took the judge in excess of three years to prepare the reasons for the order, she too was disadvantaged in several ways that I do not have to set out here. Some shortcomings arising from the long delay will become apparent from the observations that I make in this judgment.

Intervention application by second appellant

5. The first issue that the presiding judge deals with in her judgment is the intervention application. She devotes four short paragraphs to that issue:

“[5] It is convenient to start with the application for intervention. The A-Class (Pty) Ltd (“A-Class”) claims to have bought a truck for Meraka Lesotho (Pty) Ltd, (the respondent in the main application for liquidation). The truck is said to be a Nissan UD80 delivery truck with a cool unit and a freezing chamber at the back of the truck, which would enable the respondent to make deliveries of its supplies. According to

A-Class, the respondent registered the truck in its names or that of its nominee.

[6] It is the intervenor's case that it was agreed between the parties that it would be paid [for] within a reasonable time, which would not exceed three (3) months. The total price for the vehicle is said to be four hundred and nine thousand nine hundred and ninety nine Maloti and ninety eight lisente (M409 998.98).

[7] According to the intervenor, the respondent is unable to pay its debts, since it had failed to pay them as agreed. On the contrary the respondent shows that it does not have a business relationship with the intervenor, instead the intervenor had a relationship with a company called Maluti Highlands Abattoir. The truck that is the subject matter of the dispute *in casu* is said to be registered in the names of the Maluti Highlands Abattoir.

[8] The court having heard arguments from both sides allowed the intervenor to be joined as a second applicant in this matter. The court is satisfied that the intervenor had shown a sufficiently direct and substantial interest in the subject matter of the proceedings."

6. The learned judge referred to two cases and an authoritative textbook in support of her conclusion: *AAIL(SA) v Muslim Judicial Council* 1938 (4) SA 855 at 863H-864A; *United Watch & Diamond Co (Pty) Ltd & Others v Disa Hotels and Another*

1972 (4) SA 409 and Herbstein & Van Winsen, *The Civil Practice of the High Court of South Africa*, 5th ed Vol 1 at p 225-226

7. The citation of the parties in the High Court judgment does not reflect the second appellant as a party to the proceedings in that court. That must have been an inadvertence on the part of the presiding judge. After the joinder the second appellant became a party to the proceedings, and should have been cited as such party in the judgment. The failure by the judge *a quo* to cite the second respondent as a party is, in my view, not material in this appeal, nor was the issue raised by the parties. The second appellant is now clearly a party to this appeal. A cross-appeal was lodged against the order allowing the second appellant's intervention.

8. It is quite apparent that the presiding judge did not give any real reasons for her decision that the second appellant was entitled to be joined as a party to the proceedings. After

stating at paragraph [7] of her judgment that “(o)n the contrary the respondent shows that it does not have a business relationship with the intervenor, instead the intervenor had a relationship with a company called Maluti Highlands Abattoir”, it is surprising that the judge came to the conclusion that she did without resolving the factual dispute that had emerged from the affidavits as to whether the respondent bought a truck or not. The learned judge was content to baldly state that after hearing arguments on both sides she was satisfied that the second appellant was entitled to be joined as a party. This alone cannot be enough justification for the decision she made.

Cross-appeal

9. In dealing with the cross appeal, I am alive to the fact that should the result be that the main appeal fails, then there would have been no point in canvassing issues relating to the cross-appeal on the merits. But there is the issue of costs

ordered against the cross-appellant which must be resolved whatever the result in the main appeal.

10. The second appellant made common cause with the first appellant in so far as the liquidation of the respondent is concerned, and set out the respondent's alleged indebtedness to it. It also alleged that the respondent was unable to pay its debts thereby indicating the grounds upon which it contended that the respondent should be placed in liquidation.

11. The High Court did not consider, as I have earlier stated, the factual issues that arose in the intervention application. The second appellant alleged that it sold a UD80 delivery truck valued at M409 999.98 to the respondent and that, despite taking delivery of the truck and using of it, the respondent failed to pay the purchase price. It filed supporting affidavits from two persons who purport to have witnessed the transaction and were involved in the delivery of the truck to the respondent at various stages. On the

other hand the respondent denied the sale and produced positive evidence that the truck was perhaps sold to an entity called Maluti Highlands Abattoir. It produced *prima facie* evidence of ownership by that entity in the form of a registration document showing that the vehicle is registered in that entity's name. The respondent also denied the generalised assertion by the second appellant that they had been engaged in business together since 2014. It therefore stood out clearly that the fact of sale of the truck was in dispute between the parties and called for its resolution before arriving at the decision whether or not the second appellant had a direct and sufficient interest to entitle it to the relief sought.

12. The respondent set out in paragraph 6 of the answering affidavit evidence that the court should have assessed. Contending thereat that the application for intervention should be dismissed, the respondent averred-

“First, the applicant for intervention gave false evidence that the vehicle in question was sold to the respondent when this was not the

case. Second, the applicant for intervention suggested that it has always been in business with the respondent without substantiating this allegation. It has not disclosed the nature of the business relationship between the parties nor has it bothered to provide any substantial evidence pointing to the alleged relationship.”

13. The respondent’s averments placed the issue of sale of the truck at the centre of the decision whether or not to join the second appellant as a party to the proceedings. In light of the judge *a quo*’s failure to decide this factual dispute, this court is in as good a position as her to decide the disputed fact on the evidence in the affidavits.

14. The evidence before the court *a quo* did not establish on a balance of probabilities that the second appellant had had a business relationship with the respondent or that it sold the UD80 truck to it. In the replying affidavit the second appellant attempted to show that it had indeed sold the truck and attached affidavits of two drivers who delivered the truck to Ntaote, the deponent of respondent’s affidavit. Significantly, the second appellant averred that the original

invoices and registration documents were handed over to Ntaote by one of the drivers, the suggestion being that the second respondent did not retain any document to prove the purchase by it of the truck and its sale and delivery to the respondent, something that a prudent businessman would hardly do. It consequently did not establish that it sold a truck to the respondent or that it was owed the substantial amount mentioned in its papers. It consequently did not adduce sufficient evidence in proof of a substantial and direct interest in the application entitling it to be joined as a party in the liquidation application. That being the case, the judge *a quo* should not have ordered that the second appellant be joined as a party to the proceedings. This finding means that the intervention application should have been dismissed with costs.

Liquidation application

15. In light of my decision on the intervention application only the 1st appellant remains a party, as appellant, in this

appeal. Henceforth I will refer to it as the 1st appellant or simply the appellant.

16. The appellant identified, in its written submissions¹ on appeal, the issue for decision as revolving around s 125 of the Companies Act. It was submitted on its behalf that the liquidation application “is premised on 1st appellant’s claims that respondent is unable to pay its debts and it is commercially insolvent”. That this is the ground of appeal is supported by the appellant’s contention that the High Court erred in dismissing the liquidation application against the weight of evidence indicating that the respondent was unable to pay its debts, and also erred in dismissing the application when the appellant had fulfilled the requirements of s 125 of the Companies Act.

17. The appellant’s contention is that the respondent is indebted to it in a sum that has not been conclusively established and or only established to the extent that the

¹ para 1.1 and 1.3 of appellant submissions

respondent admits that some money is owed by it to the appellant.

18. On 21 December 2015 the respondent signed an acknowledgement of debt in the form of a certificate of indebtedness in the sum of R 8 022 255.65. That amount fluctuated over the period up to 23 February 2016, being date of the liquidation application, when the appellant alleged that it was owed just over M6 million. The appellant accepts that the respondent disputed the amount of the indebtedness but conceded to owing only about M2 million. In light of this dispute the appellant contended that there is no requirement to establish the exact amount of indebtedness in proceedings of this nature. For this contention it relies on *Prudential Shippers SA Ltd v Tempest Clothing Co Ltd* 1976 (2) SA 856 at 867F and *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 at 597G-H.

19. Contrary to the averments by the respondent that appellant failed to establish that the respondent was

commercially insolvent and that it was unable to pay its debts, the appellant submitted the following. There was sufficient countervailing evidence against the respondent's averments. In terms of the agreement signed between the parties late 2014, payment was due on presentment of invoices. For the period between December 2015 and February 2016 the respondent had consistently failed to pay as agreed and the debt continued to accumulate. This is proof enough that the respondent failed to meet the solvency test as set out in s 2(7) and (8) as read with sections 95 and 96 of the Companies Act, as well as proof that the respondent was unable to pay its debts. The respondent's response consisted of, not only a failure to pay the amounts due on a monthly basis, but also of a serious breach of the agency agreement entered into in 2015, accompanied by failure to place orders with the appellant, obtaining supplies from another South African entity on the basis of forged import permits. In the appellant's view the only admissible evidence of indebtedness was the certificate of indebtedness and the balance unpaid as at the

date of the application for liquidation. It also submitted that whereas the respondent was required to prove its solvency, it made only bald allegations of solvency without regard to the provisions of the Companies Act referred to above, section 2, 95 and 96. In this connection the appellant also pointed to the failure by the respondent to produce financial statements in support of its solvency as required by the mentioned provisions of the Companies Act.

20. The respondent's submissions are centred around the issue whether or not the appellant established commercial insolvency on the respondent's part and that the respondent was unable to pay its debts as they fell due.

21. It may be necessary at this point to set out the genesis of the differences between the parties and the events leading to the application to place the respondent into liquidation. The facts are however set out in sufficient detail in the judgment of the High but it is desirable to rehash them for purposes of clarity of this judgment.

22. The parties entered into an agreement, first oral and then reduced to writing in 2015, in terms of which the appellant was to supply, from its sources in South Africa, cattle and sheep for slaughter and sale by the respondent in Lesotho to meet the entire requirements of the market in the country. The parties also contemplated that in due course the respondent would export beef to China. It appears the relationship between the parties commenced on a good note but, according to the appellant, before the year was out signs began to show (from July/August 2015) that the respondent was, or would be, unable to pay for the supplies as soon as they were made and invoiced. By December 2015, the parties agreed on a certificate of indebtedness reflecting that the respondent owed the appellant about R8 million. Thereafter the parties continued to do business together but the debt also continued to accumulate until the appellant instituted these proceedings on 23 February 2016. In the meantime from late 2015 the respondent stopped importing livestock from South Africa through the appellant. It was importing through another entity called Sorour Mining

Industrial (SMI). The appellant averred that it discovered that the respondent had been sold to Chinese nationals or a Chinese entity, and the transfer of ownership was scheduled for 1 March 2016, thereby adding urgency to the application.

23. The respondent's version is different from that of the appellant. It is that the appellant could not supply the livestock to meet the market demand, which that constrained the respondent to go into bed, so to speak, with another supplier, SMI. The acknowledgement of debt though signed did not truly reflect the respondent's indebtedness because it was designed or intended to enable the appellant to access loan funds from South African banks to enable it to meet its obligations under the agreement. It is not true that from the later part of 2015 the parties did not conduct business together or that the respondent failed to pay its debt to the appellant. In fact the respondent continued to pay what was due to the appellant during the period December 2015 to February 2016. The amounts that the respondent paid are set out in its affidavit and were not seriously contested by the appellant. Whereas the appellant

alleged in its founding affidavit that it was owed upwards of M6 million, when the respondent presented to it proof of payments made during the period I have referred to, the appellant could not contest those payments and contended that, that being the case, the respondent was still owing it to the extent of the admission. Indeed the respondent stated that as at the time of the liquidation application, it owed the appellant in the region of M2 million and was paying the invoices evidencing that amount as they fell due. Respondent also alleged that the outstanding balance was not due and owing as at the time that these proceedings were instituted. What therefore cannot be disputed is that the respondent paid substantial sums of money to the appellant during the period in question: a total of M13 745 142.00 between October 2015 and 10 January 2016; in January 2016 alone it paid M2 393 532.90; in January and February 2016, M5 393 532.90. These payments are further broken down to show that M 500 000.00 was paid on 26 January 2016; M351 905.00 on 1 February 2016 and M1.4 million on 2 February 2016. Further payments were also

made on 10, 11 and 22 February in the total amount of M1 151 205.25. The learned judge *a quo* summarised these payment at para 16 of the judgment:

“It is the respondent’s evidence that in the applicant’s own annexure “C” it shows that the respondent paid the amount of ... (M351 905.00) on the 1st February 2016..., (M1 400 000.00) on 2nd February 2016 while it had earlier on the 26th January paid the applicant... (M500 000.00). Further payments were made on the 10th, 11th and 22nd February 2016 totalling ...(M1 151 205.25). This means that the total payments for the months January and February 2016 alone were...(M 5393 532.90).

[I have omitted the reference in words to the amounts paid.]

24. The evidence establishes that the parties continued to do business with each other until January 2016, during which period the respondent made significant payments to the appellant. It establishes that as at the time of the application in the High Court the amount owing to the appellant had not been conclusively established. The actual amount was in dispute but for the purpose of the application, the appellant was prepared to accept the amount admitted by the

respondent, albeit the respondent was alleging that the amount then owing was not yet due and payable.

25. It seems to me that the real contest between the parties is not that the respondent is unable to pay its debts or is commercially insolvent. To the appellant it is really that the respondent breached the agreement between them and was now getting his supplies from another person for the reason that, according to the respondent the appellant was failing to meet its demand for livestock. The judge *a quo* adverted to this point at paragraph [12] of the judgment:

“According to the applicant, the respondent has refused to pay it, instead it has resorted to trading and purchasing livestock elsewhere in contravention of the agreement it had entered into with the applicant.”

26. Counsel for the respondent Mr *Letsie*, submitted that the real issue for decision in the appeal is whether the appellant had proved that the respondent was unable to pay its debts and had become commercially insolvent. He submitted that on the evidence the appellant had failed to make a case for

the liquidation of the respondent on the basis of s 125 of the Companies Act. He submitted that there is evidence on record that the appellant instituted proceedings in South Africa in which he claimed the amount allegedly owed to it by the respondent. It is to be noted, as stated by counsel for the respondent, that the appellant did not disclose that it had instituted action against the respondent in South Africa.

27. The learned judge *a quo* dealt with the evidence at paragraphs [26] to [28] and came to the conclusion that the appellant failed to prove that respondent was unable to pay its debts or that it was commercially insolvent.

28. I am in broad agreement with the judge's reasoning and finding. She observed that no evidence had been put before the court to establish, not only the amount owed but also the fact that it had become due and payable. In my view, it cannot be denied that the appellant did not make a demand for the amount in the conventional way. Had it done so and at the same time engaged in an analysis of what amount or amounts were due and payable, it could easily have overcome the difficulty it faced in seeking to obtain the

relief it wanted. I endorse the reasoning and conclusion of the judge a quo and for the reasons she gave I would dismiss the appeal.

29. This appeal, in my view, can be disposed of on another basis as advanced by Mr Letsie in his submissions to this Court. He submitted that the real reason that the appellant instituted the liquidation proceedings was merely to exact payment from a debtor with whom it had fallen out in the business way. I agree with this submission. In this connection, a warning was sounded out in *Lesotho Bank v Lesotho Hotels International (Pty) Ltd & Others* LCA (1995-1999) 602 at 604I, where STEYN P said –

“Many of the issues in the papers before us may well come before the courts of the Kingdom in the months or years ahead.”

30. And one of the issues he canvassed was the propriety of the institution of winding-up proceedings in circumstances where the claims are disputed. He went on to say-

“The second issue concerns the propriety of the institution of winding-up proceedings in circumstances which surround these

claims. *Henochsberg on the Companies Act*, 5 ed Vol. 2 at p 693-694 summarises the legal position thus:

“In addition to its statutory discretion, the court has an inherent jurisdiction to prevent abuse of its process and, therefore , even where a good ground for winding-up is established, the court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* bringing about of the company’s liquidation for its own sake e.g. the attempt to enforce a debt *bona fide* disputed...

Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.

See in this regard *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T). In the latter judgment , the court cited the following passage from *Buckley on Companies*, 11 ed at 357 where the author says:

“A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the

process of the court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order.”

See also *Hulse-Reuter and Another v HEG Consulting Enterprise (Pty) Ltd* 1998 (2) SA 208 (C) and *Re a Company* (NO 0012209 of 1991) [1992] 2 ALL ER 797 (Ch D) where Hoffman J says the following at p 800:

“It does seem to me that a tendency has developed, possibly since the decision in *Cornhill Insurance plc v Improvement Services Ltd* [1986] BCLC 26, [1986] WLR 114, to present petitions against solvent companies as a way of putting pressure upon them to make payments of money which is *bona fide* disputed rather than to invoke the procedures which the rules provide for summary judgment. I do not for a moment wish to detract from anything which was said in the *Cornhill Insurance* case, which indeed followed earlier authority, to the effect that a refusal to pay an indisputable debt is evidence from which the inference may be drawn that the debtor is unable to pay. It was, however, a somewhat unusual case in which it was quite clear

that the company in question had no grounds at all for its refusal. Equally it seems to me, that if the court comes to the conclusion that a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which it is not allowed under the contract, then the court would not be inclined to restrain presentation of the petition. But, if, as in this case, it appears that the defence has a prospect of success and the company is solvent, then I think that the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to the RSC: Ord 14 procedure.”

31. The cited excerpts are relevant in this case and also for the purpose of alerting practitioners to the dangers of approaching the courts of law by way of a procedure intended for one purpose in order to achieve another purpose, which, in all the circumstances, should not to be legitimately achieved by the procedure adopted. Here, we have an applicant for a liquidation order who has instituted proceedings in a foreign jurisdiction in order to recover the same amount for which it is seeking the liquidation of a

company. The applicant does not disclose the existence of the foreign proceedings. The applicant misrepresents the payments made to it and is not certain what the amount actually owed is, or if it knows as surely it must, because it made a claim on the same cause of action in a foreign jurisdiction, claims a much bigger amount, which when faced with a lower amount possibly owing to it, it is prepared, for the purpose of obtaining relief, to accept that lower, and apparently admitted, amount. It ignores the fact that its debtor paid not insignificant amounts of money during two or three months immediately preceding its institution of the liquidation application. It betrays in its papers that the real bone of contention between the parties is not the amount outstanding but the fact that the debtor has breached an agreement between them and is doing business with a third party. It latches onto a certificate signed some two and half months evidencing a much higher amount of indebtedness by its debtor "as the only admissible evidence buttressed by a balance as at 21 December 2016", some two months before its application, conveniently ignoring large amounts

paid in reduction of the debt within a period of two months before the application. All this in circumstances where the debtor is not shown to be commercially insolvent and unable to pay its debts and is, in fact, paying off its debt as well as, to the knowledge of the applicant, also paying its current supplier of livestock. Whilst I accept that it is not necessary that an exact amount of the debt be presented, I am satisfied that on a conspectus of the evidence before the court *a quo*, the bona fides of the applicant in taking the course of liquidation in the circumstances prevailing, is clearly open to doubt. The appellant's "predominant motive or purpose [...] is something other than the *bona fide* bringing about of the company's liquidation for its own sake. Its application was against a solvent companies company by all measure and a way of putting pressure upon it to make payment. I would, as submitted by respondent's counsel, dismiss the appeal on this ground alone.

32. An issue concerning the non-joinder was raised by this Court *mero motu* at some stage. It was common cause that although the Master of the High Court was not joined as a

party or cited, the documents in these proceedings were in fact served on that office and a bond of security was issued by the office. In view of the dismissal of the appeal, it is no longer necessary to deal with this issue even for whatever it may be worth doing so.

33. In the result the order of the High Court is affirmed in respect of the main application. That whole order will be altered to take account of this Court's decision on the intervening application.

34. It is therefore ordered that -

(a) the cross-appeal is allowed with costs;

(b) the main appeal is dismissed with costs;

(c) the order of the High Court is altered to read-

“(a) The application for intervention is dismissed with costs.

(b) The main application is dismissed with costs.”



**MH CHINHENGO
ACTING JUSTICE OF APPEAL**

I agree:



**DAMASEB ACTING
ACTING JUSTICE OF APPEAL**

I agree:



**VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL**

For Appellants: Adv T Mpaka
For Respondents: Mr Letsika