



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

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: 07/11/2022 **Signature:**

Case No. 44310/2021

In the matter between:

TN MOLEFE CONSTRUCTION (PTY) LTD

Applicant

and

SOKI (PTY) LTD T/A SCM CONSTRUCTION (PTY) LTD

Respondent

JUDGMENT

MAHOMED AJ

INTRODUCTION

1. This is an application for a provisional order, for the winding up of the respondent. The parties concluded two agreements, the first was terminated due to non-payment and “revived,” on the same terms and

conditions, by way of an addendum. This “revival” is disputed however there is no evidence that the new contract varied from the first and how. It is, therefore, common cause that a contract is in existence on the same terms as the previous one, for civil engineering services.

2. The applicant rendered the services and was paid for all payment certificates issued, except certificates, 12 for R176 825.03 and 13 for R877 988,67¹.
3. The application is made on grounds that the respondent is deemed to be unable to pay its debts in terms of s344(f) read with s 345(1) (c) of the Companies Act 61 of 1973.
4. Section 344 (f) provides, “*a company is unable to pay its debts as described in section 345.*”
5. Section 345 lists various instances when a company is deemed unable to pay its debts. Section 345(1) (c) provides, “*it is proved to the satisfaction of the court that the company is unable to pay its debts.*”

¹ Caselines 003-266-67

6. The application is opposed on the basis that the debt is disputed on bona fide and reasonable grounds.

STRIKING OUT OF (008-1)

7. Advocate Wells appeared for the respondent and applied to strike out paragraphs 22, 24 and annexure FA 7 of the founding papers. Counsel submitted that the allegations therein pertained to negotiations between the parties, are privileged, and therefore inadmissible. It stands to be struck from the papers.
8. Counsel further submitted that there are disputes of fact, which cannot be resolved on the papers and therefore the court cannot grant the order sought.
9. Counsel referred the court to the judgment in **VOLTEX (PTY) LTD T/A ATLAS GROUP v RESILIENT ROCK PTY LTD**², in which Movshovich AJ, addressed a similar dispute.
10. Advocate Naidoo appeared for the applicant and submitted that there was no dispute between the parties when the application was launched. There was no need for any negotiations as alleged by the

² 26 April 2022 Movshovich AJ, caseline 028-1

respondent when the papers were drafted and upon receipt of annexure FA7.

11. The applicant received FA 7 and understood it, on an ordinary reading to be an acknowledgement of liability and noted the follow up email to constitute an inability to pay debts as and when they fall due. In the follow up email, the respondent offered to pay the debts on terms based on cash “to be” unlocked from other projects.
12. The evidence is that the debts were due, it was still to unlock cash to pay those debts on the dates it proposed. The respondent did not have the money to pay its debts when they fell due.
13. Mr Naidoo argued that even if the documents were privileged , it is subject to the exception to the rule of non-disclosure as stated in the judgment in **ABSA BANK v HAMMERLE GROUP** ³, where the respondent in that matter stated in a letter that it “*would like to make a settlement proposal*, that that it was “*struggling to turn the business around*” and was “*unable to make any meaningful profit in the business*”. The SCA held that the contents of the letter, constituted a clear acknowledgement of indebtedness and demonstrated that the Hammerle Group was unable to pay its debts as and when they fell due and that it was commercially insolvent.

³ [2015] ZASCA 43, 2015 (5) SA 215 (SCA)

14. Mr Naidoo submitted further that in that case the court was of the view that any admission of insolvency, whether made in confidence or otherwise, cannot be considered privileged, as insolvency and liquidation proceedings by their nature are of public interest.

15. The offending paragraphs read as follows:

16. On 11 March 2021, the respondent addressed an email to the applicant, in which it stated,

“the attached schedule is a true reflection of our liabilities to you as of now.”

17. On 6 September 2021, the respondent in a further email (FA7)⁴ to the applicants stated:

“...as for the payment we would like to propose payment as follows.

...

We are basing this proposal on a new cashflow to be unlocked by the construction of We would like to kindly request your understanding and consider accepting out payment proposal.” My emphasis.

⁴ Caselines 003-273

18. Annexure FA7 a reconciliation statement which was drafted by the respondent and sent to the applicant, which the respondent denied having sent.
19. Mr Naidoo submitted that a dispute was raised for the first time, in the answering affidavit.
20. There was no dispute raised at the time that his client received the proposal for payment terms and therefor no negotiations were necessary.
21. The respondent admitted liability and proposed terms based on cashflow to be unlocked, it did not have the money to pay as his client's claim fell due. It must be deemed to be insolvent. Counsel submitted his client has met the requirements for the order it seeks.
22. Mr Naidoo further submitted that the respondent drew up the document and annexed it to its email, the respondent even referenced the schedule or reconciliation when it argued that "the applicant read it out of context." The respondent approbates and reprobates, it now attempts to "run for cover" and hide behind legal privilege.
23. In paragraph 18 of its founding papers, the applicant sets out:

“the aforesaid failure by the respondent to effect payment occurred notwithstanding the fact that the aforesaid amounts as per payment certificates 12 and 13, subject to the necessary deductions in terms of payment certificate 11 (which is attached as annexure “FA 5”, are not in dispute by the respondent.” Emphasis added.

24. Mr Well's submitted the amounts are in dispute, and that the applicants simply left the site, there were many defects in the work done, it was therefor in breach of the agreements.
25. Mr Well's submitted further that the amounts were subject to an issue of a final certificate.
26. In reply Mr Naidoo submitted that the amounts were never disputed before this application was launched. It was only from the answering papers for the first time that the applicant learnt of the disputed amounts.
27. Counsel argued further that it makes no sense for the respondent to have drafted a reconciliation statement and confirmed therein that amounts are *“a true reflection of its indebtedness”* to the applicant, if, the amount was in dispute; subject to a final certificate; and the applicant had breached the contract.

28. Mr Naidoo submitted the application to strike out is yet another attempt by the respondent to frustrate the applicant in its efforts to seek redress and another attempt to delay the liquidation proceedings.
29. Counsel submitted that in the Volex case the court addressed the issue of a failure to pay, and held it was not a ground to support an application for a provisional order. In casu, the respondent, has admitted its liability based on its own calculations, and communicated to the applicants that it offers to pay over the period as it is to unlock cash. An event to happen, it does not have the cash as the debt is due.

MAIN APPLICATION

Applicant's Submissions

30. Mr Naidoo submitted that its common cause that the first agreement was terminated, and a new agreement was concluded. The applicant is of the view that the new agreement simply revived the earlier agreement whilst the respondent argues that it is a novation of the last agreement. Counsel argued that the respondent however fails to state what the updated terms of the agreement are, or how the agreement varied from the previous agreement.

31. Counsel submitted the agreement in place is on the same terms and conditions as the previous agreement regarding the 2010 GCC and contract data.
32. Upon failure to pay for payment certificates 12 and 13, the applicant sent a letter of demand⁵ in February 2021 and the respondent replied by email dated 11 March 2021, to which was annexed a reconciliation document which it compiled, as referred to earlier.
33. The document included a note, *“the attached schedule is a true reflection of our liabilities to you as of now.”*
34. The respondent in its answering papers denied having attached the schedule and denied admitting liability to the applicants. Mr Naidoo submitted that the answering papers are simply an attempt to get around and avoiding the winding up of the entity. He proffered if there were no application for the winding up, there would be no dispute. The language in this reply is plain and unambiguous.
35. On 26 July 2021 applicant sent a second demand and on 6 October 2021 respondent made a proposal to pay off the debt in four instalments. This proposal is based on cash to be unlocked as set out in paragraph 17 above.

⁵ Caselines 002-21

36. Advocate Naidoo contended that the respondent makes bald allegations and untruths, all of which is unsubstantiated. Although the respondent alleges the applicant breached the agreement, it misleads the court and the applicant when it refers to a list of defective work annexed to its answering papers. No list is annexed to the papers, no notice of breach has ever been sent to the applicant, nor is there any information as to how or in what respects the applicant had breached the agreement.
37. Counsel informed the court that to date there is no annexure of this nature before the court, despite the applicant's reply advising of same. The respondent has supplemented its papers by filing this notice.
38. Counsel submitted that the content of the email of 6 October 2021 sets out that the respondent made the offer to settle in instalments based on cash it was going to unlock. The language in this response is again plain and unambiguous. This must mean it did not have the money to pay its debt at the time it fell due. It must follow then that the respondent is insolvent, as they do not have money to pay debt as and when it falls due.
39. Mr Naidoo submitted that the applicant prays for a provisional order and at this stage it is required only to prove a prima facie case on all

the affidavits before the court on the respondent's ability to pay its debts.

40. Counsel argued that Mr Wells is incorrect when he argues that a dispute of fact exists and that the court cannot determine the dispute on the papers, that the matter should be referred to oral evidence.
41. Mr Naidoo referred to the judgment in **PROVINCIAL BUILDING SOCIETY OF SOUTH AFRICA v DU BOIS**⁶, where the court stated, that save in exceptional circumstances, a referral to oral evidence should not be resorted to at the provisional stage, a provisional order should be granted.
42. Furthermore, in **KALIL v DECOTEX (PTY) LTD**⁷ the court stated that at the final stage, a court may consider if there exist disputes of fact that cannot be determined on the papers and that stage refer the matter to trial. Counsel argued that the applicant should be granted the provisional order, it has met the requirements for the order. At a final stage the disputes may be resolved and as to the amounts due, a liquidator can provide the correct figures.

⁶ 1966 (3) SA 76 (W) at 79H to 80 E

⁷ 1988 (1) SA 943 AD at 979 B-E

43. Counsel referred the court to the judgment of Rodgers J in **GAP MERCHANT RECYCLING CC v GOAL REACH TRADING 55 CC**⁸, where the court stated that if the applicant makes out a prima facie case on a balance of probabilities with reference to all the affidavits, the onus then is on the respondent to demonstrate that debt is bona fide disputed on reasonable grounds, (the Badenhorst Rule).
44. Mr Naidoo submits the debt is not bona fide disputed on reasonable grounds. The respondent has not demonstrated it is solvent. The argument that the parties were negotiating, is only the respondent's belief, to support its own efforts to avoid liquidation proceedings.
45. Counsel proffered that the court has a discretion and must also consider the history of the litigation of this matter, the respondent has changed attorneys, failed to comply with the rules and had to be compelled to file heads, it has postponed the matter previously and generally adopted the usual tactics in its efforts to avoid a liquidation of the entity.

THE RESPONDENT'S SUBMISSIONS

46. Advocate Wells submitted that the respondent raises three disputes.

⁸ 2016 (1) SA 261 (WCC)

47. Counsel submitted that the applicant repudiated the first agreement when it left the site and the agreement ceased to exist. A new agreement was concluded, which the applicant has breached when it was notified of its defective work that it needed to address. Counsel submitted therefor the disputes cannot be decided on the papers and must be referred to trial.
48. It was submitted further that the certificates issued were all provisional and subject to change, and a final certificate is to be issued upon completion of the work.
49. Mr Wells argued the applicant is not entitled to payment due to the disputes raised. A reconciliation is to be done before payment is made.
50. Furthermore, the payment proposal at FA 7, were negotiations held to achieve a settlement. Respondent did not admit liability to the applicant it only shared a reconciliation with the applicant, and it was meant to serve as a starting point through negotiations to be finalised.
51. Mr Wells argued that the applicant failed to prove that the respondent is insolvent, it presents no direct evidence of its insolvency, nor any evidence on the status of its assets or its liabilities.

52. It was submitted the applicant has not made out a case for provisional winding up. The disputes of fact will become clearer on hearing of oral evidence. Counsel reminded the court the respondent will suffer grave prejudice if the order is granted as the banks will freeze accounts and its contracts will be placed in jeopardy.
53. Mr Wells argued that the applicant wants the court to draw an inference from FA7 that the respondent is unable to pay their debts, which is incorrect, those were only settlement negotiations, they cannot be understood as evidence of insolvency.
54. In reply Mr Naidoo distinguishes the case of Voltex which the respondent relied on, in that in the Voltex judgment, the respondent failed to pay on a date as promised and the court correctly held that it did not mean that the respondent was unable to pay its debts. In casu the respondent stated it offered the terms of payment as it will be unlocking cash from other projects in the future.
55. Counsel argued the respondent did not have the money to pay the applicant the debt owed at the time it fell due and that the order is appropriate.

56. Mr Naidoo submitted that the applicant approaches this court in terms of s345(1) (c), which requires that the applicant must satisfy the court that the respondent is deemed to be unable to pay its debts.
57. The contents of the email sent by the respondent are clear that it was still to unlock cash to pay the applicant's debt. It did not have the money to pay the debt, and therefore the parties find themselves before this court.
58. Counsel submitted that the respondent in the answering papers⁹ failed to give any notice of the applicant's breach of defective work, although it alleged it had a letter dated 25 March 2021. The court must also note that after 25 March 2020, despite the alleged poor workmanship, the respondent paid the applicant some of the debt owed. There appears no logic its behaviour where there is a breach of the agreement, if there was indeed a breach. Counsel submitted if there were such defects, it would have been an easy defence that could have been raised much earlier.
59. Counsel submitted that the court must look at the conspectus of the evidence in the determination of the matter.

⁹ Caselines 006-7

JUDGMENT

60. The application is brought in terms of s344 (f) read with s345 (1) (c) of the Companies Act 61 of 1973.
61. The section provides that the applicant is to prove to the satisfaction of the court that the respondent is unable to pay its debts.
62. The applicant relied on correspondences from the respondent in reply to its letters of demand. The evidence before this court is that it raises seeks a reconciliation, of the amounts due, however it is only in respect of a part of the debt. I am of the view that the applicant is in terms of s 346(1) (b) a prospective creditor and has the necessary locus standi to apply for the order. See **PREMIER INDUSTRIES LIMITED v AFRICAN DRIED FRUIT CO (1950) LTD AND OTHERS**¹⁰. The respondent disputes only a part of the debt.
63. I am of the view that the language employed in the reply and the circumstances surrounding the reply to the letters of demand must be considered in the application to strike out.
64. As set out earlier in the papers, the reconciliation document, was drafted by the respondent. There is nothing ambiguous in the

¹⁰ 1953 (3) SA 510 (C) 513 D-F

language employed in their reply. It is noteworthy, that the respondent denies having sent this document, albeit that it appears as an attachment to its email.

65. Mr Wells failed to address this point or explain the circumstances that caused the document to be attached to the respondent's email, if it denied having sent it.
66. The applicant sent two letters of demand for payment when the respondent, in response to the first attached a spreadsheet which it prepared and which it stated, was a true reflection of its liability to the applicant, as set out in paragraph 16 above. Other than the respondent's say so, there is nothing before this court to demonstrate that they were still negotiating with the applicants. The applicants rejected their proposal, after they received the acknowledgement of liability and instead applied for this order.
67. I agree with Mr Naidoo that as at the date the payment proposal was made there was no need for any negotiations to be had as there was no dispute between the parties. The reconciliation document was clear that the respondent was indebted to the applicant in the amount reflected therein.

68. The respondent raised a dispute only in the answering papers. It would have been logical, to have raised their dispute, if there was one, before they sent off their reconciliation document, or made their payment proposals.
69. Those disputes were, allegedly defects in work done which could have been identified long before a reconciliation was sent. Logically, the disputes on amounts owed and subject to final certificates, was known to the respondent long before a reconciliation was drafted and sent. It could have factored those in. The dispute raised appears as an afterthought in opposing papers.
70. The payment proposal and its wording are clear that the respondents were *“still to unlock cash from future projects, on which the terms of payment as proposed, were based.”* It is clear it did not have the money at the time it had to pay the applicant the debt owed.
71. I am of the view that the respondent is insolvent, or it would have paid its debt. It had identified what it owed and admitted that all that appeared in its reconciliation document, was owed, it was a true reflection of its indebtedness to the applicants.

72. In the **HAMMERLE** judgment supra, the court in a unanimous decision stated:

“It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is a regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a “without prejudice” basis, is admissible in evidence as an act of insolvency. Where a party therefor concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest. It follows that any admission of such insolvency, whether made in confidence or otherwise cannot be considered privileged.”

73. I agree the ethos of the insolvency and liquidation proceedings are in the public interest, even if one has regard to the statutory requirements to advertise, to holding of creditors meetings, to advertising of accounts and the like. This court must consider public policy and interests in the exercise of its discretion.
74. Accordingly, the application to strike out if refused, the respondent’s financial position is a matter of public interest.
75. It is insolvent and cannot claim protections under legal privilege in insolvency proceedings.

76. I agree with Advocate Naidoo that the dispute raised is not bona fide and reasonable. There is no evidence before the court that the respondent is solvent. It would have paid its debt to the applicant if it had access to cash. The respondent unequivocally states, it makes an offer to pay in instalments, "based on new cash to be unlocked."
77. I am of the view that the respondent has admitted liability for its debts to the applicant and it has indicated that it does not have the money to pay that debt, as they fell due, the terms it offered were based on new cash flows it is still to unlock.
78. Therefor in my view the applicant has proven prima facie, on all the affidavits before the court, the requirements for the order it seeks.
79. On the conspectus of the evidence before me including the history of this litigation the respondent has frustrated the applicant's efforts to proceed with this application.
80. It claimed to have given notice on 25 March 2021 of the defective services rendered and had annexed the list to the answering papers. No list appears before this court and counsel submitted there can be no merit in this claim, in that the respondent paid the applicant monies

after 25 March 2021. It is illogical that they would do so if they noted a breach of the agreement.

81. In my view a breach is an obvious and easy defence to raise, however, it was not raised, because it does not exist.
82. It is clear to me that the respondent has done all to avoid the granting of this order, even to a point of misleading this court.
83. I am satisfied that the applicant has made out a prima facie case for the provisional order and the application must succeed.

Accordingly, I make the following order:

1. The respondent is placed in provisional winding up in the hands of the Master of the High Court.
2. The costs of this application shall be costs in the winding up.

MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal

representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 7 November 2022.

Date of Hearing: 8 September 2022

Date of Judgment: 7 November 2022.

Appearances: For Applicant:

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