

IN THE HIGH COURT OF SWAZILAND

HELD IN MBABANE

CASE NO. 1669/2003

In the matter between:

L.G. ELECTRONICS SA (PTY) LTD

PETITIONER

VERSUS

KC AIR CONDITIONING ELECTRICAL

AND INSTRUMENT CONTROL (PTY) LTD

RESPONDENT

CORAM

SHABANGU AJ

FOR PETITIONER

MR. N. SEGAL

FOR RESPONDENT

MR. S.C. SIMELANE

JUDGEMENT

29th July, 2004

The Petitioner L.G. Electronics (S.A.) (pty) Ltd has commenced proceedings seeking an order provisionally winding up the respondent K.C. Air Conditioning Electrical and Instrument Control (pty) Ltd.

The petition is made on the basis of section 112 (f) of the Companies Act 7/1912 which provides that a company may be wound up by the court "if it is unable to pay its debts."

Section 113 of the aforesaid companies Act 7/1912 provides that a company shall be deemed to be unable to pay its debts inter alia if ;

- (a) ... a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred rand then due, has served on the company, by leaving it at its registered office, a demand requiring the company to pay the

sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or to compound for it to the reasonable satisfaction of the creditor; or...

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

The essential question therefore is whether I am satisfied that the Respondent is a company which is unable to pay its debts within the contemplation of section 112 (f) read with section 113 of the Companies Act of 1912. Henochsberg commenting on the provisions of the South African equivalent of our sections 112(f) read with section 113 observes that the court has a discretion whether or not to grant the order even where the applicant or petitioner has established that the company is unable to pay its debts. On the papers it appears to be common cause that the Petitioner is a creditor of the respondent. The respondent appears to be saying that it does not know the exact figure of the debt due to the petitioner and states that there should be a debatement of the account for the purpose of ascertaining the true figure it owes to the petitioner and that once this is done payment will be made to the petitioner for the amount found to be due. Even though the original amount said to be due in the petition is R400,215-56, during the hearing the petitioner conceded some problems in the computation of its claimed debt and had to reduce the stated debt by a number of various figures to an amount of not less than E226, 538-76. The Petitioner starts by stating that it has performed a reconciliation of its books and then concedes that there are two payments of E50,000 each which may not have been taken into account when the initial amount of E400,215-56 was compiled and that if these two payments are taken into account the amount due by the respondent to the petitioner is reduced to E300,215-56. The petitioner has also accepted that the respondent is entitled to a credit in a further amount of E57,489 because it apparently relates to goods which the petitioner delivered to the respondent without such goods having been ordered. I refer to the aforementioned factors and concessions by the petitioner to illustrate that there may be a real and genuine need for a debatement of the respondent's account between the parties for the purpose of ascertaining the true amount due from the

respondent to the petitioner. It is quite possible that the respondent's failure to pay is not related to an inability to pay but rather to a genuine concern that the amount claimed by the petitioner may not be an accurate reflection of the amount due from the respondent to the petitioner. The petitioner has instituted separate action proceedings in this court wherein the petitioner sues for the same amount of E400,215-56 arising from the same transactions. In the action proceedings the present petitioner did not apparently apply for summary judgement. Those proceedings are still pending before this court. It seems to me that the amount of the exact indebtedness of the respondent to the petitioner requires to be determined and this may more appropriately be determined and resolved either in the action which is currently pending before this court or through a debatement of the account as proposed by the respondent. Mr. Segal who appeared for the petitioner submitted that the petitioner is not under a legal obligation to debate the account with the respondent. He further submitted that the debatement of an account can only appropriately be required where the parties are in a fiduciary relationship. However it is trite that the duty to render an account and a debatement thereof is dependant not only upon the existence of a fiduciary relationship between the parties, but such a duty may arise if there is a contractual obligation thereto or if there is a statutory duty to render an account and a debatement thereof, (see RECTIFIER AND COMMUNICATIONS SYSTEMS (PTY) LTD V. HARRISON & OTHERS **1981(2) SA 283** (C), ROSSEAU N.O. V. CLOETE **1952 (3) SA 703** (C); DOYLE & ANOTHER V. FLEET MOTORS P.E. (pty) LTD **1971 (3) SA 760** (A); NARAYANASAMY V. VENKATRATHAM **1979 (3) SA 1360** (D). In support of the amount claimed the petitioner relies in clause 4(a) of the terms and conditions contained in a credit application which was submitted by the respondent when applying for credit facilities which both parties agreed would govern all purchases or orders made by the respondent during the currency of the credit facility. The said clause 4(a) reads;

"the contract price shall be paid by the purchaser without any deduction or set off on or before the 25th of the month following upon the date of the statement in which goods are dispatched from the supplier's premises. "

The credit application form in which the said clause 4(a) may well be a document designed and drafted by the petitioner. I am not certain that the said clause 4 (a) having regard to the manner it is worded, is clear as to its description of the date upon which

payment would become due in respect of any goods dispatched and delivered to the respondent. The meaning of the expression "the statement in which the goods are dispatched" may be a little bit obscure. Does the determination of the date upon which any payment would become due to the petitioner depend on the date of dispatch of the goods ordered or does it depend upon the date of the statement. In other words is the date when any payment becomes due determined by reference to the date of the statement or the date upon which the goods are dispatched. However, if the point of reference in determining the date of payment in respect of any goods ordered is the statement (which is a statement of account) it may well be that the respondent is entitled to demand a debatement of the account before payment of the amount which will be ascertained in such debate to be due. I need not say much about these matters particularly because there is an action in respect of these transaction which is still pending. Suffice it to say that I am not satisfied that the respondents' failure to make payment of the amount demanded or stated by the petitioner to be due is because the respondent is unable to pay its debts. Indications, as I have already indicated are that there are genuine concerns on the part of the respondent, which concerns need to be addressed before it can be suggested that the respondent is unable to pay its debts. This may be addressed through either a debatement of the account or by letting the litigation in which the parties are already engaged run its course.

In the circumstances, because of the foregoing reasons the petition for the provisional winding up of the respondent is refused and is therefore dismissed with costs.

ALEX S



JUDGE