IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

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

SIGNATURE DATE: 26 September 2023

Case No. 2022/057058

In the matter between:

RICHLINE SA (PTY) LTD Applicant

and

LUXE HOLDINGS LIMITED Respondent

JUDGMENT

WILSON J:

1 The applicant, Richline, sold just over R11 million worth of jewellery to the respondent, Luxe, on consignment. Luxe did not pay. Richline contends that Luxe's non-payment is indicative of the fact that Luxe is insolvent, and seeks a final order winding Luxe up.

2 Richline originally brought the winding-up application on an urgent basis. The matter was ultimately struck from the roll, but not before Luxe acknowledged that it was indebted to Richline for the amount alleged, and

entered into an agreement setting out how it would repay that amount. The agreement, reached on 21 December 2022, envisaged that Richline and Luxe would continue to do business with each other, and that Luxe would trade itself out of its difficulties. However, that was not to be. Luxe failed to perform in terms of the agreement, and Richline now persists, before me, in the relief it originally sought.

3 Luxe's defence to the application is so confused as to be incapable of rational summation. In the urgent application, Luxe originally contended that it did not owe the amount Richline claimed. But the settlement agreement, in which Luxe acknowledged that it owes exactly that amount, put paid to that defence. In a supplementary affidavit, filed when the matter was set down in the ordinary course, Luxe suggested that (a) the consignment agreement on which Richline grounded its claim was never with Luxe, but with its subsidiary companies; that (b) that the consignment agreement and the settlement agreement were concluded without its authority; and that (c) Richline had failed to serve its papers on Luxe's employees, as required by the Companies Act 61 of 1973 ("the Act").

4 The first and second of Luxe's new defences are mutually destructive. If the consignment agreement was never with Luxe, then the authority of those who entered into it is irrelevant. The second defence presumes that the consignment agreement was in fact with Luxe, but those who signed the agreement purportedly on Luxe's behalf were not authorised to do so. While it is perfectly permissible to plead alternative legal defences on the same set of facts, it is not permissible to plead alternative defences, each of which

depends on a different factual version. The effect of any attempt to do so is that each alternative factual version must be rejected.

5 In any event, Luxe at all material times held out that the individuals who signed the consignment agreement and the settlement agreement were authorised to do so. Richline has relied on that representation to its detriment. In these circumstances, Luxe is now estopped from denying those signatories' authority. If that were not enough (it is), the whole process of negotiating and overseeing the signature of the settlement agreement was conducted by Luxe's attorney, a Mr. Amod, who is himself one of Luxe's directors. It is inconceivable that he would have allowed unauthorised persons to enter into the agreement on Luxe's behalf. It was, indeed, Mr. Amod who held out that a Mr. Ngubane, who signed the settlement agreement, was authorised to do so.

6 The settlement agreement was signed on Luxe's behalf, not on behalf of any of its subsidiaries. In addition, the invoices issued under the consignment agreement were issued to Luxe (albeit "trading as" one of its subsidiaries). There can accordingly be no doubt that Luxe was party to, and bound by, both the settlement agreement and the consignment agreement.

7 That leaves the question of whether Luxe's employees have been served. They plainly have. On 18 January 2023, before the matter was originally struck from the urgent roll, a firm of attorneys purporting to represent Luxe's employees filed a notice of intention to oppose the liquidation application. The employees have, however, taken no further steps to intervene, or to file

an answering affidavit, despite Richline's invitation that they do so, and its undertaking that the employees' intervention would not be opposed.

8 It follows from all this that, even if I overlooked that fact that Luxe's defences contradict each other, each of them is wholly lacking in merit on its own terms. While not explicitly conceding this, Ms. Lennard, who appeared for Luxe before me, declined to advance submissions grounded in the facts alleged in either of Luxe's answering affidavits.

9 It remains, however, to consider whether Richline has discharged the onus of establishing that Luxe is insolvent on the facts that it has alleged in its founding and supplementary papers.

10 The Supreme Court of Appeal has recently re-affirmed "generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt" (*Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA), paragraph 12). Unless the demand for payment has been made under section 345 (1) (a) (i) of the Act, an unmet demand must be evaluated in the context of all the other facts relevant to the question of the solvency of the company sought to be wound up. That is why an unpaid creditor is only entitled to an order winding the company up "generally speaking".

11 Here, Richline's demand for payment has not been made under section 345 (1) (a) (i). That means that I must be satisfied, under section 345 (1) (c) of the Act, that the Luxe is indeed unable to pay its debts as a fact. I do not think I could be so satisfied if, notwithstanding the fact of the unmet demand, there were clear indications on the papers that Luxe is in fact solvent.

12 Ms. Lennard suggested that there is one such indication on the papers. If Luxe really was insolvent, she submitted, then Richline would never have agreed to continue trading with it under the settlement agreement concluded on 21 December 2022.

13 That may have been indicative of some doubt about whether Luxe was insolvent in December last year. However, on the facts before me, Luxe has still not paid what is due to Richline, despite having taken advantage of the lifeline Richline threw it in the settlement agreement. That, it seems to me, strengthens the inference that Luxe is genuinely insolvent. If that is not enough, I have also weighed the fact that two of Luxe's subsidiaries are fighting off liquidation applications brought by their creditors. Those additional facts tend to show that Luxe is insolvent.

14 Finally, Luxe has not attempted to provide me with any insight into its true financial position by adducing its balance sheet or other accounts. Nor, in either of its answering affidavits, does Luxe otherwise attempt to set out a coherent body of facts that could support the inference that it is in fact solvent. That also invites the conclusion that Luxe is unable to pay its debts.

15 For all these reasons the application must succeed. Mr. Pincus, who appeared for Richline, asked that I refrain from permitting Luxe to recover the costs of opposing this application from the liquidator. Given the plainly frivolous nature of Luxe's case, I will accede to Mr. Pincus' request.

16 Accordingly –

16.1 The respondent is placed under final winding up.

16.2 The costs of this application, save for the respondent's costs of opposition, are costs in the winding-up. Those costs will include the costs reserved on 21 December 2022.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 September 2023.

HEARD ON:	5 September 2023
DECIDED ON:	26 September 2023
For the Applicant:	SP Pincus SC Instructed by Mouyis Cohen Inc
For the Respondent:	U Lennard Instructed by Amod Attorneys