MAKHUVA AND OTHERS v LUKOTO BUS SERVICE (PTY) LTD AND OTHERS 1987 (3) SA 376 (V)

Citation	1987 (3) SA 376 (V)
Court	Venda Supreme Court
Judge	Van Der Spuy AJ
Heard	June 19, 1986
Judgment	September 15, 1986
Annotations	❑

Flynote : Sleutelwoorde

Company - Judicial management - Application for - Application by members of company - In terms of ss 346(2) and 427(2) of Companies Act 61 of 1973 only basis on which members may apply is on just and equitable grounds - Such grounds not present where applicants the majority shareholders and domestic remedies not exhausted - Fact that company could be run more efficiently not in itself constituting ground for granting judicial management order.

Headnote : Kopnota

The applicants sought an urgent order during the Court recess placing the first respondent, a company of which they were directors and the majority shareholders, under judicial management. A previous application had been withdrawn a few days prior to the present application when the Court pointed out a number of difficulties, including the absence of proof that any debt was owed by the company. It appeared

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VAN DER SPUY AJ

that disputes had arisen between the applicants and second respondent, the managing director of the first respondent, over his management of the company. The applicants alleged that the second respondent was acting beyond his powers and in his personal interest in purchasing vehicles and a cold room and that their salaries as directors had not been paid, and, furthermore, that the company had reached a state of total collapse and, in order to protect the growth of the company and in the interests of creditors, there were grounds for placing it under provisional judicial management. The applicants produced a computer print-out from the company's bankers reflecting that on 12 June 1986 there was a debit balance in the company's account of R36 000. The respondents opposed the application contending that there were no grounds for the order, that the application was not urgent and that the company was not in any financial difficulty. The respondents contended that on 12 June 1986 there were sufficient funds in another bank account to meet the needs of the company.

Held, that in the present case there was no reason why the matter could not have waited for the ordinary Motion Court roll in the new term: although some financial loss to the applicants was alleged there was no suggestion that it would be irrecoverable and the application

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accordingly had to be struck from the roll.

Held, further, that in any event in terms of s 346(2) and 427(2) of the Companies Act 61 of 1973 the only basis on which the applicants as members of the company could apply for its being placed under judicial management was on just and equitable grounds: by virtue of the applicants' majority shareholding deadlock had not been reached and the alleged problems could have been solved by domestic remedies. The Court was accordingly precluded from finding that it was just and equitable that the first respondent be placed under judicial management.

Held, further, that it was not in itself a sufficient ground for placing a company under provisional judicial management if the company could be run more efficiently.

Held, further, that in the circumstances, where the applicants had not disclosed certain facts and the proceedings were malicious, vexatious and ill-founded, the respondents were entitled to have costs awarded in their favour on an attorney and client scale. Application dismissed.

Case Information

Application for a provisional judicial management order. The facts appear from the reasons for judgment.

P N Ndou for the applicants.

E Bertelsmann for the respondents.

Cur adv vult.

Postea (September 15).

Judgment

Van der Spuy AJ: This is a matter in which the three applicants are seeking to place first respondent, a public passenger carrier, under judicial management in most unusual circumstances.

The three applicants had previously applied to this Court by way of an urgent motion for the liquidation of first respondent. That motion was dealt with by me on 12 June 1986 and, after having raised various difficulties which included the absence of proof of any debt owing by first respondent and that applicants should resolve their domestic difficulties with the second and third respondents by way of the company's internal mechanisms, rather than apply to Court for liquidation, applicants withdrew the application and no order was made on those papers.

On 19 June 1986, the present notice of motion was first placed before me. The notice of motion with the founding affidavit of first applicant was dated 16 June 1986 and was served on respondents in the late afternoon of 17 June 1986. and was called in this Court as a matter of extreme urgency on 19 June 1986, during the recess of this Court during the holiday period 15 June - 31 July.

VAN DER SPUY AJ

In the founding affidavit first applicant sets out that he is a secretary and one of five directors of first respondent. He sets out that first respondent was incorporated and registered on 12 September 1983 in the Republic of Venda and that it has since carried on the business of a passenger transport service throughout Venda. Furthermore, he states that first respondent has an authorised capital of R2 000 divided into 2 000 ordinary shares of R1 each, and that all the shares have been issued.

This fact was not established in the founding papers nor in the papers later filed, ie the supplementary affidavit, the answering affidavit and the replying affidavit. The parties, however, agreed that the share certificates should be produced, and they were in fact filed with the Registrar after I had reserved judgment. They have now been placed in the file and marked exh E.

According to this exhibit, the three applicants and second and third respondents hold two sets of share certificates, evidencing firstly allotment to each of them of the shares subscribed to in the memorandum of the association, the relevant certificates being dated 12 September 1983 and, secondly, the issue of 399 shares to each of the parties on 20 November 1984, which in effect made each of the parties the holder of 400 shares in the capital of first respondent.

It appears that when applicants and the aforementioned two respondents took control of first respondent they came to an agreement regarding their shareholding and their powers and duties *inter se*, and that agreement was filed as annexure A to the founding affidavit. The agreement was signed at Thohoyandou on 20 November 1984, the same day when the aforementioned blocks of 399 shares for each of the said members were issued to them.

The agreement records that the first directors of the company would be the second respondent, Mr Muthige, the second applicant, Mr Mufamadi, the third applicant, Mr Highson Makhuvha and the first applicant Mr Alpheus Makhuvha. It further records that, until the first general meeting, a quorum for a meeting of directors shall be three directors and, thereafter, a quorum for a general meeting shall be four members in person or represented by proxy or by power of attorney.

The agreement further records that second respondent will be the first chairman of first respondent and that he would have a casting vote in a meeting of directors, or in any general meeting of the company. The agreement then goes on to provide that there will be no further issue of shares, other than those already referred to, and that if there were to be further issues of shares, they should only be issued with the approval of the shareholders in general meeting.

It is then recorded that, as from 1 March 1984, second respondent would be appointed as manager at a salary of R3 000 a month, which was to be increased to R3 600 a month as from 1 September 1984. It is further recorded that the appointment would be valid for one year, and that the position would then be reviewed.

It was further recorded that, with effect from 1 March 1984, third respondent would be appointed as chief mechanic at a salary of R2 500 a month, which was to be increased to R3 000 a month as from 1 September 1984, and that this appointment was to be valid for one year and that the position would then be reviewed.

VAN DER SPUY AJ

In regard to the manager, the agreement specifically provides that he shall be entrusted with the official day to day management of the business of first respondent.

Clause 9.4.2 provides:

'It is however specifically recorded that the manager shall not incur extraordinary expenditure on behalf of the company without the prior approval of the board of directors, nor shall the manager take any decision relating to major policy, disposal of assets of the company and/or the acquisition of motor vehicles on behalf of the company.'

Clause 9.4.3 provides:

'The manager shall be responsible to the company and shall attend meetings of the board of directors and when required to do so to report to the board in regard to the progress of the business of the company, and shall at all times keep the board of directors fully informed in regard to the financial affairs of the company.'

Clause 10 provides:

'In so far as the "non working" directors of the company are required from time to time to carry out certain functions and/or duties on behalf of the company (other than those duties falling under the functions of the manager and the chief mechanic in terms of their respective appointments), it is hereby agreed that the said "non working" directors shall be remunerated for their service in this regard at the rate of R1 000 per month.'

In regard to the duties of the 'non working' directors, the founding affidavit sets out that the 'non working' directors, that is the three applicants, could be required from time to time to carry out certain functions and/or duties, and I was informed that these initially included inspection of bus routes, but later merely required attendance of directors' meetings.

Paragraph 9.1 from the founding affidavit records:

'The "non working" directors' services of bus inspection continued but their remuneration was discontinued towards the end of 1985 despite the fact that there was no resolution by the board of directors to that effect. The manager, Mr Muthige, unilaterally took the decision to discontinue the remuneration without further ado.'

The founding affidavit chronicles a number of complaints against the management of first respondent by second respondent.

The first complaint is that the applicants had never received share certificates but in view of the fact that exh E has now been produced, I hold that there was no basis whatever for that complaint.

The next complaint is that no financial statements were placed before board meetings by the manager to enable the deponent together with other members of the board to be informed in

regard to the financial affairs of first respondent.

The third complaint is that regular board meetings had been held once a week whereat the affairs were fully discussed, but at one stage second respondent stated that such meetings were unnecessary and 'a waste of time' and they should be discontinued.

The founding affidavit then avers:

'9.5 Since then, the company's affairs have been conducted in complete secrecy by Mr Muthige (second respondent) without any report being made to the other directors, albeit (*sic*) myself or the other two applicants.'

VAN DER SPUY AJ

The founding affidavit proceeds to set out that since no board meetings have been called by the manager, first applicant and the other two applicants decided on their own initiative to requisition a meeting on 13 May 1986 at which meeting the agenda required a discussion as to past, present and future prospects of first respondent as well as the production of financial statements and reports on first respondent's affairs.

It is then said that at the said meeting second respondent failed to give the necessary explanation and to present any of the items mentioned above, professing not to have understood the contents of the agenda.

At a subsequent meeting called by second respondent and held on 10 June 1986 at the Venda Sun Hotel, second respondent again failed to explain anything about the past, present and future prospects of the company. Nor did he present any financial statements and reports.

It is stated that at this meeting second respondent indicated that first respondent was experiencing serious financial problems as its cash flow was poor and since some of first respondent's cheques had been dishonoured by the bank. He indicated that 'this downfall' could only be avoided if an amount of R100 000 were raised from whatever source.

This suggestion was, however, rejected by applicants who were all along labouring under the impression that the company was in a sound financial state, bearing in mind that first respondent received substantial government subsidies on a monthly basis.

The founding affidavit then continues to state:

'we did not deem it necessary to throw money *into a bottomless pit* without satisfying ourselves about the position of the first respondent through an acceptable auditors' report.'

(Italicising by me.)

The affidavit continues to set out further instances of misconduct or mismanagement by second respondent, in that he allegedly bought 'a big cold room without even consulting us' concerning which it is stated:

'It is my feeling and that of the other two applicants that this is a serious abuse of managerial powers by Mr Muthige as the company is not running a butchery and does

not need a cold room. *Clearly, the manager is on a big money spending spree.'*

(Italicising by me.)

The affidavit continues to state that second respondent was authorised to sign company cheques together with one of the applicants, but instead he made a 'unilateral decision' to appoint third respondent as his cosignatory. Since October 1985, so it is alleged, neither first applicant nor the other two applicants has ever consigned any cheque on behalf of first respondent:

'though we believe on reasonable grounds that cheques for first respondent are going through the bank *on normal routine*.' (*Sic*.)

(Italicising by me.)

The affidavit continues to set out that applicants learnt on 10 June 1986 at the aforesaid meeting, with 'shock and dismay', that first respondent had, through its managing director, acquired certain motor vehicles: a Ford Cortina (sedan), a Mercedes Benz 230E and a Toyota Hi-Lux light delivery van which has since been replaced by a Toyota Landcruiser.

It is said that of these vehicles the Cortina and the Mercedes Benz were registered in the name of second respondent although the instalments were

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VAN DER SPUY AJ

paid out of the funds of first respondent. The other vehicle was registered in the name of third respondent, although the instalments were paid from the funds of the company. It is then stated:

'When Mr Muthige was confronted with this problem of the vehicles, *he indicated that he was trying to evade personal income tax* and I and the other two applicants have since learnt that the above instalments have since 10 June 1986 been paid in full.'

(Italicising by me.)

Based upon these allegations the opinion is voiced that:

'*First respondent is prevented from becoming a successful business concern by the mismanagement thereof by, second respondent* and the normal remedy of resolving to remove second respondent from this position of power will have little effect on the streamlining of the first respondent's affairs in view of the fact that second respondent has run the affairs of first respondent since incorporation single-handedly and towards the achievement of his personal aims and direction.'

(Italicising by me.)

There is also a further allegation that second respondent:

'exercises extra-ordinary influence on all personnel of first respondent, so much that his unseating and subsequent replacement by one of the other directors could have an adverse effect on the productivity and efficient running of first respondent.'

The founding affidavit characterizes these complaints as follows:

'In view of the above, I respectfully submit that the manner in which the affairs of first respondent are being run have seriously affected its liquidity to such an extent that it is unable to pay its debts or is probably unable to meet its obligations as it has incurred a bank overdraft of R36 160,23 as at 12 June 1986 as per annexure B. *The first respondent* appears therefore *to have reached a state of total collapse and in order to protect the growth of the company* in particular *and the interests of the creditors* in general, I humbly submit that there are *sufficient grounds for the placing of first respondent under provisional judicial management.*'

(Italicising by me.)

Annexure B constitutes a computer print-out of the bank in respect of the account of first respondent dated 12 June 1986 and it evidences a debit balance of R36 160,23.

I may pause to state that the facts as set out above persuaded me in the first instance to consider that there might be some grounds for the relief sought, and I postponed the matter to 8 July 1986, giving applicants leave to supplement before 23 June 1986, the respondents to answer on or before 30 June 1986 and the applicants to reply, if so advised, by 4 July 1986.

When the matter was called before me on 8 July 1986, I postponed it for hearing during August 1986, directing the various parties to prepare heads of argument on the various issues raised and to which I will refer later in this judgment.

Before the supplementary affidavit was filed, second respondent filed an opposing affidavit dated 18 June 1986 and in this affidavit second respondent states that he received the papers late on the afternoon of 17 June and that he immediately made arrangements with first respondent's attorneys, Friedland Hart and Partners of Pretoria, (which firm had apparently served first respondent for some 20 years) for consultations and the filing of a comprehensive answering affidavit.

In regard to the allegations that there was a deficit at the bank, second respondent pointed out in the opposing affidavit that on the same day, ie

VAN DER SPUY AJ

12 June 1986, there was a credit of R37 000 on the number 1 account of first respondent from its number 2 account, which is the account kept to receive subsidies from the Republic of Venda. The result was that as at close of business on 12 June

there was in fact a credit of R339,77.

Second respondent annexed a bank statement dated 14 June 1986 which clearly shows that on that date, far from there being an overdraft, there was in fact a credit balance of R339,77.

I emphasize that the impression created in the first instance with me was that the company was in serious financial trouble and that its banking account was in debit.

I now wish to refer to the supplementary founding affidavit which did not add much to the

founding affidavit. It contains various allegations which were not supported, such as that it was resolved that first respondent should be liquidated because of:

'the irregularities which we discovered at our utter dismay (*sic*) and which appeared to constitute serious violations of various provisions of the Companies Act 61 of 1973.'

No facts were alleged in support of the 'serious violations' complained of. The affidavit contains the following allegation against second respondent:

'As second respondent is the only person who knows what assets the first respondent company owns, and the extent of such ownership, I verily believe that he is in a position *to funnel away some of the company assets without trace*, now that he is aware of the action pending.'

(Italicising by me.)

There then follows an allegation that if first respondent were not placed under judicial management, irreparable prejudice would be caused to first respondent and that there was an urgent need for proper management between the date of the supplementary affidavit and a hearing 'in due course'.

I should state here that second and third applicants supported the founding affidavit as well as the supplementary affidavit.

I now deal with second respondent's answering affidavit. In regard to the payment of R1 000 a month to non-working directors (being the three applicants) second respondent states they were remunerated for actual services rendered to first respondent. He then refers to bus route inspections which had ceased towards the end of 1984 when it was decided at a board meeting to appoint full-time bus inspectors. The applicants nevertheless continued throughout 1985 to receive their remuneration 'for doing nothing more than attending board meetings once a week'.

In regard to signatures of cheques, second respondent states that at the time of signature of annexure A, second respondent, second applicant and third respondent were signatories to cheques drawn on the banking account.

When second respondent approached the bank to change the name of the account, he was informed that the bank required a copy of the articles of association before effecting any change, and that as from November 1984 (when annexure A was signed) until September 1985, all cheques of first respondent were to be signed by second respondent and second applicant who was also an approved signatory in terms of clause 11 of the agreement.

VAN DER SPUY AJ

According to the answering affidavit, a serious dispute arose during September 1985 between the directors, and as applicants refused to have anything to do with the business from then onwards:

'I was compelled to get third respondent (who was at that stage still registered at the

bank as a signatory) to sign urgently needed cheques on behalf of first respondent.'

In regard to the termination at the end of 1984 of the non-working directors' services of bus inspection, but their continued receipt of remuneration for their attendance of weekly board meetings, second respondent states that the three applicants refused to attend board meetings as from the beginning of October 1985, and although it was initially thought that this temporary truculence would not be a serious problem and he continued paying them their remuneration, he ceased to do so as from February 1986. The grounds for such a step were that they were not prepared to render any services whatsoever, nor to attend any meetings of the board.

Various cheques were annexed to the answering affidavit to prove that applicants had in fact been paid their remuneration, not only until the end of September 1985, as alleged by them, but up to the end of February 1986.

In regard to the failure to place financial statements before meetings of the board, the deponent alleges that:

'on his appointment in March 1985 as financial director, one of first applicant's duties was to arrange for the preparation of financial statements for the financial year ending February 1985. This he failed to do.'

He therefore brands the allegation that applicants were not informed as to the financial affairs of first respondent as entirely misleading. He states that there were regular weekly meetings held for a long period, and all books of first entry, including ledgers, accounts, vouchers, receipts and bank statements were kept in the office of the first respondent and

'were at all relevant times available for inspection by any of the directors'.

He also states that any of the directors were free to enter his office at any time to enquire from him about any specific transaction or matter relating to first respondent and to inspect any books of account. In this regard he is corroborated by third respondent in his supporting affidavit.

At some stage, so it is alleged, the other directors discussed the possibility of their taking over the management, but no agreement could be reached and discussions became acrimonious. Ever since the day when these discussions took place, that is 13 May 1985, applicants failed to attend directors' meetings.

This they repeatedly refused to rectify, despite telephonic requests, and second respondent says that the business of first respondent was in any event then attended to by third respondent and himself 'in an ordinary and correct fashion', and applicants were welcome to inspect the books that were kept during this period.

In regard to the meeting of 13 May 1986 which had been requisitioned by applicants, deponent states that the meeting was not called by himself, but that first applicant informed him by letter of the meeting.

That meeting apparently did not effect much in regard to the business of first respondent and a further meeting was held on 10 June 1986. In

respect of this, deponent says that a completely false impression was created by applicants. Second respondent states that before the meeting he had drawn up a memorandum which was annexed to the papers marked annexure K1, and he states that annexure K1 represented the notes used by him in presenting a verbal report to the directors at the meeting.

During argument, counsel for applicants treated this memorandum with scant respect, if not levity, but it is quite apparent that the existence of this memorandum was iii fact not denied, and in those circumstances the memorandum must be regarded as having been admitted.

The only comment that was found in reply to the relevant paragraph dealing with the memorandum was that second respondent had read 'a long and irrelevant life history of the company from handwritten notes which he had made'. But these handwritten notes were in fact admitted.

I called for the original of this document and it is quite apparent from it that it contains various references under the rubric 'introduction' on the third page thereof to the whole history of first respondent and the financial position of first respondent. After that, second respondent reported on the activities of first respondent from October 1985 to April 1986. Under the word 'subsidy' he stated that it 'always comes too late' and that this was the cause of any financial embarrassment that may have existed at the bank. Under 'finance', second respondent reports: 'Books available for inspection at office.'

Second respondent's memorandum ends off by stating that the most appropriate means by which first respondent could improve its cash flow for the time being was to engage a loan of not less than R100 000.

On scrutiny of the whole of this document, it is not my impression that second respondent failed to make a full disclosure of first respondent's position to its directors.

Second respondent then alleges that:

'I was of opinion that the abovementioned amount of R100 000 would ensure that first respondent would be able to continue operating without an overdraft, as the first respondent has never had formal overdraft arrangements with the bank, in spite of handling a monthly turnover of some R200 000.'

He therefore states that the allegation that first respondent was experiencing serious financial problems was untrue to the knowledge of applicants. They knew, so he claims, that the R100 000 was merely for 'bridging capital' and there was no serious financial situation into which the first respondent was degenerating.

In regard to the cold room, second respondent states that it was not a big cold room and that it cost no more than R4 600, and it was acquired to provide the drivers with daily rations, which included meat both for lunch and supper.

In regard to the unwarranted purchase of vehicles, the affidavit sets out that they were purchased in his own name, but then transferred to the business, and paid for by the proceeds from the business. He states the reason for this namely:

'the situation was in fact so bad that no financing institution or motor car or bus

dealer was prepared to sell any vehicle to the business in the business's own name.

As to the particular vehicles he states that the Mercedes Benz was, acquired for himself as managing director, the Ford Cortina for the

VAN DER SPUY AJ

assistant manager, and the Hilux vans were used in the performance of their duties by the inspectors.

The Landcruiser which was later brought in was registered in third respondent's name, but was used for first respondent's purposes. He states that the previous Landcruiser, which was also registered in third respondent's name for the same reasons, was now being used by first respondent's mechanics for the purposes of the company.

He then points out that the Toyota Hilux vans, purchased by first respondent between the years 1980 and 1984, were still registered in the names of first and second applicants. When they ceased to act as inspectors at the end of 1984, these Hiluxes were not returned to first respondent, although first respondent paid the purchase prices of these Hiluxes in full. They are at present still possessed by first and second applicants for their personal use.

It appears from this, that all the directors really derived personal benefits by using vehicles in their own names for the business of first respondent and that applicants had failed to put the full facts before the Court in the founding and supplementary affidavits.

In regard to judicial management on the basis that first respondent was 'not a successful business', the deponent claims that the allegation is vexatious and totally unfounded. He annexes the balance sheet and the profit and loss account for the year ending February 1985, and from these it appears that first respondent, when one includes the State subsidy for the financial year, made a profit of R10 322.

Having regard to the difficulties which are attendant upon public carriers, especially of passengers only, one cannot really assert that first respondent was 'an unsuccessful concern'.

Second respondent therefore concludes that the allegations concerning mismanagement were not only vexatious but born of malice and were totally unfounded.

In support of the allegation that first respondent is in fact 'a successful business', reference is made to affidavits by Dorbyl Financing (Pty) Ltd, a finance house, as well as that of S & S Tyres, a business which supplies first respondent with its tyre requirements.

In regard to the allegation of mismanagement and the replacement of second respondent as manager, it is averred that there would be a danger that first respondent's efficiency could be detrimentally affected by replacing him by one of the other directors.

In regard to the overdraft which was alleged in the applicant's foundation papers, second respondent reiterates that there was a deliberate attempt to mislead the Court and a malicious attempt to suppress the truth 'in the interests of a personal vendetta on the part of applicants'.

Second respondent concludes as follows:

'Far from any case having been made out that the first respondent should be placed under judicial management, it is my respectful submission that the applicants have allowed themselves to be actuated by malice to such an extent that this application was brought on alleged grounds of urgency, after the above honourable Court had apparently rejected an application for liquidation of the first respondent. This again is a fact which the applicants have failed to deal with in their founding affidavit. In my respectful submission, the above honourable Court should mark its displeasure of the applicant's conduct by a special costs order.'

(That is an order for attorney and client costs.)

VAN DER SPUY AJ

I deal now with the replying affidavit filed on behalf of first applicant to which second and third applicant also subscribed by reasons of confirmatory affidavits.

In regard to the allegation that the Court had been misled as to the banking account, applicant states:

'I did not purposely see fit to mislead the above honourable Court regarding the first respondent's banking practice as suggested.

I was aware of the two banking accounts at Barclays National Bank in Thohoyandou, but was never aware or informed that the one account could be overdrawn at the expenses of a subsequent transfer from the other account.

I therefore *bona fide* believed that first respondent was experiencing serious financial difficulties as reflected in annexure B.'

If the applicants took any trouble at all to request a further print-out at the close of business on 2 June, let alone on the day which the affidavits were first filed, ie 16 June, the impression that was left with the Court concerning the alleged overdraft would never have been created.

In the course of the replying affidavit many of the allegations made by second respondent in regard to the company's affairs, for instance in regard to the authority to sign cheques, was merely dealt with on the following basis: 'The contents of this paragraph are taken note of.'

In the course of argument I put it to counsel for applicants that, where a deponent is under a duty to admit or deny or to confess and avoid a direct allegation, a reply that the allegations are 'taken note of' would, in the circumstances, amount to an admission. See in this respect the case of *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E - D where it is stated that whilst 'quiescence is not necessarily acquiescence', a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him. As to admissions, denials, confessions and avoidance in pleadings see Rules 22(2) and 25(1) and as to affidavits in motion proceedings see Rule 6(4)(*d*) and 6(4)(*e*). It is clear that affidavits really constitute both pleadings and the evidence in support of the allegations made, and the rules as to pleadings should, to that

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extent, be applied to affidavits.

In regard to the alleged failure to give proper financial information, the reply was singularly vague. In regard to annexure K1 the reply was that, although it was a 'long-winded and irrelevant life-history', the contents were not denied.

In regard to the impression that the company was in a weak financial position, first applicant states that that was a 'general impression' created by second respondent at the meeting of 10 June 1985. The other allegations which respondent had made in regard to the meeting 'are noted' and then in regard to the annexure M which is a statement by the bank manager, Mr Van Rensburg, as to the running of the accounts if the company and the putting through of certain debits, it is simply said that the contents 'are noted'. What is added reads as follows:

'I humbly submit that the annexure referred to *is irrelevant for the purposes of this application which is primarily designed to remedy a conflict within the members of the company vis-à-vis* the company itself as opposed to a conflict between the company itself *vis-à-vis* outsiders.'

(Italicising by me.)

VAN DER SPUY AJ

It is quite evident from the italicised words what the real purpose of the application was, namely to remedy a conflict between the members of the company and, in regard to the allegation that a large sum had been spent on a cold room, the reply was that the explanation by Mr Muthige was 'noted', but it is then said that the amount of R4 600 was an item of extraordinary expenditure. It is then said that the background as to the purchase of the cold room was 'besides the issue' as it was in any case *ultra vires* the powers of the managing director.

It is apparent from the reply that applicants did not persist in the allegation that the purchasing of the cold room was of itself a matter which warranted a judicial management order. The same applies to the allegation that third respondent had, during a certain period, been allowed to sign cheques.

In regard to vehicles that were bought without authority, it is stated that the previous purchases were 'taken note' of, but it is added that such purchases were only made possible by the unanimous consensus of all the parties involved.

It is reiterated there was no board meeting sanctioning the purchase of the Mercedes Benz and its registration in the name of second respondent. Concerning the use of the Toyota Landcruiser and the Hilux vehicles used by applicants, it is stated that the acquisition of the motor vehicles in question was in complete disregard of company policy and was solely aimed at benefiting second and third respondents.

In regard to the company's alleged 'unsuccessful career' applicants take up the stance that:

'under proper management *the company could even do better* than reflected.'

(Italicising by me.)

In regard to the allegation in the answering affidavit that there were attempts to mislead the Court as to essential facts which were suppressed in the interests of 'a personal vendetta' by applicants against second respondent, the following allegation is made in reply:

'There was no deliberate attempt to mislead the above honourable Court or a malicious attempt to suppress the truth in the interests of a personal vendetta by myself and the other two applicants against second respondent.

I further state that second respondent is opposing this application as a matter of personal prestige and survival and not in the best interest of first respondent, its shareholders and the economic and social development of the country.'

It is stated that the application was brought to Court as an urgent matter solely for the purpose of resolving the 'stalemate' existing between first applicant and the other two applicants on the one hand, and the second and third respondents on the other hand.

Having fully outlined all the salient facts I now deal with four submissions made by respondent's counsel, Mr *Bertelsmann*, which were contested by the applicants' counsel, Mr *Ndou*. Some of these submissions concern points *in limine*, but I ruled that applicants' counsel should first address me on all four aspects after which respondent's counsel should answer the submissions. I deal with the respective heads *seriatim*.

A. Urgency

It was contended that no urgency whatever attached to this application from its inception, and that no case had been made out for condonation of

the non-observance of the Rules of Court relating to service and the time periods regarding appearance to oppose and the filing of the various sets of affidavits.

I have already set out that the application was brought after only some 36 hours' notice, during a Court vacation period, and that it was heard by me on 19 June in the first instance. The time allowed for the hearing of this matter was so short that it contrasts starkly with the present Rules of the Venda Supreme Court.

I refer to the Rules of Court embodied in Government Notice R1528, published in the *Government Gazette* of the Republic of South Africa 6579 of 13 July 1979, as later amended by various proclamations within the Republic of Venda, and especially Rule 6 which deals pertinently with applications. Rule 6(4)(*d*)(ii) provides that any person opposing a grant of ail order sought in a notice of motion shall, within 21 days of notifying the applicant of his intention to oppose, deliver answering affidavits, if any, together with the relevant documents.

It was noted during the argument of Mr *Bertelsmann* that the Rules do not expressly provide what period should be allowed for notification of intention to oppose, but I was convinced by his argument that that must also be a period of 21 days since Rule 6(4)(*b*) requires in unopposed motions that the matter cannot be set down on less than 30 days' notice after

service, so that, even though the Rules appear to be silent on this point, it has always been accepted in this Court, as a matter of practice, that a period of 21 days should be assigned as *dies induciae*.

Rule 6(4)(*e*) provides that within 21 days of service of the answering affidavit applicant may deliver a replying affidavit.

It means, in effect, that in terms of the present Rules of the Venda Supreme Court an application could be pending for a period of 63 days before the full sets of affidavits are filed. Rule 6(4)(*f*) provides for the set down of the matter within at least 10 days of delivery of the replying affidavit. In other words, a disputed motion could take as long as 73 days to reach the Court.

The result is that in Venda resort must often be had to Rule 27 which provides for an application to Court for extensions of time and for condonation of non-observance of the time periods discussed above.

Rule 6(1) deals with urgent applications and it provides:

'(1) **(*a*) In urgent applications the Court or a Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.**

(*b*) In every affidavit filed in support of any application under para (*a*) of this subrule of *any applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course*.'

It would therefore be incumbent upon an applicant to set out clearly in his founding affidavit the grounds of any alleged urgency. The extent to which an applicant should so set out his grounds have been dealt with in various cases, see *Eniram (Pty) Ltd v New Woodholme Hotel (Pty) Ltd* 1967 (2) SA 491 (E) at 492H - 493H. See also *Sikwe v SA Mutual Fire & General Insurance Co Ltd* 1977 (3) SA 438 (W) at 441C - D; and, furthermore, *Luna*

VAN DER SPUY AJ

Meubel Vervaardigers (Edms,) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977 (4) SA 135 (W) .

In the latter case, Coetzee J laid down in a most useful and comprehensive judgment the parameters of urgency.

In regard to what the present case might have been termed, namely an 'extremely urgent application', Coetzee J stated:

'... applicant's counsel had difficulty in suggesting then, that is yesterday afternoon, and I have listened to him carefully again this morning to discover what the reason may be, why the matter should not have been placed, albeit on short notice, on the motion roll in the ordinary way. This would mean the motion roll for next week. Such

a reason has not emerged. His initial reaction was,... to submit that what has been done was conceived to be simply "the usual practice", that is that if a matter is conceived to be urgent it can be set down for any time on any day. Yesterday he added that, if that were not so, then he *bona fide* believed that such was the case. Further, that, if the matter was indeed improperly enrolled, I should not in the exercise of my discretion strike it off the roll, but that a warning of this impropriety should first fall from the Bench before a stricter attitude is taken up in these matters.'

In the Venda Supreme Court the time has certainly arrived for a clear warning to 'fall from the Bench' of a stricter attitude in the future, since in the Republic of Venda a practice seems to have been adopted that any matter can just be brought at any time as a matter of urgency since the time limits laid down by the Rules require a very long period before a hearing in due course.

Even this pernicious practice is, however, a far cry from setting a matter down almost by way of an *ex parte* application, without proper notice to the opponent, after a previous application had in fact been withdrawn which had also been brought urgently and equally urgently withdrawn after certain remarks were made by me in regard to defects in the application.

In the present case there was indeed no reason, on the alleged grounds of having been deprived of their monthly remuneration, and even on the allegation that there were some difficulties with first respondent's cash flow, why this matter could not have waited for the ordinary Motion Court roll in the new term, that is after 1 August 1986. For the sake of clarity I should again spell out the ordinary Court terms, ie from 1 February to 15 April; 1 May to 15 June; 1 August to 30 September; and 16 October to 30 November. (See *Government Notice* 36 by the Life State President of Venda, proclaimed on 28 December 1979.)

In this respect I also wish to refer to what Coetzee J stated in the *Luna Meubel* case *supra* in regard to urgent applications in general, namely:

'Although it happens far too frequently that urgent applications are set down at any time without any consideration of these simple and logical factors which I have canvassed, I nevertheless believe that this is not a general practice which is so deeply ingrained that a warning to desist should first be given.'

In the present case, I do not consider a 'warning to desist' is required since applicants should have known that the facts that they were bound to allege in terms of the Rules should at least disclose the grounds of the alleged extreme urgency.

I am not persuaded that the matter was so urgent that anything more drastic than enrolment on the motion roll even in the ordinary way, even if that were on short notice, was required. The case of *Luna* has been followed in many Divisions, and the latest case to which I wish to refer is

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VAN DER SPUY AJ

that of *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* ; *Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 111A and 111C.

In the present case some financial loss to applicants is alleged, albeit faintly, but there is no suggestion that it would be irrecoverable. Certainly the reasons which Fagan J gave in the *Aroma Inn* case cannot rescue the present applicants in the sense that they would be sustaining losses which they could not possibly recover by a 'remedy in due course'.

I refer here in particular to the complaint that they had not recovered their remuneration as directors.

Applying the above principles to the present case, I find that in the founding affidavit it was alleged that first respondent was experiencing 'serious financial problems' and that some of its cheques were dishonoured. The facts later disclosed showed that there was no serious situation at all.

Furthermore, the founding affidavit averred that the company was unable to pay its debts or probably unable to meet its obligations because of the alleged overdraft of R36 160,23, and this prompted first applicant to state that first respondent 'appears therefore to have reached a state of total collapse'.

This is not only a misleading and untrue statement, but one which was highly melodramatic. It was clearly proved that the overdraft position was not as set out and that on the very day there was a credit balance of R339,77.

It is clear that grave financial misgivings were relied upon by applicant as a basis for the application for judicial management as a matter of extreme urgency.

In second respondent's opposing affidavit, dated 18 June 1986, the allegation that the company was unable to pay its debts was specifically refuted, and the misleading statement as to the overdraft was immediately corrected. This should have served as a warning light to applicants at an early stage of the proceedings.

In spite of this, and in spite of my granting the applicants leave to file supplementary affidavits, no attempt was even made by the applicants to deal with the incorrect allegation regarding the bank overdraft in the supplementary affidavit and applicants' surprising failure to place the correct information before me in the founding affidavit in the first instance.

Instead of that, applicants then tried to transpose the gravamen of their attack to an alleged mismanagement of first respondent's affairs by second respondent.

They also introduced allegations of personal aggrandisement against second respondent and, furthermore, the somewhat scurrilous, if not defamatory, statement that 'second respondent will funnel away' first respondent's assets.

Apart from these new personal sorties against second respondent, applicants failed to set out any further factual allegations supporting the new submissions which appear in the further affidavits, and in the replying affidavits they virtually conceded that the company was not in serious financial difficulty, but might have functioned *more successfully* if properly managed.

VAN DER SPUY AJ

I emphasise that the allegations in the answering affidavit that first respondent was not

experiencing serious financial problems, and was not on the point of crashing, were 'taken note of' in the replying affidavit, without even attempting to traverse those allegations.

In fact the bank manager's deposition that first respondent did not experience any serious financial problems is blithely dismissed as being 'irrelevant for the purposes of this application'. First applicant advances in the reply, for the first time, the true reason for this application, ie:

'to remedy a conflict within the members of the company *vis-à-vis* the company itself as opposed to a conflict between the company itself *vis-à-vis* outsiders.'

In my view, the aforementioned references make it quite clear that the applicants have signally failed to disclose grounds of urgency in the founding affidavit.

In it I find not a tittle of evidence in support of 'extreme urgency' and in reply I find an entirely new ground, namely that the company could have been more successful were it not for second respondent's alleged mismanagement. Concerning the latter, it is now settled law that an applicant cannot in reply raise new grounds previously not even adumbrated. See *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369A - B.

Generally, it is my finding that the allegations contained in the founding affidavit, in the supplementary affidavit and in the replying affidavit were so vague, superficial and even contradictory, and so devoid of any facts justifying a hearing out of term, or for promotion on the roll of this Court that I am not justified in holding that there was any 'urgency' at all.

Even if the complaints were valid, for instance that the company could be better managed, that applicants should have received their remuneration, that second respondent bought various articles without authority, those complaints could not have made the matter one of urgency. On applicants' showing these circumstances existed from about the end of 1985. Yet the application was only brought in June 1986, which shows that applicants hardly regarded the matter as one of 'urgency'.

The abuse of the procedure of this Court by bringing any complaint before it as a matter of urgency even out of term is something which we must now take note of and positively discourage. Especially when during recess a Judge is called upon to hear a matter at his own considerable inconvenience. I feel that the convenience of the Court is a matter that must be considered when urgent applications are thrust upon the roll and for this additional reason I also find that there was no urgency proven and that the application should be struck off the roll. I deal with the question of costs later on. Despite the above finding important legal aspects were urged by Mr *Bertelsmann* with which I feel I should deal, although I am not compelled to do so.

B. Applicants failed to make out a *prima facie* case

The argument for the respondents was that, even if all applicants allegations were accepted at face value, there was in law no basis for an order for judicial management of first respondent.

The first leg of Mr *Bertelsmann's* argument concerns the *locus standi* of applicants. It would seem that applicants approached the Court solely on

VAN DER SPUY AJ

the basis that they were members, being the holders of the share certificates which I have outlined above.

In terms of s 427(2) of Act 61 of 1973, an application for judicial management may be brought by any person entitled to apply for winding up in terms of s 346 of the Act. See in this respect 753 of Henochsberg *On the Companies* Act 4th ed vol 11.

Section 346 provides that various persons, or even companies, may bring a liquidation application, but I consider s 346(1)(*a*), (*b*), (*e*) and (*f*) to be totally inappropriate, the only appropriate section being ss (*c*) which reads that it may be brought 'by one or more of its members'.

A difficulty which was raised by Mr *Bertelsmann* and which I have encountered is the true inwardness of s 346(2) which provides:

'A member of a company shall not be entitled to present an application for the winding-up of that company unless he has been registered as a member in the register of members *for a period of at least six months immediately prior to the date of the application* or the shares he holds have devolved upon him through the death of a former holder and unless the application is on grounds referred to in s 334(*b*), (*c*), (*d*), (*e*), or (*h*).'

(Italicising by me.)

It will be seen that ss (*b*), (*c*), (*d*) and (*e*) of s 344 are obviously inapplicable and inapposite. Consequently applicants could only have relied on the allegation that the Court is entitled to entertain the application by members if it appears to the Court that it 'is just and equitable that the company should be wound up' (ie s 344(*h*)).

Mutatis mutandis this means that an applicant for judicial management would have had to show that it was just and equitable that such an order be issued, and in view of the majority of their shareholding (ie R1 200 to applicants against R800 to second and third respondents) that ground was, arguably, untenable.

There is of course another answer, and that is that the proviso to s 346(2) need not apply here at all, since it can be inferred from exh E that the membership of all the applicants in regard to the shareholding goes back to November 1984, which is a period of more than six months immediately prior to the date of application.

That, of course, does not mean that there was proper proof of the *members' register* of the company as provided for in s 346(2) and, in such event, the considerations under that subsection would still have applied, and it would have been necessary for applicants to allege and prove that the order sought was 'just and equitable'.

No such allegation appeared in the founding affidavit, nor in the supplementary affidavit, nor was it even stated in the replying affidavit.

The only basis for an order based on 'justice and equity', so it was argued by Mr *Ndou* for applicants, was the alleged 'deadlock' or 'stalemate' between applicants and second and

third respondents. But as against this, I must emphasize that there was certainly no such allegation in the first instance, and on the authority of *Titty's* case *supra* it could not have been raised for the first time in the replying affidavit, as applicants sought to do.

On this basis I hold that applicants have hardly made out a case that they were entitled to approach this Court for a judicial management order in terms of s 344(*h*), read with s 346(2) and read with s 427 of the Act. I

VAN DER SPUY AJ

was nevertheless prepared to entertain the application on the basis that applicants were members on the assumed 'register of the company', if one accepted that the share certificates, later handed in, reflected that fact.

The second leg of Mr *Bertelsmann's* argument under this head was that, although applicants repeatedly claimed that they were not allowed to participate in the proper management of first respondent, there was no reason advanced why applicants were not able to correct that alleged state of affairs at a duly constituted meeting of the board of directors, or at an ordinary meeting of first respondent. Through the exercise of the ordinary internal controls, or control mechanisms of first respondent, so it was argued, this alleged irregularity could have been redressed in due course.

I find on all the facts that applicants did not attempt to set out any reasons why the internal control mechanisms or the domestic remedies which they had could not have been applied to resolve what they considered to be an unsatisfactory state of affairs.

In such circumstances there is sufficient authority for the proposition that a Court would not intervene and will in fact refuse an order for judicial management. I am bound to hold that if the alleged problems in first respondent were capable of internal solution by domestic remedies, or as it was called 'internal control mechanisms', that would have precluded me from making a finding that it is just and equitable to place first respondent under judicial management. That ground, namely 'justice and equity', is consonant with a complete deadlock situation, which was certainly not demonstrated in this matter.

If second respondent was obstructive in calling meetings, or allowing other directors or members to participate either in a directors' meeting, or in meetings of the company, then the majority both in value and in number of the shares held by applicants could have forced him to hold meetings, and at such meetings a motion that he was to carry on the business in a certain way would certainly have been successful. He would then have had to submit to such a resolution and, if not, there may have been a reason for coming to Court for a *mandamus*, or another suitable order under alternative relief, forcing him to carry out the wishes of the majority.

In regard to his alleged refusal to allow access to books or accounts, similarly, an application could have been brought to compel him to do so by way of a *mandamus*. But in view of the facts, as I have outlined them fully above, I find that the applicants have totally failed to establish a *prima facie* case for the grant of an order of judicial management.

The authorities which I have consulted clearly show that in circumstances such as these a Court ought not to get itself involved in a situation where first respondent was capable of

resolving internal disputes and certainly, in such circumstances, I would be precluded from holding that it would be 'just and equitable' to place first respondent under judicial management.

The first case to which I refer in this connection is *Maynard v Office Appliances (SA) (Pty) Ltd* 1927 WLD 290 wherein Barry J stated at 293:

'It is a well-established principle that a Court of law will not interfere with the internal; management of companies, except in circumstances which are not present in this case.'

VAN DER SPUY AJ

His Lordship quotes English authorities, including the case of *Foss v Harbottle* 1843 (2) Hare 461 (76 ER 189) to the effect:

'that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent, - unless there be something *ultra vires* on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it;'

The words just quoted by His Lordship Mr Justice Barry were derived from the judgment of Lord justice James in the case of *MacDougall v Gardiner* (1875) 1 ChD 21. The same proposition had been stated in the earlier case of *Cluver and Another v Robertson Portland Cement and Lime Co Ltd* 1925 CPD 45 at 52 where it was stressed:

'nor should the Court, unless a much stronger case is made out, interfere with the domestic forum which has been established for the management of the affairs of a company (vide *Langham Skating Rink Co* 5 Ch D 669).'

See furthermore *Repp v Ondundu Goldfields Ltd* 1937 CPD 375 at 370 *and Ronaasen and Others v Ronaasen and Morgan (Pty) Ltd 1935 CPD 562 at 564.*

In the latter case it was pointed out, at the passage cited, that there was not much hope, even if a judicial management were granted and even if it were practical to appoint a judicial manager, that the parties would ever be able to work together after the judicial management order had been cancelled. The point made was that the whole purpose of the judicial management would really be defeated if the Court interfered with the management of companies if this were unrelated to a *moratorium* or a breathing space, after which a company is supposed to surmount its difficulties, and to carry on with the same management.

In the present case, certainly, the facts are that it would be most unlikely that the parties would ever reach the stage where they would cooperate in the future management of the company. In the case of *Taylor v Welkom Theatres (Ptd) Ltd and Others* 1954 (3) SA 339 (O) Horwitz J deals extensively at 346A *et seq* with the principle of oppression, and the fact that it would be just and equitable to grant a winding up order (which would *mutatis mutandis* apply to a judicial management order) and, after referring to *Ronaasen's* case *supra*, he

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stated at 348H:

'In effect, it was held the company was a partnership which was managed by these three shareholders who had fallen out amount themselves, the position resulting was, as was admitted by all the shareholders, a deadlock. It is clear from page 563 of the judgment that it was realised by both sides that it was impossible to carry on the company under the existing circumstances and, whereas the petitioners asked for liquidation, the other shareholders suggested the appointment of a judicial manager.'

Now it cannot be said, applying the *dicta* of Horwitz J to the present facts, that it has been proved by applicants that it would have been *impossible* to carry on the company under existing circumstances.

Apart from these considerations I find that the mere fact that the alleged problems were capable of internal resolution by the majority of the shareholders, namely the applicants, would preclude me from a finding that it would be 'just and equitable' to place first respondent under judicial management.

For this proposition, I refer firstly to *Reich v Harthorn Syndicate Ltd* 1930 NPD 233 where Grindley-Ferris J held at 244 that the decision as to

VAN DER SPUY AJ

whether it was just and equitable to issue an order for judicial management must also be seen to be a decision as to whether it is 'desirable'. With reference to an earlier case he states that in that case there was complete deadlock between the only two shareholders, who were also the sole directors, the one allegedly having committed fraud against the other, whereas in the case dealt with by him there was no allegation of fraud. There were four shareholders, three of whom were directors, and he was not satisfied that a state of deadlock had arisen. In those circumstances he held at 245 that he could not find that there was any 'desirability' to appoint a judicial manager to take charge of the business of the company.

In the matter of *Silverman v Doornhoek Mines Ltd* ; *Smith v Doornhoek Mines Ltd* 1935 TPD 349, reference was made at 353 to the judgment of Barry J in the case of *Maynard* (*supra*) and it is then stated by De Wet J:

'It seems to me that the object of the section is to obviate a company being placed in liquidation.'

His Lordship was referring to the prior section, namely s 195 of the earlier Companies Act, dealing with judicial management and he stated that that remedy is only to be adopted

'if there is some *strong probability that by proper management or by proper conservation of its resources it may be able to surmount its difficulties and carry on*. It is a special privilege given in favour of a company and is to be authorised only in very special circumstances.'

(Italicising by me.)

He held that since, in the case dealt with by him, irreparable harm had already been done,

judicial management was totally inapposite. He added:

'It seems to me that the section contemplates the case where there are pressing creditors, and where the Court realises that if these creditors are allowed to enforce their claims at once *the company must go under, while if the Court were to allow the company breathing space* by the appointment of judicial managers *the company might be enabled to discharge its obligations and continue to carry on its business.*'

(Italicising by me.)

It is clear from the *Doornhoek* case that the test really is whether there is a case made out for a tiding over, or for a *moratorium* and that the company would, after a certain period, be able to carry on.

In the present case none of these considerations are present, and the complaint appears to me a personal complaint against the personality of second respondent, and I have yet to find a case in which it was held that such considerations would warrant the issue of a judicial management order.

See furthermore in this connection the matters of *In re Winchester Tea Lounge Ltd* 1936 EDL 188; *Irvin & Johnson Ltd v Gelcer & Co (Pty) Ltd* 1958 (2) SA 59 (C) ; *Rustomjee v Rustomjee (Pty) Ltd* 1960 (2) SA 753 (D) and *Yende v Orlando Coal Distributors (Pty,) Ltd and Others* 1961 (3) SA 314 (W) .

It would appear on all these authorities and the facts which I have outlined above that the applicants have totally failed to establish a *prima facie* case on their own showing for the grant of the relief sought and that the application should be dismissed on that ground also.

VAN DER SPUY AJ

C. The propriety of issuing a judicial management order purely where it is claimed that a company can be run more profitably

I now come to a substantive point which I raised in the course of argument, and that is whether it was ever the intention of the Legislature, in terms of s 427, that a Court ought to exercise its discretion purely because a company might have run more successfully if its management were more efficient. I posed this question to Mr *Ndou* for applicants, namely that, if the facts were that a company was making a profit of R10 000 per annum but it could be shown that it could make a profit of R100 000 per annum, the Court would on that account issue a judicial management order.

I have found no authority which warrants this approach in interpreting s 427 nor the predecessor of that section.

Firstly, it is clear that the whole purpose of a judicial management order is that it should be granted to obviate a company being placed in liquidation and where there is a strong probability that, by proper conservation of resources and by proper management, it would be able to surmount its difficulties and 'might then carry on'. See J T R Gibson *South African Mercantile and Company Law* 5th ed at 476; Joubert *The Law of South Africa* vol 4 para 594 at 490; Wille and Millin *Mercantile Law of South Africa* 18th ed at 917; *Ex parte Judicial Manager of Die Transvaalse Begrafnis Genootskap (Edms) Bpk* 1946 TPD 649; and *Lief NO*

v Western Credit (Africa) (Pty) Ltd 1966 (3) SA 344 (W) where Snyman J puts it as follows at 348B.

'A winding-up order in its nature is intended to bring about the dissolution of the company, whereas the purpose of the judicial management order is to save the company from dissolution. An important feature of a winding-up order is that upon such an order being granted there is a *concursus creditorum*. A judicial management order on the other hand usually provides for a moratorium in respect of the company's debt in the hope that it will lead ultimately to the payment of all creditors and the resumption by it of normal trading. Furthermore, it is true that for judicial management orders provision is made in the section for the order in which payment to creditors are to be effected, and that preference is given to older creditors over later ones.... A winding-up order is usually granted where a company is in fact insolvent, whereas a judicial management order is usually granted where a solvent company has run *into financial difficulties because of* *mismanagement* and because there is hope that with better management it will overcome its difficulties.'

(Italicising by me.)

See further in this connection *Klopper en 'n Ander NNO v Die Meester en Andere NNO* 1977 (2) SA 477 (T) ; *Reich v Harthorn Syndicate* 1930 NPD 233, and *East London Development Co v Simon Hotels Ltd* 1940 EDL 118. The accent throughout is on the overcoming of financial difficulties and *not the streamlining of the company's affairs to make it more profitable* and I would once more refer to the matter of *In re Winchester Tea Lounge Ltd* 1936 EDL 188.

I was only referred to one South African decision where a judicial management order was granted under circumstances where there was in fact no financial embarrassment or failure to achieve the company's object, and that was the case of *Lenning and Another v Orenstein and Koppel (SA) Ltd* 1940 WLD 59. In this matter the company could not function because the majority of shareholders and all its directors were enemy aliens and the managing director had died. Under the circumstances a judicial management order was granted.

VAN DER SPUY AJ

It is clear from the facts of that case that the company would for all practical purposes have been rendered moribund unless some form of judicial management were granted. The facts are totally distinguishable from those in the present matter. In any event, in circumstances such as the *Lenning* case, the expectation would surely be that, once hostilities have ceased, former enemy aliens would again be able to perform their normal function in the company.

I have not been able to find a single authority for the proposition that if a company could be run more efficiently and more profitably, that by itself constitutes a ground for granting the judicial management order.

On the contrary there is an avalanche of authority to the effect that a judicial management order is only appropriate where 'internal control mechanisms' and 'domestic remedies' were entirely ineffectual in overcoming its internal problems, especially if those arose from

clashes between the personalities of the various directors.

There is certainly no ground for holding, as applicants invited me to do, that there should be judicial management order to make the company more profitable.

D. The failure to disclose essential facts and request for attorney and client costs

It is obvious on the various heads discussed above that the application fails. I have been asked to award a special order for costs in that applicants did not place full facts before the honourable Court in support of the application.

The authorities that have been placed before me include *Ladybrand Hotel (Pty) Ltd v Segal and Another* 1975 (2) SA 357 (O) ; *Weinberg and Another v Modern Motors (Cape Town) (Pty) Ltd 1954 (3) SA 998 (C) ; Ex parte Onus (Edms) Bpk* ; *Du Plooy NO v Onus (Edms) Bpk en Andere* 1980 (4) SA 63 (O) , particularly at 68A.

In the *Ladybrand* case it was held by Erasmus J that an applicant who bases its case for judicial management on scant information and generalisations does so at his own peril.

In the *Weinberg* case De Villiers JP reiterated that an applicant should place sufficient information before the Court. In the case of *Du Plooy*, I find but scant support for the submission that facts should be placed honestly and fully before the Court, since the Court was not therein concerned with that aspect.

Indeed, in all three cases quoted by counsel for the respondent, namely *Ladybrand, Weinberg* and *Du Plooy*, the issue was not really the misleading nature of the application.

In the matter of *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) , it was held that there is a duty upon applicants to disclose all relevant facts truthfully and honestly and the suppression of fact need not be wilful to incur the Court's displeasure. See Le Roux J's *dicta* at 348H to 349B.

In this respect I was asked to hold that the following facts had not been candidly and honestly disclosed:

(1) the fact that first applicant was appointed as financial director of the first respondent;

VAN DER SPUY AJ

(2) the fact that first applicant is the secretary of first respondent;

(3) the fact that the third respondent always had signing powers in the past;

(4) the fact that first applicant was appointed as managing director.

I do not hold that these facts were material, nor that the Court was misled by the applicants in that respect.

But then it is said that books were never made available, whereas annexure K (admitted as being correct) clearly proves that books were in fact offered at the meeting of 10 June 1986. I consider this defect in the application to be very material. Applicants gave the impression

to the Court at the first hearing that they were completely obstructed from gaining access to books, and this was clearly not the true position.

A further fact that was unnecessarily emphasised was the alleged acquisition of certain vehicles by second respondent, whereas applicants were still in possession of vehicles which had been purchased for them in the past.

Furthermore, there was in my view a serious misstatement with regard to the alleged overdraft at the bank on 12 June 1986, and also with regard to the balance sheet of 1985 showing that the company was in fact not in 'dire distress', nor that money was being put into a 'bottomless pit', nor that the company was in danger of a 'sudden collapse'.

I find that there were non-disclosures of certain facts, but I find it difficult to justify the submission that the applicants were guilty of a wilful attempt to mislead the Court. I do, however, find that there was negligent conduct in not verifying facts before placing them before the Court on oath in the founding affidavit.

Apart from non-disclosure or misstatements which should have been verified, there are further considerations in regard to attorney and client costs.

Firstly, the allegations against second respondent were certainly malicious, vexatious and illfounded, especially that he was 'funneling off' assets or funds, and that he was misleading the Court with regard to books which were never shown to the applicants. These facts must be considered in making an order for attorney and client costs.

Compare in this regard Cilliers *The Law of Costs* 1st ed (1972) at 59, 67 - 8; *In re Alluvial Creek Ltd* 1929 CPD 532; *Morris v Jacobs and Wolpert* 1950 (2) SA 189 (D) ; and *Lemore v African Mutual Credit Association and Another* 1961 (1) SA 195 (C) at 199E - H.

There is also another aspect, and that is that the application was brought with unwarranted haste and against the warning that I had issued on the first occasion, ie that internal mismanagement was, if it could be corrected by domestic remedies, hardly a ground for proceeding to Court for a winding up order and applicants should have been mindful of this when asking for a judicial management order as a matter of 'extreme urgency'.

As to the order for attorney and client costs being made where proceedings are brought over hastily, I need refer only to *Epstein & Payne v Fraay and Others* 1948 (1) SA 1272 (W) .

Whilst, therefore, I would be not disposed to award attorney and client costs purely on the non-disclosure of vital facts (although in my view the misrepresentation of the banking account is a very serious matter) I am

persuaded that this is a case where applicants repaired to Court overhastily on ill-advised grounds, which they could not even support in the replying affidavits, and which they in fact abandoned. They should never have argued this matter before me after they had been apprised of the facts set out in the answering affidavits, and to persist in the application in such circumstances evinces a total disregard for the rights of the opponents who were put to great expense in resisting the relief claimed. Such conduct which is not only ill-advised but somewhat reckless, if not vexatious and frivolous and clamours for correction by means of a

punitive order for costs. Cf *Lemore's* case *supra* at 199E - H.

In all the circumstances it is in my opinion necessary that an attorney and client costs order be made, and I do so after careful reflection.

I was asked that, in the event of making such an order, I should indicate that the extraterritorial attorneys, Messrs Friedland, Hart and Partners in Pretoria, were in fact the attorneys of respondent and that they should get their fees and disbursement on taxation, the local correspondent, Mr Meek, being merely their correspondent, who filed the papers and attended Court on one or two occasions. He was also not charged with drawing the papers nor with instructing counsel.

Since I am persuaded that in an attorney and client bill of costs both sets of attorneys can only recover their *pro rata* fees and disbursements, and that there would be no duplication when the Taxing Master taxes the bill, I am of opinion that there should be a note to the effect that the attorneys of first instance were Messrs Friedland, Hart and Partners of Pretoria and the correspondents in Venda were Mr K J Meek and Partners. I made the direction for the purposes of taxation.

In the result the application is dismissed with costs on the attorney and client scale, payable by the applicants jointly and severally, the one paying the other to be absolved, and such costs are to include the costs of attorneys Friedland, Hart and Partners of Pretoria.

Applicants' Attorneys: *Aly Lukoto*. Respondents' Attorneys: *Friedland, Hart and Partners*, Pretoria; *K Meek & Co*, Thohoyandou.