CIV/PET/01/11

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABEX LIMITED	**1ST APPLICANT**
MARIUS WELTHAGEN	**2ND APPLICANT**
DR JOHN ANTHONY CRUISE	**3RD APPLICANT**
IZAK BENJAMIN VAN TONDER	**4TH APPLICANT**
JEFFREY RAYMOND RAPOO	**5TH APPLICANT**
DR JAN WALTERS KRUGER	**6TH APPLICANT**
MASANKISI KAMWANGA	**7TH APPLICANT**
RESKOL DIAMOND MINING	**8TH APPLICANT**
CORNELIUS JOHANNES ENGELBRECHT	**9TH APPLICANT**

AND

DANIEL GERHARDUS ROBERTS	**1ST PETITIONER**
BADENHORST ST CLAIR COOPER	**2ND PETITIONER**

AND

ANGEL DIAMONDS (PTY) LTD	**RESPONDENT**

JUDGMENT

Coram : **Chaka-Makhooane J**
Date of hearing : **30th March, 2011**
Date of Judgment: : **1st November, 2012**

Summary

Urgent petition for winding-up of a company – Disputed claims – Bona fide *defence – Winding up proceedings should not be resorted to as a why of enforcing payment of a debt, particularly where a claim is bona fide disputed by the company of reasonable grounds the company on reasonable grounds – Application for winding-up dismissed with costs.*

ANNOTATIONS

CITED CASES

1. ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and others 1993 (4) SA 436 at 440F-H.
2. Lesotho Bank v Lesotho Hotels international (Pty) Ltd LAC (1995-99) 602 at 613H-J – 615 A-G
3. Investec Bank Ltd v Lewis 2992 (2) SA 111 (C)
4. Robson v Wax Works (Pty) Ltd [2001] 3 ALL SA 546 (C)
5. Barnard v Carl Greaves Brokers (Pty) Ltd and Others 2008 (3) SA 663 (C)
6. Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (united Dress fabrics (Pty) Ltd and Another Intervening 1978 (1) SA 70 (d) at 72E
8. Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597 C-F
9. Stainer v Estate Bukes 1933 OPD 86
10. Trust Wholesalers and Woollens (Pty) Ltd v Mackan 1954 (2) Sa 109 (N)

11. Gardee v Dhanmanta Holdings and Others 1978 (1) SA 1066 (N) 1068-1070

12. Hollhouse v Stott

13. Freban Investments (Pty) Ltd v Itzkin

14. Botha v Botha 1990 (4) SA 591 (D).

    Meskin & Co v Friedman 1948 (2) SA 555 (W) at 558.

15. BP Southern Africa (Pty) Ltd v Furtenburg 1966 (1) SA 717 (O) at 720

16. Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A)

17. Minister of Prisons & Another v Jongilanga 1985 (3) SA 117 (A) at 123 F-1

18. Jagger & Company Ltd Dasoo & Sons (Pty) Ltd & Others 1962 (3) SA 586 (3)

19. Standard Lesotho Bank Limited v Moiloa Isaac Pati CCT/27/2010

20. Wackril v Sandton International Removals (Pty) Ltd and Others 1984 (1)AS 282 (W) at 293B-E

21. Henri Viljoen (Pty) Ltd v Awerbuch Bors 1953 (2) SA 151 (O) at 168 – 170

22. Investec Bank Ltd v Mutemeri 2010 (1) SA 265 (GSJ) at 278A-F

23. Aquatur (Pty) Ltd v Sacks 1989 (1) SA 56 (A) at 62A-E

24. Feedem Catering Services (Pty) Ltd v Feedem Catering Services Lesotho (Pty) Ltd.

STATUTES

1. Companies Act, Act No. 25 of 1967

BOOKS

[1] On the 30th September, 2011 the present petitioners filed a petition with the High Court seeking an urgent winding-up order against the respondent company, on the ground that the company is unable to pay its debts. The petitioners feared that the assets of the respondent will be removed and sold, to the severe prejudice of the general body of creditors. A provisional winding-up order against the respondent company had earlier been granted on the 8th October, 2010.

[2] The petitioners were appointed as provisional liquidators of the respondent. However, on the 19th May, 2011 the provisional winding-up order was discharged, and as a result, the appointment of the petitioners as provisional liquidators fell away. It is alleged that the Master of the High Court ("the Master") duly taxed and determined the amount due to the petitioners in the sum of two hundred and forty seven thousand one and seventy five Maloti (M 247, 175.00). It is common cause that, until the date of the hearing of this matter, the respondent had not settled the debt.

[3] The petitioners argue that a written demand for the payment of the taxed bill, dated the 28th July, 2011 was sent to the directors and shareholders of the respondent. It is apparent that the formal request was made in an attempt to conform with the provisions of **section 172 (a)** of the **Companies Act**[1] of 1967 ("the Act). Upon the realization that the payment

[1] Act of 1967

was not forthcoming, the petitioners have since approached this Court claiming that the respondent company is unable to pay its debts.

[4] I pause here to put the above facts in perspective and further narrate briefly the events that led to this point. The respondent company was granted a prospecting lease to mine the Kolo area, Mafeteng. Sometime during 2009, a dispute arose between the respondent's shareholders, that is, between the Welthagen Group (1st to 7th applicants) and the Engelbrecht Group. On the 8th October, 2010 the 9th applicant obtained an *ex parte* interim order from my sister **Majara J,** to the effect that the respondent should be provisionally wound-up.

[5] The petitioners were as a result of this order granted by **Majara J,** appointed as provisional liquidators of the respondent company. However, on the 19th May, 2011 that order was discharged. On the 30th September, 2011 the petitioners' representatives appeared before my brother **Molete AJ** and obtained a provisional winding-up order against the respondent. The Master then appointed Christoffel Johannes Dippennar as provisional liquidator of the respondent.

[6] The return date of that interim order was ultimately set on the 30th March, 2012 hence the petitioners are now before this Court seeking a final winding-up order. It is common cause that a mining lease over the area in question was in the course of these events granted to another company,

Reskol Diamond Mining (Pty) Ltd ("Reskol") by the Minister of Natural Resources ("the Minister"), on the 4th July, 2011. As is usual with liquidation cases, this matter is mired with a myriad of financial and other claims for and against the respondent company.

[7] Another point which the petitioners have advanced in this matter is that the respondent should be liquidated since its liabilities far exceed its assets. The petitioners submit that, on the one hand, the respondent's known realizable assets are only a mining plant and equipment, with an estimated realizable value of one million Maloti (M 1, 000, 000.00). On the other hand, the petitioners further claim that, according to the best of their knowledge and belief, the respondent's known liabilities sum up to two million two hundred and thirty six thousand one hundred and eighty two Maloti and seventy four lisente (M 2, 236, 182.74). These figures present a shortfall of one million two hundred and thirty six thousand one hundred and eighty two Maloti and seventy four lisente (M 1, 236, 182.74).

[8] The petitioners have further alleged that the respondent is commercially insolvent and therefore unable to pay its debts. They support this claim with the allegation that the respondent was unable to produce proof of funds to the Minister, which failure ultimately led to the loss of tan opportunity to obtain a mining lease. It is further alleged that most of the employees of the respondent have been retrenched, save for security staff to protect the plant and machinery.

[9] Reskol later intervened in these proceedings in that it had a claim against the respondent in the amount of five hundred and eighty four thousand four hundred and two Maloti and sixty one lisente (M 584, 402.61). Reskol alleges that it had paid the said amount to the respondent's creditors upon the Minister's condition that, for them to obtain a mining lease, it should pay the respondent's local creditors. Furthermore, Reskol seeks an order to provisionally liquidate the respondent, their basis being that the respondent has no mining business in the area in question and is therefore commercially insolvent. It will be recalled that Reskol has been granted a mining lease for the area in question.

[10] On the 9th February, 2012 the Welthagen Group became the second intervening party to this case, their argument being that the respondent is not insolvent. The final party to intervene herein is Engelbrecht who claims that the respondent company is commercially insolvent and therefore, it is just and equitable to liquidate it. He claims that the respondent owes him an aggregate sum of one million five hundred and ten thousand and nine Maloti and fifty lisente (M 1, 510, 009.50), the majority of which was lent to the respondent. The intervening party however hastily concedes that all the amounts have not been reflected in properly prepared statements of the respondent.

[11] The respondent vehemently opposes this application and has since joined hands with other interested parties which include its main shareholder,

Thabex Ltd ("Thabex"). It is convenient from now on to refer to these parties holistically as opposing parties. These opposing parties claim that the respondent company was mothballed during the time pending the Minister's consideration of its mining lease. They argue that as a result, it was agreed among the respondent's directors that the company would not incur any expenditure or enter into any obligations.

[12] The opposing parties submit without hesitation that the respondent company had sufficient funds to settle its legitimate debts. It is further submitted on behalf of the respondent that there was sufficient funding for mining activities, and also that its main shareholder, Thabex had complied with the proof of funds requirement as stipulated **section 172** of the Act. As shown above, this mining quest was halted by a provisional winding-up order of the 8th October, 2010.

[13] As regards the petitioners' claim that the respondent is indebted to them in the amount of two hundred and forty seven thousand one hundred and seventy five Maloti (M247,175.00), the opposing parties challenge its basis on the ground that it was not lawfully taxed. It appears that the Master had a predicament on how to tax the provisional liquidators' fees, since it appears on the record that they "*have not been taxing provisional liquidators' fees*"[2] and further that they "*have not been able to get*

[2] Annexure PET 2

precedence (sic) in this regard and are pursuing same"[3]. The opposing parties argue that it is evident from this statement that the purported taxation has not complied with Table Six of the seventh schedule to the Act which obliges the Master to have "*due regard of the special circumstances of the case*"[4].

[14] It is apparent that the petitioners have since refuted the contention that the Master failed to comply with the said provisions. Nonetheless, the provisions dealing with winding-up of companies clearly show from their wording that such orders should not flimsily be endorsed, there should be scrupulous inspection of both a claim and its defence. Hence courts of law have been reluctant to grant final winding-up orders where the existence of a debt is *bona fide* disputed by the company on reasonable grounds.

[15] In the case of ***Lesotho Bank v Lesotho Hotels International (Pty) Ltd***[5], the Court has referred with approval, the legal position in this regard from **Henochsberg on the Companies Act**[6], where it was illustrated that winding –up proceedings should not be resorted to as a way of enforcing payment of a debt, particularly where a claim is *bona fide* disputed by the company on reasonable grounds. This case further instructs that where the claim is challenged in good faith, the company being sought to be wound-

[3] Annexure PET 2
[4] Annexure PET 2
[5] LAC (1995 – 99) 602 at 614 A - C
[6] 5th Ed Vol. 2 at p693 - 694

up should be given the benefit of doubt[7].(See also ***Kalil v Decotex (Pty) Ltd & another***[8].

[16] It appears that the opposing parties have a valid claim against the petitioners' claim of two hundred and forty seven thousand one hundred and seventy five Maloti (M 247, 175.00), more so when the opposing parties have contended that they never received the bill concerning this debt. I am inclined to reject the petitioners' claim on the ground that the respondent has raised legitimate defences against such a claim.

[17] To the claim that the respondent's assets exceed its liabilities, the opposing parties accuse the petitioners for failing to account for realizable assets, such as diamond stock valued at approximately five hundred and fifty thousand Maloti (M 550, 000.00) and other movables valued in excess of one million Maloti(M 1, 000, 000.00). In turn, the opposing parties have in the alternative made a counterclaim against the petitioners in excess of one million Maloti (M 1, 000, 000.00) for the petitioners' alleged negligent conduct, in failing to protect and preserve its assets. Without conceding, the opposing parties argue that if the respondent's assets had been used for the benefit of the respondent, they would have settled the alleged debts.

[7] Lesotho Bank v Lesotho Hotels International (Supra) at 615 A - G
[8] 1988 (1) SA 943 (A) 980 - 2

[18] The opposing parties have further supported their defence with the petitioners' own assertions. The petitioners have shown in their papers that they dismantled and removed the respondent's mining plant and equipment. The petitioners have further indicated that the respondent's genset was removed and sold to pay the respondent's employees. The opposing parties have also challenged the credibility of the petitioners' claim by pointing out that, in all the transactions concerning the respondent company, the petitioners have not prepared a statement of account.

[19] There seems to be an element of doubt on the claim that the respondent's assets exceed its liabilities. As stated in the ***Lesotho Bank*** case (supra), where a doubt exists on the indebtedness of a company facing liquidation, that company should be given the benefit of such doubt. It can be gleaned from the foregoing claims that the assertion that the respondent's liabilities exceed its assets, is up to this point uncertain. There appears no clear and cogent evidence on the papers for the respondent's indebtedness. The same applies with the claims by the intervening parties. This doubt should thus lean in favour of the respondent company.

[20] On the issue of pending wages of employees, the opposing parties have submitted that since the operations of the respondent were mothballed, the respondent was not supposed to incur any further expenditure, and in particular, the employees' wages had not been budgeted for. Other than that, the opposing parties have shown some contradictions in the amounts

claimed to be owed to employees. The Directorate of Dispute Prevention Resolution ("DDPR") award, annexure "MWI 34" and Reskol's annexures show respective amounts of ninety one thousand six hundred and fifty five Maloti and thirty seven lisente (M91, 655.37), one hundred and twenty five thousand Maloti (M125, 000.00 and one hundred and seven thousand one hundred and nine Maloti and three lisente (M107, 109.03). The respondent sums these contradictions up by arguing that the amounts were cooked and therefore false.

[21] In any event, the claim concerning non-payment of employees can be brought and advanced by none other than the affected employees.

[22] It is for the forgoing that, the petitioners' and interveners' respective applications for the provisional winding-up of the respondent company are dismissed with costs.

CHAKA-MAKHOOANE
JUDGE

For the Applicants	**:**	**Mr. Letsika**
For the Petitioners	**:**	**Mr. B. Pretorius**
Assisted by	**:**	**Mr. Mpaka**
For Reskol	**:**	**Mr J. W. Steyn**
For Interveners	**:**	**Mr. Edeling**