IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED No
DATE:	26 March 2019.....
SIGNATURE:	.....

Case No. 79186/2017

In the matter between:

DREDGING AFRICA (PTY) LTD **APPLICANT**

And

MASTER CHEMICALS SOUTH AFRICA (PTY) LTD **RESPONDENT**

JUDGMENT

MILLAR, A J

1. This is an unusual matter in which there are two different legal proceedings brought under one case number. Enrolled for hearing before me was an application for the liquidation of the respondent. The facts of such an application is ordinarily unremarkable. What makes this matter remarkable is that the liquidation proceedings were instituted simultaneously with action proceedings under the same case number.

2. Civil litigation may be instituted through either motion proceedings or by action proceedings. This is commenced by the issue of process by the Registrar in terms of Rule 3 of the Uniform Rules of Court ("the Rules"). In the case of motion proceedings, the process that is issued is a notice of motion in terms of Rule 6 and in the case of action proceedings, a summons in terms of Rule 17.

3. Rule 3 refers to the "*issue of process*"– either by way of motion or by way of action. The Rule self-evidently contemplates the birth of a single process and not that of non-identical twins as occurred in the present matter.

4. On 23 November 2017, the applicant in the present matter proceeded to institute motion proceedings for the liquidation of the respondent. Simultaneously therewith, the applicant also instituted action proceedings for the recovery of a debt for which it claimed

the respondent was liable. Inexplicably both of the application for liquidation as well as the summons were issued bearing the same case number.

5. The two processes were served on the respondent at the same time. The respondent gave notice to oppose the liquidation proceedings and entered appearance to defend the summons. The respondent filed a notice in terms of Rule 6(5)(d)(iii) giving notice of its intention to argue points of law in the liquidation proceedings but filed no affidavit in answer. In the action proceedings, a plea was delivered, and pleadings closed. Thus, *litis contestation* was reached in respect of each of the cases made out in the two different processes.

6. The processes issued under the same case number are fundamentally different. While it is so that the liquidation proceedings may have the effect of enforcing the payment of a debt, this is not the purpose which is to protect the *concursus creditorum*. The action proceedings have as their sole purpose, the enforcement of the payment of the debt.

7. The two separate proceedings are irreconcilable under the same case number having regard to their nature, their purpose and the different procedures laid down in the Rules for the adjudication of each. The applicant cannot claim that the respondent is insolvent and seek an order for its liquidation and at the same time engage it in trial proceedings in which the existence of the very debt, the non-payment of which founds the liquidation proceedings is in dispute.

8. I raised this anomaly with counsel for the applicant when the matter was called and after some debate, the applicant withdrew the action proceedings and tendered the respondent's costs in respect thereof. The matter then proceeded in respect of the liquidation.

9. The crux of the dispute in this application was whether there was a "debt" owed by the respondent to the applicant. I n anticipation of the award of a tender for the clearing and dredging of certain sludge dams within the Tshwane Municipal area, the respondent had sought, and the applicant had furnished a quotation for the execution of such work. The quotation was in writing and was dated 27 July 2016. There were further negotiations between the parties and on 30 July 2016, and the respondent delivered a counter-offer in which the price quoted was accepted subject to the exclusion of certain conditions in the original quote. The applicant accepted the counter-offer with the exclusion of the specific conditions in the original quote on 4 August 2016. The work progressed and payments were made by the respondent to the applicant. This was common cause between the parties.

10. The dispute between the parties lies in respect of two aspects. Firstly, the original quote of 30 July 2016 had expressed the price as R1 436 000,00 (excluding VAT) however the counter offer simply referred to a price of R1 436 000,00 with no reference to VAT. Secondly, the respondent contends that on 19 October 2016, a further oral agreement was entered into in terms whereof the original price was reduced to R1 219 040,00 due to a reduction in the scope of the work from 3 dams to one and also that this price was

subject to the applicant removing 22 000 cubic metres of silt. If less than this amount of silt was to be removed the price would be adjusted downward pro-rata.

11. The respondent filed no answering affidavit in the liquidation application, but its dispute of the debt is set out in the plea filed in the action proceedings and the Rule 6(5)(d)(iii) notice.

12. On 29 November 2016, the applicant invoiced the respondent for the balance it claimed was due. On 10 January 2017, the respondent wrote to the applicant and disputed the amount claimed and that 22 000 cubic metres of silt had been removed. The respondent claimed only 8 200 cubic metres of silt had been removed. Correspondence was exchanged between the parties, but this did not result in any resolution of the dispute. On 10 February 2017, a notice in term of section 345 of The Companies Act 1973 was dispatched to the respondent. Thereafter on 20 November 2017, both the liquidation application and summons were issued and served on the respondent.

13. The founding affidavit in the liquidation is silent on the dispute raised by the respondent. It refers to the price of R1 436 000,00 but makes no mention of VAT. It refers to the payments received and indicates that these were *"(VAT EXCLUSIVE)"*. Furthermore, the statement summary attached to the founding affidavit and which reflects the amount of the debt in the sum of R920 404,35 also provides for unapproved work done as well as VAT on the original price. It also specifically refers to "*excavation of 22 000m3 of sludge and disposal thereof.*" The founding affidavit is silent on the respondent's dispute raised as early as 10 January 2017.

14. The respondent besides raising the dispute in regard to the debt, to which I shall return, also sought to impeach the founding affidavit. This was on the basis that the Commissioner had not printed his full name and business address below his signature[1]. In the instant matter the commissioner was a police officer at the Garsfontein Community Service Centre and the stamp of the Centre together with his signature and force number appear below his signature.

15. The respondent referred me to Nkondo v Minister of Police & Another[2] as support for the proposition that the founding affidavit has consequently not been properly commissioned and should be disregarded. I disagree, the complaint in this case is of a technical nature and does not go to whether the affidavit was in fact commissioned or not. If there is a failure to comply with the regulation, then this was not in respect of the administration of the oath but simply in respect of compliance with the regulation once the oath had been administered. The purpose of the regulation is so that the commissioner of oaths can be identified and located if necessary.

16. In re Malefane v Standard Bank of SA Ltd[3] it was held that:

> "*In Ex Parte Du Toit 1962 (1) SA 445 (E) the usual endorsement that the deponent knows and understands the contents of the affidavit was wanting from the affidavit in question. The Court stigmatized the defect as a formal defect and condoned*

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[1] See section 7 read together with regulation 4 promulgated in terms of section 10 of the Commissioners of Oaths and Justices of the Peace Act 16 of 1963
[2] 1980 (2) SA 362 (O) at 367 and also 369
[3] 2007 (4) SA 461 (Tk) at 465B-D

non-compliance. I agree with the approach of the Court in that case. In the present case the deponents have acknowledged that they knew and understood the contents of the relevant affidavits as required by reg 4. The only defect is that reference is made to Government Notice 35 of 14 March 1980 instead of Government Notice R1258 of 21 July 1972 as amended. I am of the view that this is a formal defect and that there has been substantial compliance with reg 4 in respect of all the impugned affidavits. Non-compliance with reg 4 is accordingly condoned. There is no need for a substantive application."

17. The defect complained of in the present matter is to my mind for the reasons set out above, one of a formal nature. I find that there has been substantial compliance with regulation 4 and that no substantive application for condonation thereof is necessary.

18. In regard to the disputed debt, in Badenhorst v Northern Construction Enterprises (Pty) Ltd[4] it was stated:

"*An application for the liquidation of a company should not be resorted to to enforce the payment of a debt which is bona fide disputed by the company. The liquidation of a company affects the interests of all creditors and share-holders, and an order for its liquidation should not be lightly granted on the application of a single creditor.*"

[4] 1956 (2) SA 346 (T) at 346G-H; Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A)

19. It was argued by the respondent that its dispute of the debt was on *bona fide* and reasonable grounds. The applicant for its part argued that since the respondent had not filed any answering affidavit, there was nothing before the court in regard to the dispute.

20. For this proposition, the applicant relied on Payslip Investment holdings CC v Y2K Tech Ltd[5] where the court held:

> "*With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers filed of record that the applicant's claim is disputed on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general.*"

21. In the instant case, the papers filed of record are not limited only to those specific to the application. The anomalous situation of both the application and action proceedings being conducted under the same case number means that the documents filed in respect of the action, are at least insofar as the issue of the debt is concerned "filed of record". The plea to the summons and particulars of claim deals specifically with the allegations relating to the indebtedness and sets out with sufficient particularity the respondents defence thereto.

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[5] 2001 (4) SA 781 (C) at 783I

22. Even though the applicant withdrew the action at the hearing of this application, the documents "filed of record" in regard to it are still before the court and merit consideration for the proper determination of whether the debt is disputed on bona fide and reasonable grounds.

23. The test to be applied is set out in Hulse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)[6]where the court held:

> *"I think it is important to bear in mind exactly what the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claims, and do so bona fide, …what they must establish is no more and no less that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claim. They do not, …have to prove the company's defence in such proceedings. All they have to satisfy me of is the grounds which they advance for their and the company's disputing these claims are not unreasonable …it seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide, … to allege facts which, if proved at trial, would constitute a good defence to the claims made against the company."*

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[6] 1998 (2) SA 208 (C) at 219E – 220A

24. After receiving the applicants' invoice at the end of 2016, the respondent immediately raised a dispute. This was before any formal demand for payment was made. Thereafter, a full 10 months before any legal proceedings were instituted. The dispute was not raised to impede or otherwise frustrate the proceedings, predating them. Notwithstanding the dispute having been raised, the applicant proceeded and, as is evident from the application, simply ignored the dispute. In these circumstances it can hardly be said that the respondent was not *bona fide*.

25. The grounds upon which the dispute is founded were set out in the respondent's letter of 10 January 2017 and reiterated in the plea filed in response to the action. If the respondent is able to establish the oral agreement of 19 October 2016 and its terms, which I might add were not wholly inconsistent with their prior dealings, then the question of the specific amount of silt and sludge removed is directly relevant to the determination of the debt.

26. The applicant argued that I should find that a portion of the debt is due and that even if an amount of at least R100 is due to the applicant by the respondent[7], then I should find that there is a debt due and grant the order sought.

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[7] Section 344(f) read together with section 345(1)(a) of the Companies Act 61 of 1973

27. I am not persuaded by this argument. The applicant asserted that the full amount of the debt was due but having regard to the statement of account which it relied upon, notwithstanding the dispute, the amount of the indebtedness would not be for the amount claimed having regard to the items in it relating to the unapproved works as well as the VAT. The applicant asserted the debt as a whole as being due and it follows, that the establishment of a *bona fide* and reasonable dispute as to the existence of the debt must be in respect of the whole debt[8].

28. Before the applicant embarked on any litigation, it knew that the respondent disputed the debt and the specific grounds upon which the dispute was founded. Notwithstanding this, it proceeded with motion proceedings and furthermore advertently and deliberately omitted any reference to the dispute from its founding papers[9]. The conduct of the applicant in this regard is to be deprecated. The respondent argued that the application for liquidation was, when considered against the raising of the dispute 11 months before

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[8] Walter McNaughtan (Pty) Ltd v Impala Caravans (Pty) Ltd 1976 (1) SA 189 (W) at 192A

[9] The position was usefully summarized by Moshidi J in Scania Finance Southern Africa (Pty) Ltd v Go-Liner Tours (Pty) Ltd (2010/50597) [2011] ZAGPHC 99 (12 August 2011)-"In dealing with disputes of fact in motion proceedings, Conradie J in *Cullen v Haupt* 1988 (4) SA 39 (C) at p 40F-H, said: "*I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, 'particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop'. The next of better known cases on this topic is that of Conradie v Kleingeld 1950 (2) SA 594 (O) at 597, where Horwitz J said that a petition may be refused where the applicant at the commencement of the application should have realised that a serious dispute of fact would develop.* " More recently in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para [26], Harms DP said:"*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justifies 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 …* "

either the application or action proceedings were instituted, an abuse of the process of the court. I find merit in this argument and intend to make a punitive costs order.

29. In the circumstances, I make the following order:

29.1 The application is dismissed with costs on the scale as between attorney and client.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	20 MARCH 2019
JUDGMENT DELIVERED ON:	26 MARCH 2019
COUNSEL FOR THE APPLICANT:	ADV. B STEYN
INSTRUCTED BY:	ROELF NEL INC.
REFERENCE:	MR R NEL
COUNSEL FOR THE FIRST RESPONDENT:	ADV. D HODGE
INSTRUCTED BY:	TSHABALALA ATTORNEYS
REFERENCE:	MR. R TSHABALALA