IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 84979/2014

In the matter between:

ROSELLI, VITTO Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

DEREK'S BOEREWORS & PIE MECCA CC First Respondent

NIEMANN, ANNA SUSANNA Second Respondent

NIEMANN, SUSAN Third Respondent

JUDGMENT

NGALWANA AJ

A. **The Problem**

[1] The applicant comes to this Court, on special motion, seeking an order that the first respondent *"be finally wound up and placed in the hands of the Master"*. The obligatory costs order is also sought – against all three respondents. It is common cause that the second and third respondents are members of the first respondent close corporation.

[2] The basis for the order sought is that the first respondent close corporation is commercially insolvent and, in any event, it is just and equitable to *"place the hand of the law"* upon it as it is being used by the second respondent for insalubrious purposes: fraud to be precise.

[3] He seeks to hinge his *locus standi* on his membership of the first respondent close corporation or, in the alternative, his status as creditor of the first respondent close corporation in a sum in excess of R1,2 million. The second respondent places in dispute both the applicant's membership of the close corporation and his status as its creditor.

[4] The respondents contend that there arise material and *bona fide* disputes of fact that are not capable of resolution on the papers and that were known to the

applicant at the time of launching this application. For that reason they seek a dismissal of this application with costs.

[5] The respondents also balk at the joinder of the second and third respondents in proceedings that are targeted at the first respondent close corporation and in which no relief is sought against them. For this they want a punitive costs order against the applicant whether or not his application succeeds. There is no misjoinder. The second and third respondents, being members of the close corporation, clearly have a direct and substantial interest in the winding up of the close corporation. In any event, a punitive costs order is not an appropriate remedy for misjoinder.

[6] They also want a punitive costs order because, they say, the applicant included in his papers settlement proposals between the parties which they contend constitute inadmissible evidence. Again, a punitive costs order is not appropriate remedy for that. A striking out application is. The respondents have not sought the latter.

[7] The applicant contends that these settlement proposals constitute evidence of the close corporation's inability to pay its debts and are thus admissible in winding-up proceedings. The respondents' retort is that this position is true only where the applicant relies on an act of insolvency. It is not necessary to decide

this issue here. The respondents have not sought the striking out of the matter about which they complain.

B. The Solution

[8] The purpose of the courts in motion proceedings is to resolve legal disputes on common cause facts. This application does not fit that mould. In my view the application is disposable on one question, namely, whether there arise disputes of fact of the sort that is material, *bona fide*, foreseeable and incapable of resolution on the pleadings.

[9] The application was launched on 27 November 2014. A month earlier (on 28 October 2014) the respondents' attorneys cautioned the applicant's attorneys about the inappropriateness of motion proceedings in light of *"a clear dispute of fact"*. That dispute related to whether the applicant was a member of the close corporation and held an interest in it. Moreover, there is a material dispute as regards whether the applicant is a creditor of the first respondent close corporation or of the second respondent. These are not spurious disputes.

[10] More than 65 years ago a warning was sounded by our courts about the abuse of motion proceedings as follows:

"It is becoming a habit to bring applications to Court on controversial issues and then to endeavor to turn them into trial actions. Applicants thereby obtain a great advantage over litigants who have proceeded by way of action and who may have to wait for many months to get their cases before the Court. Such applications-cum-trials interpose themselves, occupying the time of Judges and still further delaying the hearing of legitimate trials. Applications for the hearing of viva voce evidence in motion proceedings should be granted only where it is essential in the interests of justice."[1]

[11] This is why a Court has a discretion to dismiss an application with costs where an applicant knows or ought reasonably to have known that there is likely to arise material and *bona fide* disputes of fact which cannot reasonably be resolved on the pleadings.

[12] More than 40 years ago, this division re-iterated a well-established rule of practice here as follows:

"It is a well-established rule of practice in this Division, that dismissal of the application with costs is the proper course to follow if Omegalabs knew

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1 *Garment Workers' Union v De Vries and Others* 1949 (1) SA 1110 (W) at 1133. See also *Seloadi v Sun International (Bophuthatswana) Ltd* 1993 (2) SA 174 (BG) at 191; *Bonges v Bonges en 'n Ander* 1965 (2) SA 82 (O) at 85; *De Kloe and Slingerland v Geddes* 1946 TPD 650 at 653.

or should have known before the proceedings were instituted, that there was likely to be a dispute of fact which the Court would not be able to resolve on affidavit."[2]

[13] Once identified, the resolution of factual disputes in motion proceedings must be done pursuant to the long-established principles laid down in the qualified *Stellenvale*[3] rule in motion proceedings[4]. Those principles are, in summary, the following:

13.1 The starting point is that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts.

13.2 Unless the circumstances are special, motion proceedings cannot be used to resolve factual issues because they are not designed to determine probabilities.

13.3 Where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits,

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2 *Carrara and Lecuona (Pty) Ltd v Van Den Heever Investments Ltd and Others* 1973 (3) SA 716 (T) at 720

3 Which derives from *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G

4 See *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para [26], 290E-F; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.

13.4 It may be different if the respondent's version consists of bald or implausible denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers.

13.5 I should add that where facts are peculiarly within the knowledge of the party who fails to transmit that knowledge to the Court, the Court is entitled to draw inferences that are least favourable to that party from the proven facts.

[14] But the qualified *Stellenvale*[5] rule in motion proceedings[6] does not even arise here because these disputes are not capable of resolution on the papers. The picture that emerges is this:

14.1 The applicant knew a month before launching these proceedings that his membership of the first respondent close corporation is strenuously disputed.

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5 Which derives from *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G

6 See *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para [26], 290E-F; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C

14.2 He knew from the correspondence with the second respondent's attorneys that his dispute was with the second respondent and not with the first respondent close corporation. Indeed, his opprobrium in the pleadings is reserved for the second respondent (not the close corporation) for the manner in which he says she has conducted herself and the affairs of the close corporation throughout.

14.3 In any event, it is clear from the pleadings that whatever *"agreement"* there may have been is between the applicant and the second respondent. On his own version in founding papers, the applicant talks of an agreement with the second respondent for the acquisition of an interest in the close corporation following payment of some R1,2 million. The second respondent denies that there was such an agreement and in any event pleads in the alternative that even if there were such an agreement, the applicant had not fulfilled its terms as he had not paid the full amount agreed upon. In reply, the applicant does not aver that the agreement was with the close corporation and that the close corporation is indebted to him. He says,

"I note the admission <u>on behalf of the second respondent</u> that I '. . . only paid over an amount of roughly R1,296,704.25'.

On her own admission, there is an indebtedness to the sum of in excess of R1.2 million, and as such, I am clearly a creditor."

14.4 In this context, clearly the averment is that the applicant is the creditor of the second respondent. The close corporation is a separate person and, although the applicant alleges fraud on the part of the second respondent in her running of its affairs, there is no relief sought under section 20(9) of the Companies Act, 71 of 2008 for the piercing of the corporate veil. Winding up proceedings against a close corporation that on the facts is not indebted to the applicant are not the appropriate remedy for the recovery of a debt that is owed by a member of that close corporation.

14.5 There are no special circumstances that warrant the resolution of these factual disputes in the affidavits.

14.6 These disputes are material, *bona fide*, and were foreseen by the applicant.

14.7 In any event, the applicant seeks a <u>final</u> winding up order which is not available where there are disputes of fact. Only in his supplementary heads of argument and from the Bar did Counsel for the applicant seek an interim winding up order. I can think of no compelling reason in the interests of

justice to grant orders not sought in the papers and for which no case is made out in the papers.

14.8 It would hardly be in the interests of justice to refer these factual disputes to the hearing of *viva voce* evidence. Not only did the applicant know, at least a month before launching these motion proceedings, that his membership of the close corporation was disputed, he also knew that both the quantum of his claim and the party against whom it lies was disputed. To refer such disputes for the hearing of *viva voce* evidence would in my view encourage precisely the sort of *"applications-cum-trials"* that were deprecated by the courts more than 60 years ago.

[15] For all these reasons, and on the authority of *Carrara and Lecuona (Pty) Ltd v Van Den Heever Investments Ltd and Others* 1973 (3) SA 716 (T) at 720, the application must be dismissed with costs. It is hardly an answer in these circumstances to say because the Companies Act requires that winding up proceedings must be brought on motion, therefore action proceedings are not an option. The applicant had other remedies available to him for the recovery of a debt – assuming for the moment that the debt is owed by the close corporation.

[16] In argument the applicant's Counsel sought to mount a different steed. He contended that following the respondents' admission that some R1.2 million had

been paid by the applicant to the second respondent which did not result in the transfer of the 50% interest in the close corporation as had been the applicant's intention, then the applicant's claim for the winding up of the close corporation is founded on *condictio indebiti*. He says this is because it is the close corporation that has been enriched and not the second respondent.

[17] This horse has short legs. First, this was never the applicant's basis for the winding-up application in the pleadings. Second, this was never the relief sought in the notice of motion. Third, a *condictio indebiti* is a delictual remedy against a party who has not only been enriched but also unjustly so at the expense of another in action proceedings.

[18] In the result, the application is dismissed with costs.

V NGALWANA

ACTING JUDGE OF THE HIGH COURT

Date Heard: 21 November 2016

For the Applicant: J Hershensohn

Instructed by: Coetzer and Partners

For the Respondents: JGC Hamman

Instructed by: Romanos Attorneys

Date of Judgment: 01 December 2016