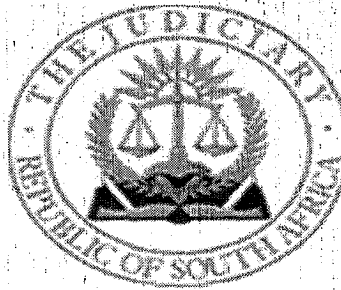


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: <input checked="" type="checkbox"/> YES / NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> YES/NO
(3)	REVISED.
<u>18/12/18</u> Date	
 ML TWALA	

CASE NO: 22343/2018

22344/2018

In the matter between:

MONDO MECCANO CIVIL CONTRACTORS cc

APPLICANT

AND

DANIELS AND SIMPSON PROPERTIES cc

RESPONDENT

JUDGMENT

TWALA J

- [1] This is an opposed application wherein the applicant sought an order for the final winding up of the respondent who is indebted to the applicant in the sum of R1 282 419.11 excluding interest to be calculated at the rate of 26.6 % per annum.
- [2] The applicant has brought two and almost similar applications for the winding up of the respondent and its surety, Jevic Property Holdings (Pty) Ltd, under case number 22344/2018. In this judgment, I am called upon to deal with both cases as they are identical and interrelated.
- [3] This case served before me on the 3rd of December s2018 when counsel for the respondents applied for the matter to stand down for 3 days since the respondents were attempting to pay their outstanding debt to the applicant. The applicant did not object to the postponement - hence I granted the application for the postponement of the matter for 3 days to the 6th of December 2018.
- [4] It is not in dispute that the respondents signed an acknowledgement of debt and the suretyship in favour of applicant in the sum of R2 440 419.11 and failed to perform in terms of these agreements. It is further not in dispute that the applicant issued a letter of demand, as contemplated by section 345 of the Companies Act, on the 2nd May 2018 demanding payment of the sum of R1 451 646.71 and the respondents failed to meet that demand. This galvanised the applicant to launch this application for the winding of the respondents. It is common cause that on the 5th of December 2018 the

respondent paid a sum of R1 457 050.80 into the account of the applicant in settlement of the claim of the applicant.

- [5] It is contended by counsel for the applicant that, if the applicant were to accept this payment, it would be exposing itself to be sued by a liquidator who may be appointed in the next 6 months to liquidate the respondent. It will be presumed that the respondent has preferred the applicant above other creditors, unless the respondents establish that it made the payment in the normal course of its business. The respondents, so the argument goes, owe Nedbank a substantial sum of money and since it is unable to pay the applicant as one of its contractors, it is clear that it is unable to pay some of its other contractors.
- [6] Counsel for the respondents contended that there is no underlying debt between the applicant and the respondents since payment of the debt has been made. It therefore goes without saying that the applicant does not have *locu standi* to launch these proceedings against the respondents for the debt has been extinguished. There is no evidence, so it is contended, before the court to show that the respondent preferred one creditor above the other. Therefore the transaction cannot be said to be voidable. The applicant should institute a separate inquiry if it were to require the information as to the source of the funds of the respondents.
- [7] I am respectfully in agreement with counsel for the respondents that, since the underlying debt between the parties has been paid, there applicant lacks *locu standi* to launch an application for the winding up of the respondents under the prescripts of section 345 of the Companies Act.

- [8] In *Badenhorst v Northern Construction Enterprises (Pty) Limited* 1956 (2) SA 346 (T) which decision has been quoted with approval in a number of cases including the Constitutional Court in *Trinity Asset Management (Pty) Limited v Grindstone Investment 132 (Pty) Limited* CCT 248/16 (5 September 2017), it was stated as follows:

“If an applicant’s claim is bona fide disputed by the respondent on reasonable grounds, an application for a sequestration or winding-up order cannot succeed”

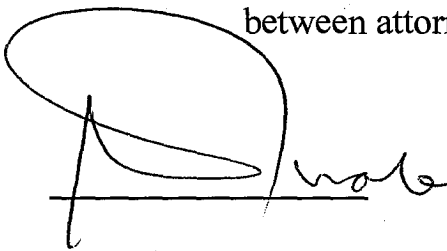
- [9] I am acutely alive to the fact that the applicant disputes that the debt has been settled in full due to the calculation of interest and costs. However, counsel for the respondents contended that the respondents paid the outstanding amount including interest. In my view, there is a dispute between the parties with regard to the amount owing. I am of the considered view therefore that the respondents have raised a bona fide defence on reasonable grounds against the further claim of the applicant and therefore, the winding up application falls to be dismissed.
- [10] I find myself in agreement with counsel for the respondents that, to determine whether the disposition was not made with the dominant intention to prefer one creditor above another requires a separate enquiry from the proceedings before this Court. Whether the liabilities of the respondents at the time the disposition is made exceed its assets does not raise the presumption that the debtor’s dominant intention in making the disposition was to prefer the applicant above other creditors.
- [11] Counsel for the respondents tendered costs for the application as per the acknowledgement of debt entered into between the parties. However,

counsel conceded that the Magistrate Court does not have jurisdiction to wind up a company except for close corporations. Counsel for the respondents therefore submitted that the costs for the application against the respondent be on a magistrate court scale and against the surety be on the High Court scale.

[12] I am unable to agree with this contention. Counsel for the applicant correctly submitted that it would have been difficult to run both matters in separate courts. I am in agreement that the applicant would not have come to court had the respondents met their obligations. It is not for the respondents now to start putting blame on the applicant for coming to court for redress.

[13] In the circumstances, I make the following order:

- I. The application for the winding up of the respondents is dismissed;
- II. The respondents are to pay the costs of the application, jointly and severally the one paying the other to be absolved, including costs for the postponement on the 3rd of December 2018 on the scale as between attorney and client.

A handwritten signature in black ink, appearing to read 'Twala M L', is written over a horizontal line.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 6 December 2018

Date of Judgment: 13 December 2018

For the Applicant: Adv. D. Goodenough
Instructed by: Milemans Attorneys
TEL: 011 895 9000

For the Respondents: Adv. R. Blumenthal
Instructed by: Shultz Mmuoe Inc
TEL: 011 484 0945