REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 17/2014

In the matter between:

CHAARDI BIRGITTA KLEIN **APPLICANT**

And

CAREMED PHARMACEUTICALS (PTY) LTD **RESPONDENT**

Neutral citation: *Klein v Caremed Pharmaceuticals (Pty) Ltd* (A 17-2014) [2015] NAHCMD 136 (11 June 2015)

Coram: PARKER AJ
Heard: **8 April 2015**
Delivered: **11 June 2015**

Flynote: Company – Winding-up – Application for – Applicant averring that company (respondent) has failed to pay its debts – Unpaid debt arising from costs order granted in previous proceeding – Applicant relying on the general rule of *ex debito justitiae* to support winding-up application – Respondent aggrieved by costs order and desirous of taking appropriate steps to appeal that costs order – Respondent's request for reasons for the costs order has to date been ignored – Court held that the *ex debito justitiae* rule does not apply where unpaid debt is bona fide disputed by company (respondent) – Court found that in instant matter the unpaid debt is bona fide disputed – Besides, court found that the applicant's demand for security for costs had been fully and duly satisfied by a bond of security – Court

concluded therefore that in the circumstances and on the facts applicant has failed to prove to the satisfaction of the court that the respondent is unable to pay its debts within the meaning of s 349(f), read with s 350(1)*(c)*, of the Companies Act 28 of 2004 – Consequently, application dismissed with costs.

Summary: Company – Winding-up – Application for – Applicant averring that company (respondent) has failed to pay its debts – Unpaid debt arose from costs order granted without reasons in previous application proceeding – Respondent disputes the unpaid debt – To date respondent's request for reasons to enable it to take appropriate steps to appeal the costs order has been ignored – Besides, applicant's demand for security for costs had been fully and duly satisfied – Court concluded therefore that in the circumstances and on the facts applicant has failed to prove to the satisfaction of the court that the respondent is unable to pay its debts within the meaning of s 349(f), read with s 350(1)*(c)*, of the Companies Act 28 of 2004 – Consequently, application dismissed with costs.

ORDER

The application is dismissed with costs on the scale as between attorney (legal practitioner) and client, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] In this proceeding the applicant has launched an application by notice of motion wherein she seeks primarily an order that –

'1. the respondent be placed under provisional liquidation;

2. a rule nisi be issued, calling on all persona interested to appear and show cause, if any, to this Honourable Court, on a date to be fixed by this Honourable Court as to:

2.1 Why respondent should not be placed under liquidation.

2.2 Why the costs of the application should not be costs in the liquidation.'

The remainder of the relief concerns service of the order and other or alternative relief. Thus, this is basically an application for the winding-up of a company, that is, the respondent. The respondent has moved to reject the application.

[2] The starting point in the determination of the application is naturally the interpretation and application of the relevant provisions of the Companies Act 28 of 2004. On the facts, the provisions that are really relevant in the determination of the instant application are, indeed, what the applicant relies on for relief. The provisions are contained in s 349, which says that –

> 'A company *may* be wound up by the court if –
>
> (f) the company is unable to pay its debts as described in section 350; *or*
>
> (g) …
>
> (h) it appears to the Court that it is just and equitable that the company should be wound up.'

(Italicized for emphasis)

And s 350 provides:

'(1) A company or body corporate is deemed to be unable to pay its debts if –

(c) *it is proved to the satisfaction of the Court* that the company is unable to pay its debts.'

(Italicized for emphasis)

[3] In virtue of these provisions, in order to succeed, the applicant must establish the requisites set out in s 349(f), read with s 350(1)*(c)*, of the Companies Act. I should point it out that para (h) is disjunctive, not conjunctive, to para (f) and para (g); and so, it is not relevant here.

[4] Before considering the provisions with reference to the facts of the instant case, it is important to start with a brief relevant background to the present application. In 2010 the respondent instituted action under Case No. I 3442/2010 against the applicant who was hitherto the managing director and accountant of the respondent. The applicant defends the action which is ongoing.

[5] There has been several interlocutory applications launched by the parties in the course of events. One such application and the order made thereanent merit special treatment because it is the genesis of, and the real basis for, the winding-up application. According to the order granted on 13 June 2013, the applicant's application for the dismissal of the plaintiff's claim in Case No. I 3442/2010 was dismissed, but the court ordered the plaintiff to 'pay the costs occasioned by the application on the basis of one instructing and (one) instructed counsel'. The court gave no reasons for the order then; and it has to date not given any reasons. This cogent finding leads me to the next level of the enquiry.

[6] Since 9 July 2013 the respondent has sought reasons for the order but to no avail. It is not contradicted that the respondent, being dissatisfied with the costs order, has requested the reasons to enable it to appeal to the Supreme Court against the costs order, after obtaining leave to appeal. Meanwhile, the taxing officer taxed

the costs on 18 September 2013. It is important to make the point that the taxing of the costs and the issuance of an allocatur cannot take away the respondent's right to appeal which it is entitled to do after obtaining leave to do so in due course.

[7] In this regard, I should signalize this point: either the respondent is entitled to the reasons or he is not. If he is entitled to the reasons – and I hold it is entitled – any reason why the respondent has not been furnished with the reasons, which it has requested, is immaterial; *a priori*, the issuance of the allocatur cannot, on the facts and in the circumstances of the case, whittle away the respondent's dissatisfaction with the costs order (which in the first place gave the taxing officer the power to tax the costs) and the respondent's right to take the necessary steps to appeal against that order. The first logical step is to request reasons for the costs order, which, as I have said more than once, it has requested. I should add that it is of no moment if the respondents' legal representatives participated in the taxation. A waiver of a right must be clearly expressed for all to see. (*Morris and Another v Government of Namibia and Others* 2001 NR 51 (HC))

[8] Apart from all else – and this is crucial – it must be remembered that because no reasons have been given for the costs order, it would be well-nigh difficult for the court, acting fairly and judicially, to decide whether to grant leave to appeal when such application is launched. For instance, how would the court decide fairly and justly whether the respondent has reasonable prospects of success on appeal? See, eg *S v Simon* 2007 (2) NR 500, which was decided in criminal proceedings and which applies with equal force to civil proceedings. That is the real issue in this proceeding, and it cannot be trivialized on any account, particularly when, as Mr Narib, counsel for the respondent submitted, the entire basis of the winding-up application is the fact that the respondent has not satisfied the amount of costs allowed by the taxing officer to the tune of N$151 467,50 which, as I have said more than once, is based on the selfsame costs order.

[9] Without beating about the bush, I hold without a phantom of difficulty or doubt, that in the circumstances and on the facts of the case, that amount has not become

due and payable: It will become due and payable after the expiration of 15 days following upon the delivery to the respondent of the reasons for the costs order that was made on 13 June 2013 in virtue of rule 115(3) of the rules of court, as Mr Narib submitted.

[10] I have no problem with the general rule, which the applicant is so enamoured with, that an unpaid creditor is entitled *ex debito justitiae* to a winding-up order. (*Re Western of Canada Oil, Lands and Works Co* (1873) 17 Eq 1, quoted in 'The *Ex Debito Justitiae* Rule and the Court's Discretion when Hearing an Application for the Windind-Up of a Company', 1981 *SALJ* 120 at 120. The rule was also enunciated in *Bowes v Directors* 11 HL Cas 384; LJ Ch 574. 'It was however soon realized that the formulation in the *Bowes* case was rather wide if it were interpreted in such a manner that the court could no longer exercise its discretion. The most important of the exceptions to the *ex debito justitiae* rule is certainly where the unpaid debt which is relied on is bona fide disputed by the company'. (1981 SALJ 120, loc. cit.) I accept this qualification to the general rule as good law, and so, I should apply it in this proceeding.

[11] In the instant case, as I have found previously, 'the unpaid debt which is relied on is bona fide disputed' by the respondent; hence his demonstrable and genuine desire to have the costs order which gave rise to the taxed costs to be set aside on appeal. It follows inexorably and reasonably that the *ex debito justitiae* (general) rule is not applicable in the present proceeding.

[12] Apart from this conclusion, I should say that, in any case, as Mr Narib submitted further, the amount the applicant claims from the respondent, being N$151 467,50, is clearly less than the amount covered by the bond of security, which is N$250 000; and, *a fortiori*, the bond is 'for the payment of *any* judgment in respect of Defendants costs herein (ie herein Case No. I 3442/2010) to the defendants'. (Italicized for emphasis; Underlining in the Security Bond) It matters tuppence, with respect, whether the security for costs was furnished 'at the last minute', as Mr Schickerling, counsel for the applicant, submitted. What is relevant is that when the

applicant launched this application on 11 March 2014, the applicant knew that the respondent was able to pay the indebtedness of N$151 467,50, being the taxed costs; that is to say, the applicant's demand for security for costs had been fully and duly satisfied, and the applicant knew that. Furthermore, and this is Mr Schickerling's own submission, the respondent had on 11 April 2013 paid 'an amount of N$113 299,33 in respect of a previous costs order obtained against the respondent'.

[13] In view of the aforegoing, I should say that any argument that the respondent is unable to pay its debts is, with respect, fallacious and self-serving. What the applicant avers is not established; it becomes a mere irrelevance. In words of one syllable, I should say that the applicant knows that the respondent is able to pay its debts. Based on these reasons, I can see no merit in the application. After thorough consideration of the papers and submissions and a reading of the relevant provisions of the Companies Act and the authorities, I conclude that the applicant has failed to establish the requisites in s 349(f), read with s 350(1)*(c)*, of the Companies Act. In sum, I conclude that the applicant has not proved to the satisfaction of the Court that the respondent is unable to pay its debts. It follows inevitably that the application should fail, and it fails.

[14] One last consideration: it concerns costs. Mr Narib argued that since the applicant knew well about the existence of the security for costs and that it is in excess of the amount she claims and also that no reasons have been provided for the costs order she wants to enforce, in the face of the request for reasons, the applicant clearly does not have any intention to obtain the relief she seeks and that the proceedings were instituted merely for the purpose of delaying the trial. And for Mr Narib, the applicant's conduct, therefore, 'amounts to abuse of the Court process'; and that the application is frivolous and vexatious, and so it should attract a special costs order against the applicant. And what is the argument on the other side? It is simply this. 'Any suggestion that the applicant's application is frivolous, vexatious amounts to legal manoeuvring, (and) is so demonstrably baseless that it may be rejected merely on the papers'.

[15] I do not agree with Mr Schickerling. As I have found previously, when the applicant launched the application she knew too well that the respondent was able to pay its debts. She knew too well that any costs arising from the costs order were disputed in good faith and genuinely. She knew too well that the bond of security was for the payment of any judgment in respect of her costs in the matter, and that the respondent was able to pay the present indebtedness in the amount claimed to the tune of N$151 467.50, being the taxed costs. The applicant was very much aware that her demand for costs was fully and duly satisfied. In sum, surely, the applicant had, and has, no good reason to bring this application. It has been held that the court may award costs on the scale as between attorney (legal practitioner) and client where the court is satisfied that the applicant (or plaintiff) has put the respondent (or defendant) to unnecessary trouble and expense (*Namibia Breweries v Serrao* 2007 (1) NR 49 (HC). On the facts, I am satisfied that the applicant has put the respondent to unnecessary trouble and expense. That being the case, I conclude that a case has been made out for the grant of punitive costs.

[16] In the result, the application fails, and it is dismissed; whereupon, I make the following order:

The application is dismissed with costs on the scale as between attorney (legal practitioner) and client, including costs of one instructing counsel and one instructed counsel.

C Parker

Acting Judge

APPEARANCES

APPLICANT: J Schickerling
Instructed by Koep & Partners, Windhoek

RESPONDENT: G Narib
Instructed by Dr Weder, Kauta & Hoveka Inc., Windhoek