

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 4634/02

In the matter between:

COMBUSTION TECHNOLOGY (PTY) LTD

Applicant

And

TECHNOBURN (PTY) LTD

Respondent

JUDGMENT: 3 September 2002

VAN REENEN, J:

- 1] The applicant on 30 May 2002 applied for an order winding-up the respondent provisionally on the basis that it is unable to pay its debts.
- 2] The respondent opposes the application and filed an answering affidavit in response to which the applicant filed a replying affidavit.
- 3] The applicant bases its **locus standi** on an averment

that the respondent is indebted to it in an amount of R165 644,82 in respect of the balance of goods sold and delivered during 2000/2002. As regards the respondent's inability to pay its debts the applicant's case is based solely on inferences drawn from the fact that, despite meetings between the applicant's and the respondent's representatives on three occasions between 29 April 2002 and 6 May 2002, during which the respondent's queries were dealt with; promises of payment made; and a written demand made on 20 May 2002, no payment had been received.

- 4] Exactly two months after the respondent had received a copy of the application, namely on 23 July 2002, the respondent's attorneys addressed a letter to the applicant's attorneys advising them that according to the respondent's calculations the nett

amount owing by it to the applicant was an amount of R95456,23 and that it had been paid into its trust account. The respondent's attorneys on its behalf tendered payment of that amount in full and final settlement of "your client's liquidation application, as also the Magistrates Court matter under case number 26146/2000" subject to further specified conditions.

- 5] The respondent in its answering affidavit which was deposed to on 26 June 2002, referred to the fact that the amount of R95456,23 had been paid into its attorney's trust account and undertook to pay in a further amount of R70188,59 which together with the first amount would be held in trust until the winding-up application is finalised. That was done, presumably, to lend credence to the respondent's allegation that "it is prepared to, and will, pay the applicant as soon as the dispute in respect of the

amount owing can be resolved.”

- 6] The letter of the respondent’s attorney of 23 July 2002 and the contents of the respondent’s answering affidavit elicited the following response from the applicant’s attorneys in a letter dated 30 July 2002 as regards the further conduct of the matter:

“Against payment by your client of its admitted indebtedness to our client, as well as our client’s party and party costs arising from the winding up application, our client is prepared to withdraw such application subject to our client reserving its rights regarding the balance of its claim against your client.”

In the event that the foregoing does not find favour with your client, we call upon you to effect payment of your client’s admitted indebtedness to our client forthwith, the issue of costs to stand over to be determined by the court at the hearing of the matter. For the sake of clarity we record that should this proposal find favour with your client, the only issue to be determined at the hearing of the matter will be the issue of costs. Similarly in this regard all or client’s rights regarding the

balance of its claim remain reserved.

Should neither of the aforesaid proposals find favour with your client, our client shall have no alternative but to proceed with its application which would result in our client incurring further unnecessary costs. In this event, we are of the view that your client's conduct would be improper and vexatious and we hold instructions to seek a punitive costs order against your client in the event that the matter must of necessity proceed as aforesaid."

7] As neither of the proposals were acceptable to the respondent the applicant filed a voluminous replying affidavit in which it, for the reasons set out therein, intimated that it no longer persisted in seeking an order for the provisional winding-up of the respondent but that it would seek an order in the following terms:

"That Respondent be ordered and directed to forthwith make payment of its admitted indebtedness to Applicant in the sum of R95 456,23 by way of bank guarantee cheque or cheque drawn on its attorney's trust account by no later than 12h00 on Friday, 30 August 2002."

8] Advocate Selikowitz who represented the applicant at the hearing indicated that such relief was being sought in terms of the prayer for "such other and/or

alternative relief as may be deemed fit and proper” in the notice of motion.

9] In view of the applicant’s stance that it no longer persists in the seeking of an order for the provisional winding-up of the respondent, the relief claimed in paragraphs 1, 2 and 3 of the Notice of Motion is refused.

10] Is the applicant entitled to an order in the terms set out in paragraph 7 above under the prayer for other or alternative relief?

11] The extent to which a plaintiff or an applicant may be granted relief in an application or action under a prayer or claim for further and/or alternative relief is not devoid of difficulty. **I. Isaacs: Beck’s Theory**

and Principals of Pleading in Civil Actions (5th

Ed at 61) says that it “cannot be precisely indicated”

whilst **HJ Erasmus et al: Supreme Court Practice**,

at B1 – 130 A content themselves with that it “will not

assist a plaintiff who seeks relief of quite a different

nature from that asked for in the summons”. It is not

possible to distill generally applicable criteria from the decided cases in which the ambit of a prayer of that nature (the so-called **clausule salutare**) has been considered (See: **Trustees of the Orange River Land and Asbestos Company v King and Others** 6 GHC 260; **Colonial Treasurer v Senekal Municipality** 1910 OPD 7; **Queensland Insurance Co Ltd v Banque Commerciale Africaine** 1946 AD 272 at 286; **Rooibokoord Sitrus (Edms) Bpk v Louw's Creek Sitrus Kooperatiewe Maatskappy Bpk** 1964(3) SA 601 at 608 A; **Luzon Investments (Pty) Ltd v Strand Municipality and Another** 1990(1) SA 213 (C) at 229 G – 230 B). Berman J in **Luwala and Others v Port Nolloth Municipality** 1991(3) SA 98 (C) at 112 D – E provided the following, in my respectful view, instructive, exposition thereof:

“Such a prayer can be invoked to justify or entitle a party to an order in terms other than that set out in the notice of motion (or summons or declaration) where that order is clearly indicated in the founding (and other) affidavits (or in the pleadings) and is established by satisfactory evidence on the papers (or is given), cf **Trustees of the Orange River Land and Asbestos Co v King and Others** 6 HCG 260 at 296 – 297. Relief under this prayer cannot be granted which is substantially different to that specifically claimed, unless the basis therefor has been fully canvassed, viz the party against whom such relief is to be granted has been fully apprised that relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief being pressed under the head of ‘further and/or alternative relief.’

- 12] The clear purpose of the applicant’s application was to bring about a **concursum creditorum** resulting in the “hand of the law being laid on the estate” (per Innes CJ in **Walker v Syfret NO** 1911 AD 141 at 166) with a view to achieving an orderly realisation of assets and the distribution of the proceeds thereof to creditors. As was said by De Villiers CJ in **Collett v Priest** 1931 AD 290 at 299, in relation to the nature of sequestration proceedings, but in my view equally applicable to winding up proceedings,

“... there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor upon any such claim”

Not only is the relief that is now being sought namely, payment (ignoring the frills and furbelows) substantially dissimilar to the relief sought in the notice of motion but the respondent has not been apprised that such relief would be sought, and furthermore has not had an adequate opportunity of considering and dealing with it in the answering affidavit.

13] In the premises I have come to the conclusion that the applicant is not entitled to the order it now seeks under the prayer for other and/or alternative relief.

14] the only remaining issue is which of the parties should be held liable for the costs of the application. Advocate Maher, who appeared for the respondent contended that costs should follow the result and that the scale thereof should be a punitive one. Advocate Selikowitz contended that the respondent should be

ordered and directed to pay the applicant's costs of the application –

- a) up until and including 23 July 2002 on a scale as between party and party; and
- b) as from 24 July 2002, on the scale as between attorney and own client.

15] As the consequence of the dismissal of the relief the applicant sought, the respondent is the successful party and is entitled to its costs unless the general rule that costs follow the result is deviated from. The effect of the costs order that the applicant seeks is that the successful party to the proceedings should be ordered to pay the unsuccessful party's costs. Although a court in the exercise of its discretion is entitled to make such an order, it in the absence of special circumstances, is unusual (See: **Kent v Bevern and Co** 1907 TS 395 at 401; **Palley v Knight NO** 1961(4) SA 633 (SR) at 638 in fine – 639

A; **Erasmus v Grunow en 'n Ander** 1980(2) SA 792 (O) at 797 H). The instances where such orders have been made are where the court disapproved of the successful party's conduct (See: **Mahomed v Nagdee** 1952(1) SA 410 (A) at 420 – 421) such as where the successful party misled the other party into litigating; caused unnecessary litigation or procedural steps to be taken; or induced litigation by the withholding of information (See: **Kent v Bevern & Co** (supra) at 401 – 402; **Chenille Industries v Vorster** 1953(2) SA 691 (O) at 702 A; **De Villiers v Soetsane** 1975(1) SA 360 (ECD) at 363 A; **Nxumalo v Mavundla** 2000(4) SA 349 (D) at 354 D – E).

- 16] The special circumstances on which the applicant relies in seeking an order of costs against the

respondent are that it employed the stratagem of a bare denial of the quantum of the applicant's claim; that had it effected payment timeously of its admitted indebtedness in accordance with its undertaking to have done so, the application would not have been brought; and that the application was necessitated by the respondent's obstructionist and misleading attitude and conduct before and after the launching of the application, more in particular after the respondent had quantified its admitted indebtedness to the applicant in its attorney's letter of 23 July 2002.

- 17] The respondent in correspondence and in its answering affidavit disputed the quantum of its indebtedness to the applicant. The applicant by having requested that the respondent be ordered to pay an amount of R95456,23, by implication, accepted that there is a genuine dispute in respect of R70188,59 of the

amount it claims the respondent owes it. That the respondent would dispute the quantum of its indebtedness is not surprising in view thereof that the amount owed, on the basis of the different demands that the applicant made, varied from time to time. Although the dispute superficially appears to be limited to the quantum of the respondent's indebtedness, the dispute as set out in its answering affidavit, is more fundamental namely, whether there is a written or oral agreement in existence in respect of discounts that the respondent claims it was entitled to; the percentages of the discounts the respondent was entitled to in respect of different products; and whether the applicant has reneged on the agreement.

- 18] It is trite that a seller who claims payment of the purchase price in respect of goods sold and delivered

must allege and discharge the onus of proving the conclusion of a contract of sale, the terms thereof and delivery of the goods sold in conformity with the terms of the contract (See: **Crispette & Candy Co Ltd v Oscar Michaelis NO & Another** 1947(4) SA 521 (A) at 537). It is clear that the respondent disputes part of its indebtedness to the applicant. Because of that dispute the respondent, in my view, was justified to have refused to make payment so as to force the applicant to prove, in a court of law, the amount it alleges the respondent owes it. The respondent in order to ward off the application, on the basis of the information at its disposal, calculated what it believed its indebtedness to the applicant is and tendered payment thereof in full and final settlement and furthermore paid it into its attorney's trust account to demonstrate its ability to pay that amount. The respondent's obvious strategy is not to

pay that amount to the applicant in order to force it to prove the amount that it is entitled to. The respondent's conduct in refusing to pay the applicant the amount it believes is owing, in my view, is devoid of any reprehensibility. I, accordingly, decline to exercise my discretion in the applicant's favour.

19] In the premises, the applicant is ordered to pay the respondent's costs.

20] Although there may be room for speculation thereanent I am not satisfied that the respondent has succeeded in showing that the application has been brought for an ulterior purpose and accordingly am not prepared to order that the costs awarded to the respondent should be taxed on a punitive scale.

D. VAN REENEN