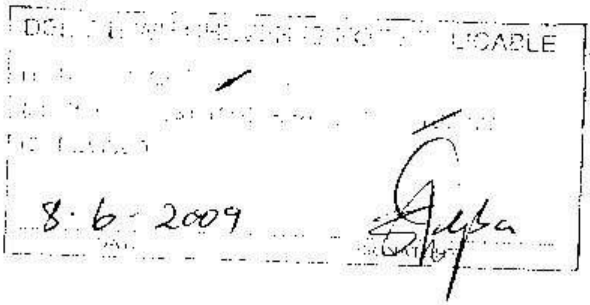
IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 45665/2008



DATE: 8/6/09

IN THE MATTER BETWEEN

MASEMA (PTY) LTD APPLICANT

AND

SELOANE FARMERS (PTY) LTD RESPONDENT

JUDGMENT

MAKGOBA, J

[1] This is the return date for a provisional liquidation order which was granted by FABRICIUS, AJ on 7 October 2008 after an urgent application was brought by the applicant.

[2] The applicant seeks a final liquidation of the respondent on the grounds that the respondent is unable to pay its debts as contemplated in section 344(f) read with section 345(c) of the Companies Act no 61 of 1973 (as amended) and also that it

would be just and equitable that the company should be wound-up as provided for in section 344(h) of the Companies Act.

[3] The application is opposed and the respondent filed its opposing papers on 13 November 2008. On 14 November 2008 the matter was postponed to 1 June 2009 for hearing on the opposed roll.

[4] The applicant's replying affidavit was served on the respondent's attorneys of record on 18 May 2009, more than five months after the respondent's answering affidavit was filed and the matter already postponed for hearing on the opposed roll.

[5] In its replying affidavit the applicant prays for condonation for the late filing of the replying affidavit. The applicant avers that the delay was caused by the immediate unavailability of certain records of payment and comprehensive documents. That it needed to retrieve records of payment and comprehensive documents from the archives of the business known as Du Roi Precision Farming ("DRPF") in Letsitele before it could reply to the respondent's answering affidavit.

[6] It is apparent from the papers that both Mr Abram van Rooyen and Ms Haasbroek, the deponent to the founding affidavit as well as the replying affidavit, are directors of both Dezzo Trading 397 (Pty) Ltd t/a Du Roi Precision

Farming and the applicant. Both the applicant and Du Roi Precision Farming's places of business are in Letsitele. It could not have taken five months to retrieve the documents. In my view the applicant could not have experienced any difficulty to obtain access to DRPS's archives.

[7] The court may, on good cause shown, condone any non-compliance with the rules. However, the "cause" must be such that a valid and justifiable reason exists why compliance did not occur and why condonation should be granted. I am of the view that no valid reasons or good cause have been shown for the late filing of the respondent's replying affidavit.

[8] A cursory look at the replying affidavit reveals that the applicant has come up with a new set of facts which were not set out in its founding affidavit. Such facts go to an extent of establishing a new cause of action which is not apparent from the founding affidavit. The general rule which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged in it. Although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or to deny.

[9] I am of the view that the acceptance of the applicant's replying affidavit *in casu* will be prejudicial to the respondent who will not have an opportunity to respond to such new allegations.

[10] In *Bayat & Others v Hansa & Another* 1955 3 SA 547 (N) at 553C-E it was said that:

> "An applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving *ex parte* or on notice to the respondent, and is not permitted to supplement it in his replying affidavit (the purpose of which is to reply to averments made by the respondent in his answering affidavits) still less make a new case in his replying affidavit."

It is against this background that I decide not to accept the late filing of the respondent's replying affidavit. The respondent's replying affidavit is therefore disregarded and consequently struck out.

[11] Before dealing with the merits of this application it is appropriate to sketch the historical and factual background to this matter.

[12] The respondent is a company established by a group of upcoming farmers who rented the farm, Seloane, from the Ba-Seloane Community in Limpopo. During

January 2004 a loan agreement was entered into between the applicant, who claims to be representing the interests of the respondent's creditors, and the respondent.

[13] As a result of the abovementioned loan agreement, the respondent was compelled by the applicant to employ Du Roi Precision Farming ("DRPF") as its management agent. This was despite the fact that the respondent, in terms of the loan agreement could have nominated any person to act on its behalf as management agent.

[14] According to the applicant it advanced monies to the respondent in terms of the loan agreement, *inter alia* R1 041 443,00 on 16 January 2004. This is specifically denied by the respondent. It is the respondent's version that it never received any money from the applicant or any of the alleged creditors. According to the respondent money might have been paid to DRPF, but it was never received by the respondent.

[15] From the outset a conflict existed between the directors of the respondent and DRPF as a result of the manner in which DRPF managed the farm. These conflicts resulted *inter alia* in a court application against DRPF in the local magistrate court and letters of complaint against it addressed to the Premier, Limpopo Province. Eventually the directors of the respondent were no longer prepared to work with DRPF as the management agent on the farm.

[16] The respondent opposes the final liquidation order on three main grounds namely-

16.1 that the applicant failed to prove any indebtedness to it, thus it has no *locus standi* to bring the application for liquidation of the respondent;

16.2 that the applicant failed to show that the respondent is unable to pay its debts or that it is insolvent or has committed any act of insolvency; and

16.3 that the applicant failed to show to the court that it is just and equitable that the company (respondent) should be wound up.

[17] I proceed to deal with each of the three grounds raised by the respondent.

[18] In the founding affidavit the applicant alleged that it was acting as an agent of the respondent's creditors namely the Development Bank of Southern Africa ("DBSA"), the Agricultural and Rural Development Corporation ("ARDC") and Du Roi Invesco and that the respondent received the credit advanced to it by its creditors through the applicant. However, despite a specific invitation by the respondent to submit its authorisation to institute the liquidation application on behalf of the respondent's creditors, the applicant failed to do so.

[19] On the applicant's own version, it was established to represent the respondent's creditors, but it failed to indicate in terms whereof it was authorised to represent

the interest of the creditors and whether it was authorised to apply for the liquidation of the respondent on behalf of any of its creditors. The applicant furthermore states in the founding affidavit that the credit to the respondent was only advanced "through it" and not by it. This is confirmed by what the applicant refers to as a reconciliation of the loan account with Masema, attached as annexure "EH2" to the founding affidavit. The reconciliation specifically mentioned DBSA, ARDC and Invesco funds. It does not make mention of any funds emanating from the applicant.

[20] The applicant failed to submit any proof of payments of the so-called money advanced to the respondent. The respondent, on the other hand, submitted proof to the contrary. It is evident from the respondent's bank statement of the period 1 January 2004 to 26 January 2004 that the amount of R1 041 443.00 allegedly paid by the applicant on 16 January 2004 was not received at all.

[21] Not only is the debt disputed, the applicant's *locus standi* is also disputed and in the premises, the applicant failed to establish a claim which entitles it to apply for the liquidation of the respondent.

[22] The respondent should have committed an act of insolvency or should be *de facto* insolvent for it to be liquidated. The applicant alleged that –

"It then came to the applicant's notice that the directors of the respondent were unlawfully harvesting the fruits and selling it, without accounting to the applicant."

This statement implies that an act of insolvency is being committed and that such removal of the fruits is being done with intent to prejudice the creditors. No further details or an affidavit from the source of this information was provided. These allegations are denied by the respondent and in the light of the fact that it is based on vague and unsubstantiated hearsay, it has no evidential value and should be disregarded.

[23] The applicant has furthermore failed to show that the respondent is unable to pay its debts as required in terms of section 344(f) read with section 345(c) of the Companies Act no 61 of 1973. According to the applicant it is the respondent's only creditor and on its own version the value of the citrus and mango crops might be R2 338 744,69 which would be sufficient to pay the outstanding loan. In the circumstances the applicant has failed to prove that the respondent is unable to pay its debts.

[24] As stated above the respondent denies any indebtedness to the applicant. The applicant failed to attach a proper certificate of indebtedness to its application. The so-called "reconciliation" attached as annexure "EH2" to the founding affidavit is not a certificate of indebtedness. The applicant has, therefore,

proceeded with this liquidation proceedings against the respondent on their own agenda.

[25] The conduct of the applicant amounts to an abuse of the process of the court. P M Meskin *et al* in *Henochsberg on the Companies Act*, volume 1, 5th edition at pp693-694 have this to say:

> "In addition to its statutory discretion, the court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a 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, eg the attempt to enforce payment of a debt *bona fide* disputed, the harassment or oppression or defrauding of the company, the frustration of its rights or the removal of an obstacle to the profitable realisation of an investment."

See also *Tucker's Land & Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 3 SA 253 (W) at 256-257.

[26] An application for the liquidation of a company should not be resorted to to enforce the payment of a debt which is *bona fide* disputed by the company. The liquidation of a company affects the interests of all creditors and shareholders, and an order for its liquidation should not lightly be granted on the application of

a single creditor. See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 2 SA 346 (T).

[27] The applicant furthermore alleged that it would be just and equitable to wind up the respondent. Section 344(h) of the Companies Act, 1973 provides that the company may be wound up by the court if it appears to the court that it is just and equitable that the company should be wound up.

In an effort to justify its allegation that it would be just and equitable to wind up the respondent the applicant has the following to say: That the respondent failed to comply with its repayment obligations and a dispute arose regarding the management of the farming activities resulting in a deadlock situation where no co-operation existed as was intended. This resulted in a total breakdown of co-operation and the unlawful harvesting of the crops.

[28] On the contrary it is evident that the directors of the respondent did everything possible to address the difficulties and act in the best interest of the respondent. Since 2007 they were dissatisfied with the manner in which DRPF managed the farm. They instituted legal action and filed several complaints against DRPF all addressing the fact that they were totally excluded from the management of the farm and the finances. Instead of listening to their plight the applicant has now resorted to liquidation proceedings. In my view the applicant's conduct in this regard smacks of high-handedness.

[29] For what it may be worth, it is apposite to mention that the community of Seloane is against the liquidation of the respondent. To this effect the respondent attached to its answering affidavit resolutions of the Seloane Communal Property Association and the Ba-Phalaborwa Ba Ga-Seloane Traditional Authority as annexures "M8" and "M9" respectively. The contents of these resolutions show clearly that the community regards the farming project conducted by the respondent as their pride which should be kept and protected at all costs. Therefore it cannot be just and equitable that the respondent be liquidated.

[30] The intended liquidation of the respondent is, in my view, an indirect hostile take-over of a community project by the applicant and the court frowns upon such a conduct. Suffice it to say that the applicant failed to submit any justifiable reasons why the respondent should be liquidated.

[31] Counsel for the respondent has asked for a punitive order of costs. He submits that the applicant was *mala fide* in bringing the application without any authorisation from the creditors and being well aware of the fact that a huge dispute in respect of indebtedness exists. I agree.

[32] I accordingly grant the following order:

(a) The provisional liquidation order is discharged.

(b) The applicant shall pay the costs of the application on attorney and client scale.

(c) The applicant shall be responsible for payment of all costs incurred by and in respect of the liquidator in terms of the provisional order granted on 7 October 2008.

E M MAKGOBA
JUDGE OF THE NORTH GAUTENG HIGH COURT

45665-2008

HEARD ON: 4 JUNE 2009
FOR THE APPLICANT: J C KLOPPER
INSTRUCTED BY: CORRIE NEL ATTORNEYS,
C/O JACQUES ROETS ATTORNEYS
FOR THE RESPONDENT: J F BARNARD
INSTRUCTED BY: G A MALULEKE ATTORNEYS
C/O P K POTO ATTORNEYS