**CCT/57/2010**

**IN THE HIGH COURT OF LESOTHO**

**In the matter between:-**

**KEABOKA REFILOE RAMATLAPENG** **APPLICANT**

**And**

**DRYTEX (PTY) LTD** **RESPONDENT**

**JUDGMENT**

**Delivered by the Honourable Madam Justice N. Majara**
**on the 7th December 2010**

***Summary***

***Ex parte*** *application for provisional liquidation of respondent moved on urgent basis – whether applicant has* ***locus standi*** *– whether respondent unable to pay its debts – whether it is just and equitable for respondent to be liquidated – applicant not a director or shareholder but a creditor in terms of the Companies Act - applicant not successfully established that respondent is unable to pay its debts nor that it is just and equitable to liquidate it – rule nisi dismissed with costs.*

This is an application for liquidation of the respondent company brought in terms of **Section 173 of the Companies Act of 1967** (the Act). In his founding affidavit the applicant describes himself as a shareholder of 30% shares and a director responsible for the Lesotho operations of the company and that *'except for a minority shareholder all the other shares are held by GJ Pienaar who hold* (sic) *at least 60% of the issued shares in the respondent company'*.

The applicant's claim is based on what he avers is an agreement and decision of the directors that he be paid a monthly consultancy fee and director's remuneration of **R45, 000.00** and that the respondent is presently indebted to him in the amount of **R141, 000.00** in terms of Annexure "A" and that he is thus a creditor in terms of the Companies Act.

The applicant adds that **GJ Pienaar** was sued by Standard Lesotho Bank as surety for the debts of a company Maloti Guardtex (Pty) Ltd to repossess all industrial machines used by the respondent in its business at Queen II Hospital all of which are under Hire Purchase with the Bank on the basis of which arrangements were made for repayment of the outstanding amounts. That when the respondent failed to honour the settlement agreement, the Bank withdrew thereof.

He adds that **Pienaar** does not come to Lesotho anymore to attend the affairs of the respondent and that he i.e. applicant was never advised about the court proceedings involving assets which he thought belong to the respondent. The applicant then sought access to the respondent's bank records with Nedbank and discovered that huge amounts were withdrawn electronically since June to September 2010 all totaling R2, 700, 000.00. That he has no knowledge of these transfers and for what or whom the payments are made in the Republic of South Africa but that investigations have indicated that they are transferred to the personal account of **Pienaar**.

The applicant further avers thus at paragraph 12.3 of his founding affidavit which in my opinion, contains the crux of his case:-

> *"The fact that I am not paid my monthly consultancy fee is clear evidence of the fact that monies are diverted from the bank account of the Respondent, leaving the Maseru operations and Respondent without any means of survival. This constitutes fraud and theft."*

It is also the applicant's assertion that the respondent did not make VAT returns to the Lesotho Revenue Authority (LRA) which have been outstanding since March 2010 to an amount estimated at **M414, 731.49** and that the Revenue authorities have threatened to close down the operations of the respondent if proper returns are not submitted and payment

made forthwith. Further that the accounts and creditors of the respondent in Lesotho are not being paid resulting in legal actions against the respondent and also that frequently, employees are not paid their monthly salaries in time and have had to wait up to the 15th or thereafter to receive their salaries.

The applicant avers further that when he registered the respondent on **Pienaar**'s instructions he was not aware that a company already existed under the name **Maloti Guardtex** and that all the machines and equipment used in the business of the respondent belong to Standard Bank in terms of a Hire Purchase Agreement and that the former company still owes huge amounts of money to the bank.

On why he approached the Court on urgent basis the applicant avers at paragraph 16.2 as follows:-

> *"We expect huge amounts to come into the Respondent's account in the next week and unless control is taken of the account the monies may disappear especially should Pienaar know of the pending order of Liquidation."*

With respect to why he contends it is just and equitable to place the respondent under provisional liquidation, the applicant asserts that this will enable the total body of creditors, assets and the extent of the debts of the respondent to be established *'to ensure that there is no prejudice or loss as a result of the unlawful withdrawals of the funds as appears*

*from the information I have provided above, and the changes in conversion of the business of previous entities.'*

It is also the applicant's assertion per his verifying affidavit that he is duly authorized to act on behalf of the petitioner in these proceedings for the Provisional Liquidation of the respondent in terms of its members' resolution.

The application is opposed and the answering affidavit has been deposed to by **GJ Pienaar** of 15 Innes Avenue, Waverley, Bloemfontein. He avers that he holds 490 shares in the respondent company and is also a co-director of respondent and that he is duly authorized to so depose on behalf of the respondent in opposition of this application. He annexed a resolution to that effect namely, annexure "P2".

The deponent to the answering affidavit has also raised points *in limine* as follows:-
That there is lack of urgency in this application namely that the petitioner created his own urgency in that a portion of his claim i.e. **M51, 000.00** was allegedly due and payable on the 31st July 2010 whereas the claim for consultation services appears in the invoice dated the 7th September 2010 payment for which is disputed and that the petitioner waited until the 28th September 2010 wherein he approached the Court *ex parte* for the interim order.

That the petitioner has not advanced proper reasons for non-compliance with Rule 8 (22) and that he should have at least given the respondent short notice to oppose and file answering affidavits within reduced time frames to enable the Court to have due regard to the respondent's case to give effect to the *audi alteram partem* rule.

Secondly that the petitioner brought the application without notice and service to the respondent and that if notice had been so given, the claim would have been paid upon receipt thereof and consequently the petitioner would have had no option but to withdraw the application as his *locus standi* as creditor would have fallen away.

Thirdly that the petitioner failed to disclose material facts to the Court in that he is not a director or shareholder of the respondent and that instead the shareholders are **Sello Wlison Ntsupa** who holds 21% of the shareholding, **Taelo Paul Ralejoe** who holds 30% thereof and **Pienaar** who holds 49% and that the three are the only directors of the respondent as evinced by Form L marked annexure "P3" in the Court's file.

**Pienaar** disputes that the petitioner is a shareholder of the respondent as he states as follows at paragraphs 5.3 to 5.5 respectively:-

> *"The petitioner deliberately and fraudulently alleges he holds 30% of the issued shares in respondent which averment is false.*
>
> *He has therefore no interest in respondent and is also most definitely not a director or entitled to director's remuneration.*
>
> *The petitioner was appointed as a consultant for the reasons as advanced later herein and he is entitled to consultancy fees in the amount of M45 000.00 per month."*

The deponent adds that prior to the return date of the application the amount of **M141 000.00** currently claimed by the petitioner would have been paid by Harley and Morris namely, respondent's attorneys of record to those of the petitioner for the credit of his account proof of which will be made available to this Court. I might add that such proof has been made albeit the Court was informed and it was not disputed that the petitioner's attorneys of record declined to accept same.

**Pienaar** also adds that the petitioner did not serve the required statutory notice of demand and did not allow three weeks for payment before he could approach the Court in this manner. Further that the petitioner has not presented

sufficient facts for the Court to find that the respondent is either unable to pay its debts or is deemed so.

I find it convenient to deal with the points *in limine* together with the merits as it is my opinion that they join issue due to the nature of this application. I now proceed to deal with the question whether in terms of the provisions that the petitioner invokes in seeking relief before this Court he has the requisite *locus standi* in terms of the Companies Act. Section 173 of the Act lays down the requirements that need to be satisfied before a company may be wound up and the petitioner relies on paragraphs (f) and (g) of the section which read respectively:-

*A company may be wound up by the court –*
*if the company is unable to pay its debts;*

*if the court is of the opinion that it is just and equitable that the company should be wound up.*

I have already stated that the petitioner describes himself as a shareholder and he avers that he is duly authorized by the respondent to institute these proceedings. However, the fact of his being a shareholder is disputed by **Pienaar** who is supported in this regard by both **Ntsupa** and **Ralejoe** respectively whose shareholding in the respondent is not

disputed albeit it is the opinion of the applicant that the latter two are *'just a front for Pienaar'.*

In my opinion whether this is so or not is immaterial for purposes of my determining whether he, i.e. the petitioner is indeed one of the shareholders. To this end, the respondent has attached copies of share certificates namely, P1, P4, P5 and P6 respectively in support of **Pienaar**'s assertions. The petitioner has in turn attached a share certificate, annexure "B" whose authenticity is challenged by the respondent. I will come back to this issue later. I might also add that although the petitioner makes reference to a resolution that authorizes him to institute this application, he has not filed it of record.

There is also annexure P3 namely Form L being the register of Directors, managers and secretaries of the company. In this document, only three names of the shareholders appear and the petitioner's is not one of them. The resolution to oppose this application i.e. P2 is also signed by the said three and likewise, there is no signature of the petitioner. The petitioner explains the issue of his disputed share certificate at paragraph 8(ii) and (iii) of his replying affidavit as follows:-

> *"Ralejoe was my representative at the time of registration and subscribed to 30% of the shares on my behalf. After registration Pienaar convinced Ralejoe not to transfer his rights of subscription to me and consequently these shares were not issued to me.*

*I admit that Pienaar instructed me to correct the incorrect share certificates, if they can be called share certificates. I deny that I stole shares. Pienaar was fully aware of the fact that I was entitled to 30% of the shares because Ralejoe subscribed on my behalf and consequently I caused the issuing of the share certificate to myself with the knowledge of Pienaar."*

In my view, this explanation does not constitute sufficient proof of the petitioner's claim that he is a shareholder in any manner. This is more so when this very fact is hotly disputed. Further, he did somewhat admit in his replying affidavit that he is not a shareholder but was supposed to have been. At any rate, **Mr. Mpaka**, his Counsel of record did concede during oral argument that the petitioner's shareholding is indeed dubious. In my opinion, this concession puts this issue to rest.

Over and above this dispute constrains me to apply the principle enunciated in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623** in terms of which I have to proceed on the basis of the correctness of the respondent's version together with the admitted facts by the applicant these being motion proceedings. In light of the principle, I accept the respondent's version, *to wit*, that the petitioner is not one of the shareholders of the respondent and

as such does not have the requisite *locus standi* as a member in terms of the Act.

This in turn means that I have to consider the petitioner's application in terms of the other provisions i.e. **paragraph (f) of section 173 of the Companies Act** as quoted above. I might also add that this section has to be read together with section 174(1). The latter provides as follows:-

> *"An application to the court for the winding up of a company shall be by petition presented … by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories or by all or any of those parties together or separately or, in a case falling within sub-section (2) of section one hundred and thirty-three, by the Minister …"*

I now proceed to deal with the question whether the petitioner has satisfied the two provisions read together i.e. is he a creditor as envisaged by the statute. To this end he has attached an Invoice as proof that the respondent is indebted to him in the amounts of **M45, 000.00** and **M51, 000.00** respectively.

The respondent does not dispute the debt in terms of **Pienaar**'s answering affidavit. In this regard, **Mr. Daffue** Counsel for the respondent made the submission that as soon as the respondent was served with the order, it arranged through its attorneys of record to settle the applicant's claim

by way of a trust cheque for which a receipt was tendered to the Court. That as such, the petitioner's claim was duly extinguished and he is no longer a creditor of the respondent.

The cheque payment is not disputed albeit it was brought to the attention of the Court that the petitioner's attorneys of record refused to acknowledge the payment. In my view, nothing turns on the refusal to accept the payment. In other words, it does not negate the fact that a cheque was paid out to the petitioner in an attempt at settlement of his claim.

**Mr. Mpaka** in turn made the submission that despite the payment, the applicant remains a creditor of the respondent because once a rule nisi is issued, a *concursus creditorium* is established and a different body of creditors kicks in. He added that the cheque was not issued by the respondent but by his attorneys of record, to which **Mr. Daffue** argued that this was a result of the provisional liquidation in terms of the order of this Court which made it impossible for the respondent to touch its assets and that for that reason, it is not proof of inability of the respondent to pay its debts.

I now proceed to deal with the effect of the payment *vis-a-vis* the status of the petitioner as a creditor and/or contingent creditor.

Authorities abound that the power of the Court in an application for a winding-up order is discretionary and has to be exercised on judicial grounds. These will depend on the reasons and grounds advanced in an application for winding up. The Court is also warned to be wary to prevent abuse of its process even in those cases where grounds for winding-up are established. **Henochsberg on the Companies Act, 4th Edition p583** states that the Court should do so even in cases:-

> *"…where the application is persisted in notwithstanding that after its presentation it is apparent that it must inevitably fail because there is another remedy available to the applicant, his failure to pursue which is unreasonable."*

The author gives various examples of abuse of court process on the basis of several decided cases such as that ***'in Re a Company (1974) 1 All ER 255 (Ch)*** *the Court stigmatized an application as abuse of its process where the applicant's allegations were partly tricky and partly false, even though through carelessness'*.

In addition, where the Court is approached for a winding-up order on the grounds of the company's inability to pay its debts, it has been stated that the Court has a discretion whether or not to grant the order even where the applicant has established that the company is unable to pay its debts. To this end the learned author states:-

*"…if the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of such order are such as show that there are liquid assets or readily realizable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts."*

Coming back to the present facts, I have already shown that the petitioner herein has been paid in the form of a cheque issued out by the firm of Harley and Morris, the respondent's attorneys of record. As such, it is my view that the respondent has settled its debt against him. Further, in terms of the Act, inability to pay debts is defined as follows in terms if Section 172 in relevant parts:-

*(a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred rand then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office, and if the company has for three weeks thereafter, neglected to pay the sum, or to secure or compound it to the reasonable satisfaction of the creditor; or*

*(b) …. …. …. …. ….;*

*(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the*

*contingent and prospective liabilities of the company.*

It is common cause that in the present application, the petitioner did not make a demand as provided for in paragraph (a) of the section. I cannot therefore find that the respondent is unable to pay its debts in terms of this provision. In addition, I have already stated that the petitioner's debt has been paid up and in my opinion, the fact that the cheque was issued by its attorneys of record does not turn on anything because it was paid only after I had already granted the rule nisi against the respondent and it was not possible for it to access its monies.

It is also my view that this particular ground might have stood if the petitioner had made the requisite demand and the respondent had failed to pay him due to lack of funds. For the reason that it was not given such a chance in terms of the Act, the fact of where the cheque came from, carries no weight and should not be used against the respondent.

**Mr. Mpaka**'s further submission was that the petitioner is a prospective creditor because he offers consultation services to the respondent in response to which **Mr. Daffoe** submitted that the applicant is not an ongoing creditor but has to first submit his statement account for work done which he has not done yet not to mention that even if he were to do so, he would

still be paid. He added that none of the employees has come forward to support the applicant's averments that they have not been paid on time.

In my view, before I can proceed to determine this issue, it is imperative for me to determine what is meant by a prospective creditor. In its basic meaning the term prospective is defined in the **Concise Oxford English Dictionary** as *'expected or likely to happen or be in the future'*.

In terms of the South African authorities, i.e. the case of **Simmons, N.O. v Snobberie Cape (Pty) Ltd 1977 (3) 451** and other authorities referred to therein, a contingent creditor has been described in these words;-

> *"For a person to be a "contingent creditor" within the meaning of section 346(1) (b) of the Companies Act, 61 of 1973, there must be a* ***vinculum juris*** *established between the applicant (for liquidation) and the respondent which may at least become an enforceable debt on the happening of some future event or some future date."*

The section referred to above is similar to our own provision in the Act which leads me to find that the same definition equally applies thereto. I have stated that the petitioner avers that he has a consultancy services contract with the respondent on the basis of which he submits periodic invoices for payment of services rendered. This has not been disputed safe for **Mr.**

**Daffoe** to submit that the applicant is not an ongoing creditor because he has to deliver his statement account for work done and has not done so. That may very well be so but in light of the above authority, it is my view that the applicant herein is a 'contingent creditor' in terms of the definition. This means that he does have the *locus standi* to bring this application in spite of the tendered cheque.

This in turn brings me to deal with the next issue, i.e. whether the applicant has successfully shown that the respondent is unable to pay its debt in terms of the Act. To this end, he avers that **Pienaar** has been withdrawing huge amounts of money from the respondent's account with NedBank. This fact is not disputed, but the respondent's reaction is that notwithstanding those withdrawals, it continues to conduct its operations in terms of three contracts namely, one with the Ministry of Health which terminates at the end of December 2010, another one a three-year contract to the value of M15 million which terminates in January 2013 and another one with Lesotho Sun and Maseru Sun Hotels. Further, in the answering affidavit, **Pienaar** agrees that the respondent has made some late payments but attributes this to the fact that their main client, the Ministry of Health does not pay the respondent on time.

While I have indeed seen the print-out from the Bank supporting the applicant's averment that there have been withdrawals of huge amounts of money, as admitted by **Pienaar** to the effect that the respondent's management and financial control is conducted from Bloemfontein in South Africa, I also find that the company is a going concern that continues to carry on its business and receives periodic payments in that respect. In addition, I am of the view that the very fact that its account has such a sizeable amount of monies, does not support the fact that it is about to become insolvent.

However, I do accept that there might be legitimate cause for concern in the way these withdrawals are made but this begs the question whether that is enough to warrant that I grant a final winding-up order against the company on this basis. I did not find any authority that supports a winding-up by the Court on such grounds. Nor have I been referred to a specific provision that prohibits this but for **Mr. Mpaka's** submission that this is in contravention of the Act. Further, I accept the submission that there was no urgency on the part of the applicant that necessitated him to approach this Court without notice to the respondent if he believed that it would not be able to pay its debts and the only remedy would be for it to be wound up by the Court.

I now turn to deal with the last ground, namely whether as the petitioner contends, it is just and equitable that the respondent should be wound-up. The main thrust of his argument in this regard is that the respondent operates to achieve a fraudulent purpose i.e. **Pienaar** uses it as front to enrich himself at the expense of the creditors including the petitioner and that this company is a one man show and as such the Court is entitled to lift the veil of in-corporation.

In terms of the authorities to which I was referred especially in **Henochsberg on the Companies Act 4th Edition, Volume 2,** it has been stated that justice and equity applies to those with competing interests such as members of the company on the basis of the various grounds and/or examples cited therein such as mismanagement, deadlock amongst members and disappearance of the company's substratum. It is also my view that those grounds would stand where one's *locus standi* derives from him being a member of the company.

For the ground of mismanagement to stand, an applicant has to show that due to this factor, the company will be reduced to insolvency so as to prejudice his prospects of being paid. In the present case, the applicant avers that the other company namely, **Maluti Guardtex** owes Standard Bank a lot of money as evinced by annexure "B" and is also behind in payment of its taxes to the LRA. He adds that the employees of the

respondent have also been paid out of time and that on the basis of all these factors the respondent is unable to pay its debts and that it is just and equitable that it be wound up. However, none of these institutions and/or employees has filed affidavits in support of these assertions. Instead, the other shareholders have filed supporting affidavits to the respondent's.

With regard to members being deadlocked, there is no such averment by the applicant nor have the facts revealed the existence of same. This leaves the ground of the disappearance of the substratum. **Henochsberg (supra) p 589** states that this means that *'the realization of the company's object or all its objects if has more than one), determined by reference to its memorandum, has become objectively impossible'*. He adds as follows:-

> *"The fact, however, that the view of the majority of the members is that the company remains able, and should endeavour, to realize its object (or any object if I has more than one) is an important consideration and ordinarily will not be overridden by the Court unless in the circumstances one could reasonably hold such view … or giving effect to it would involve committing the members' investments to an enterprise substantially different from that, or any of those, within their contemplation when the company was formed…."*

*In casu,* the applicant, a non-member believes and avers that the huge withdrawals of money from the respondent's account

by **Pienaar**, is proof that the respondent is just a front for him to enrich herself. He is not supported by any of the shareholders and/or employees in this regard. Instead, as I have shown, the other shareholders support **Pienaar**. In addition, it is my view that this ground cannot stand because it cannot be properly argued that such withdrawals amount to the substratum of the company having disappeared. The respondent has shown that it has current contracts in terms of which it still offers dry cleaning services to its clients.

It is on the basis of all the above reasons that I have formed the opinion that the petitioner has failed to make out his case on a balance of probabilities, and I accordingly dismissed his application and discharged the rule nisi.

Costs are accordingly awarded to the respondent.

**N. MAJARA**
**JUDGE**

For the applicant : Mr. T. Mpaka
For the respondent :Mr.Daffoe(with him Mr. Mabathoana)