



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

Case No: 15557/2021

In the matter between:

GERBERT HOLDINGS (PTY) LTD

Applicant

and

**TRUVELO AFRICA ELECTRONICS DIVISION
(PTY) LTD**

Respondent

DELETE WHICHEVER IS NOT APPLICABLE

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

6TH December 2022

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DATE

JUDGMENT

HF JACOBS, AJ:

[1] This is an application for the winding up of the respondent in terms of sub-section 344(f) read with section 345 of the Companies Act, 61 of 1973. There are four affidavits filed of record in these proceedings. After the founding, answering and replying affidavits had been delivered the

respondent delivered a supplementary answering affidavit whereupon the applicant delivered an answering affidavit thereto.

[2] In its founding papers which is dated 25 March 2021 the applicant relies on the statutory demand for payment and the presumption in section 345 of the Companies Act of 1973. The respondents' attorneys responded to the notice recording a bare denial whereupon the founding papers were served for the liquidation of the respondent. Prior to the liquidation proceedings the applicant raised invoices in the sum of R18 256 679.35 of which R13 408 598.24 had been paid when the liquidation proceedings were instituted on 25 March 2021. The statutory demand is made up of the balance which the applicant says the respondent cannot pay and should, therefore, be wound up. The respondent challenges the claim and, therefore, oppose the liquidation proceedings and seeks dismissal thereof. The applicant claims, in the alternative to a provisional or final liquidation order, a referral of the application to trial.

[3] "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."¹ Should an applicant fail to heed this basic proposition it would generally result in the application being refused, provided that the disputes of fact on material issues were foreseeable. Disputes of fact cannot be decided or determined in

¹ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [26]

motion proceedings on the probabilities disclosed the affidavits unless this is done to enable a court to decide whether or not to reject either parties version on the affidavits.²

[4] The approach to the disputes of fact is a robust one.³ To apply the approach mentioned above requires careful perusal of the affidavits of record in the light of the common cause or undisputed facts and it must be determined whether the disputes of fact raised in the proceedings are real, genuine or *bona fide* in nature.⁴

[5] I have carefully scrutinized the affidavits. The version set up by the respondent is, in my view, not so far fetched or clearly untenable that I am justified in rejecting it merely on the papers on the basis stated in Wightman.⁵ I can also not reject the respondents statements about its counterclaim out of hand. To determine the facts in these motion proceedings on the probabilities disclosed in the affidavits can only be made if I can decide whether or not to reject either parties version, something I cannot do.

[6] The respondent challenges the contract on which the applicants claim is founded. I cannot reject the version on the probabilities. The

² See *Plascon & Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635B

³ See *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154E

⁴ See *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 293H – 294E; *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 12

⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)

respondent answers to the outstanding invoices and alleges a counterclaim in excess of the claimed amount. Those allegations and testimony I cannot reject in motion proceedings. The challenge of the respondent was, on the evidence before me, not foreseeable by the applicant when the liquidation proceedings were instituted. Under the circumstances I am not prepared to dismiss the application. I hold this view mindful of the general principle that an order referring a matter to trial during motion proceedings should be sought *in limine*, something the applicant did not do, but submitted in support of such a finding in the alternative.

[7] Under the circumstances I am driven to conclude that material disputes of fact exist in this application and that the application cannot be properly decided on the affidavits and that it should be referred to trial.

I make the following order:

1. The application is referred to trial;
2. The applicant's notice of motion shall stand as simple summons;
3. The applicant shall deliver its declaration within 20 days from date of this order after which the Uniform Rules of Court shall apply for the exchange of pleadings;
4. The costs of the application shall be costs in the cause.

H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 6th December 2022.

APPEARANCES

Applicants' counsel: Adv L De Beer

Applicants' attorneys: Vesi De Beer Incorporated

Respondent's counsel: Adv van den Bogert

Respondent's attorneys: Tim Du Toit Incorporated