REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

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DATE
SIGNATURE

Case no.**: 20272/2021**

In the matter between:

NOBILATUS PROJECTS 23 (PTY) LIMITED APPLICANT

And

IMPROFIN (PTY) LIMITED RESPONDENT

Coram: Dlamini J

Neutral Citation: *Nobilatus Projects 23 (Pty) Limited vs Improfin (Pty) Limited* (Case No: 20272/2021) [2023] ZAG JHC 598 (30 May 2023)

JUDGMENT

DLAMINI J

INTRODUCTION

[1] This is a liquidation application brought by the applicant for a final winding-up of the respondent based on its inability to pay its debts.

[2] In its notice of motion, the applicant pursues the following relief;-

2.1 That the respondent be placed under final winding-up in the hands of the Master of the High Court.

2.2 That the cost of this application be ordered to be cost in the winding-up.

[3] It is trite that winding-up proceedings are not to be used as means to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds.[1] However, where the respondent's indebtedness has been *prima facie* established, the *onus* is on the respondent to show that his indebtedness is indeed disputed on *bona fide* and reasonable grounds.[2] The respondent disputes its indebtedness to the applicant on numerous grounds. Primarily, the respondent raises various points *in limmine* and alleges that the exists material disputes of facts in this matter and that same could not be determined in applications.

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[1] See Badenhorst v Northen Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)

[2] In Kali v Decotex (Pty) Ltd the Court said "... an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant; it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds

[4] In the winding-up application, the applicant seeks the final winding-up of the respondent, Improfin (Pty) Limited (Improfin) on the ground that it is unable to pay its debts as and when they fall due, in accordance with the provision of section 344(f), as read with section 345 of the Companies Act,[3] as amended.

[5] Section 345 titled "When company deemed unable to pay its debts" provides;-

(1) A company or body corporate shall be deemed to be unable to pay its debts if;-

(a) A creditor, by cession or either wise, to whom the company is indebted in a sum not less than one hundred rands then due;-

(i) Has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum due; or

(ii) In the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager, or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor".

[5] In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

BACKGROUND FACTS

[6] The applicant testified that it entered into two loan agreements with the respondent.

[3] 61 of 1973

[7] The first loan agreement was concluded on 10 December 2051 between the respondent and Kamal Bhimma, wherein Bhimma loaned the respondent an amount of R10 092 018.09.

[8] The second loan agreement was concluded on 17 March 2016 and the sum of R9,24 million was advanced to the respondent.

[9] That, on 17 March 2016, a company known as K2015351259 (Pty) Ltd, bound itself as surety and co-principal debtor in favour of Bhimma for all the indebtedness of the respondent and agreed to the registration of a covering mortgage bond over its properties as security for the payment of the loan.

[10] The applicant avers that on 17 March 2016, itself, K2015 and Bhimma concluded a written assignment in terms of which, Bhimma ceded and assigned all his rights, title, and interest under the second loan and suretyship to the applicant including his rights, title, and interest against K2015 arising from the bond registered over the property of K2015 to secure the indebtedness toward Bhimma.

[11] The applicant and Bhimma on 28 January 2021, concluded a written deed of cession, in terms of which Bhimma ceded, transferred, and made over to the applicant all his rights, title, and interest in and to any amount due and owing by the respondent in terms of the first loan.

[12] The applicant avers that the respondent has failed to make payment in terms of the loan agreements.

[13] As a result, the applicant demanded that the respondent make payment of the outstanding balance in letters of demand dated 4 March 2020 and 14 December 2020. The applicant submits that the aforesaid letter of demand constituted notice in terms of section 345 of the Companies Act, to the effect that the respondent will be deemed to be unable to pay its debts.

[14] In its reply, the respondent aver that there are various material disputes of facts in this present application. The respondent disputes the existence of

the alleged debt and as such the applicant's *locus standi* as the creditor. Further, the respondent denies receipt of the statutory demand in terms of Section 345 of the Companies Act.[4]

[15] According to the respondent, the applicant and the third party have issued a summons in this Court under case number 8503/ 2021 against the respondent as the First defendant and the surety K2015351259 as the Second defendant. The respondent aver that this action relates to the same alleged debt that the applicant relies upon in the winding-up application. This says the respondent point to the fact that the applicant was fully aware that the claims instituted through action procedure, were defended before the issuing of the winding-up application.

[16] Further, the respondent has in the above action joined the Register of Deeds, Pretoria, to set aside the surety mortgage bond, on the basis that the applicant did not acquire any rights in terms of the first loan agreement in that debt was extinguished through prescription, before the alleged cession taking place on 28 January 2021.

[17] In its replication, in the aforementioned action, the applicant raised the defence of interruption of prescription as envisaged in section 14 of the Prescription Act.[5] This fact also, according to the respondent raises material dispute of fact.

[18] The respondent disputes the mandate and the authority of the undertakings and acknowledgments of the debts that were made on its behalf.

[19] The question to be answered is whether the exist material disputes of facts in this matter and if so whether the applicant should have proceeded by way of action instead of application.

[20] The applicant in sum submits that the respondent’s grounds of opposition are without merit, and are not *bona fide*. Further, the respondent's indebtedness is not disputed on *bona fide* and reasonable grounds.

[4] ibid
[5] Act 68 of 1969

[21] The principles relating to the existence of material disputes of facts are now well established and have been set out in several cases. To succeed in obtaining relief in motion proceedings, the applicant remains bound to the Plascon-Evans[6] test in that it must demonstrate that the facts in the answering affidavit together with the admitted facts from the founding affidavit, justify the relief sought. The trite principle is that an applicant in motion proceedings should stand and fall by their founding papers.

[22] In *National Director of Public Prosecution v Zuma*[7] with reference to the case of *Plascon-Evans Paints Ltd v Van Reebeck Paints (Pty) Ltd,* it was held that "…. It is well established under the Plascon-Evans rule that where in motion proceedings dispute of fact arises on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

[23] If an applicant should have realised when launching the application that a serious dispute of fact incapable of resolution on the papers was bound to develop, the process of court commencing action shall be by summons.

[24] In my view, the respondent's assertion of the existence of material disputes of facts has merit. This is so, because the applicant has under case number 8503/21 instituted action against the same respondent on the same grounds that are being alleged by the applicant in his winding-up application. The defendant in the above mention action, who is the respondent in this application has raised various reasonable and *bona fide* defences, the nature of which could not be decided on application.

[6] 1984 (3) SA 623 (A)
[7] (573/08) [2009] ZASCA 1 (12 Jan 2009)

[25] Further, the respondent has disputed its liability to the applicant and has brought a counter application to have the mortgage bond declared void ab initio and has joined the Register of Deeds, Pretoria in that regard.

[26] Furthermore, the respondent has raised a defence of prescription, in that the applicant's claim had prescribed. Therefore, it is trite that the determination of whether prescription exists is essentially a dispute of fact and law. That it is a fact-based inquiry that requires viva voce evidence.

[27] Also, the respondent disputes and deny the acknowledgments and or undertakings that were made on its behalf and alleges that the respondent did not give authority to the deponent to sign the acknowledgments on its behalf. The determinitation is to whether the deponent, had authority to bind the application is a fact based enquirey that relies in orall evidence.

[28] It is thus my view that facts in dispute between the parties do not justify the order prayed for and the applicant should have proceeded by way of summons and not application.

[29] In all the circumstances mentioned above, I am satisfied that the respondent's *point in limmine* should be upheld and the application must be dismissed.

ORDER

1. The order that I signed dated 17 October 2022 is made an order of this Court.

DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Date of Request For Reasons: 16 January 2023

Delivered: 31 May 2023

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