



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

- (1) REPORTABLE: Yes/ No
(2) OF INTEREST TO OTHER JUDGES: Yes/
No
(3) REVISED.

SIGNATURE: DATE:

Case No.: 25368-2021

In the matter between:

VAN DER MERWE & ASSOCIATES INCORPORATED

Applicant

and

PREMAX TRADING 2 CC

Respondent

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be June 2023.

JUDGMENT

BAQWA J:**Introduction**

- [1] This is an application by the Applicant for the provisional winding-up of the Respondent in terms of Section 344(f) read with sections 345(1) (a) and (c) of the Companies Act, 61 of 1973.
- [2] The Applicant was mandated to provide legal services to the Respondent by pursuing an action against Dumarto Civils and Plant Hire CC during 2013.
- [3] On 14 April 2018 the Applicant rendered an account to the Respondent in the total amount of R472 562,49.
- [4] The account rendered was an itemised account claiming payment for the services rendered from 2013.
- [5] The legal action which the Applicant pursued on behalf of the Respondent resulted in the liquidation of Dumarto Civils and Plant Hire CC.
- [6] The Applicant was thereafter instructed to conduct an insolvency enquiry on behalf of the Respondent as a result of which the Respondent was awarded a dividend of R200 000,00 from the estate of Dumarto.
- [7] When the Applicant rendered its Bill of Costs to the Respondent, the latter refused and/ or failed to pay.
- [8] The Bill of Costs, which was eventually presented to the Legal Practice Council was settled by a consultant representing the Respondent in the sum of R250 000,00 in full and final settlement.

- [9] A demand for payment was sent in writing on 18 April 2021 to the Respondent. After failing to elicit a meaningful response from either the Respondent or its attorneys, the Applicant reached the conclusion that the Respondent was unable to pay its debts.
- [10] On a company search conducted by the Applicant, it appeared that the Respondent had ceased to do business. Records at the CIPC reflected the Respondent to be in a deregistration process.
- [11] The Respondent opposes the winding-up application and its main defence is that the Applicant's claim has become extinguished by prescription in terms of section 10(1) of the Prescription Act 68 of 1969.
- [12] The Respondent submits further that the Applicant is accordingly not a creditor of the Respondent and has no *locus standi* to institute these proceedings for purposes of the Section 345 of the Companies Act.

Condonation

- [13] Before dealing with the merits of the main application I propose to deal with the issue of condonation summarily. The Respondent served its notice of intention to oppose on 17 June 2021 but only filed its answering affidavit a year later on 14 June 2022.
- [14] Also, on 14 June 2022, a business rescue application was launched regarding the Respondent. As a result thereof the Applicant only filed its replying affidavit on 15 September 2022. The business rescue application was withdrawn on 22 September 2022.

- [15] The replying affidavit was met with a Rule 30(2) (b) Notice by the Respondent. On 28 September 2022 the Applicant explained by letter why the replying affidavit was only filed in September, and requested consent for the late filing. Consent was refused by the Respondent's attorneys and the Applicant was compelled to launch a substantive condonation application.
- [16] It is trite that the Business Rescue proceedings suspended the liquidation proceedings and that the filing of the replying affidavit was under the circumstances not late. The Rule 30(2) (b) Notice and the failure to give consent was not justifiable. The filing of the replying affidavit is therefore condoned and the costs thereof ought to be awarded against the Respondent and its attorneys in this regard on a punitive scale.
- [17] It is common cause that the Respondent filed an answering affidavit a year later than it ought to have done – and that there was no application for condonation in that regard.
- [18] I find it quite deplorable and petulant for the Respondent to argue that “insofar as condonation of the late filing of the relevant affidavits are concerned, it is now established, that the rules are there for the Court and not the Court for the rules, and in instances where (such in the present matter) the late delivery of an affidavit or supplementation does not cause any prejudice to the other litigant, same should be permitted without further ado.”
- [19] The quoted submission by the Respondent is made in circumstances where its answering affidavit was filed virtually on the eve of the Applicant proceeding with its application on the basis that it was not being opposed.

The answering affidavit was clearly filed in order to derail the application. To suggest in those circumstances that there was no prejudice to the Applicant is meritless.

[20] Be that as it may, it is so that instead of the Applicant filing an objection in terms of Rule 30(2) (b) to signify that the late filing of the answering affidavit without an application for condonation was an irregular step, the Applicant filed its replying affidavit thus condoning the omission by the Respondent. Whilst I find the absence of deference by the Respondent to the Uniform Rules of the Court regrettable, to say the least, I do not say more in that regard.

On the merits

[21] The Respondent takes the stance that the Applicant is not entitled to either a final or provisional winding-up order of the Respondent as it is not a creditor of the Respondent for the purposes of section 345(1) (a) and (c) as the application was launched on 21 May 2021, whereas its claim had prescribed on 13 April 2021, being three years after the account was rendered to the Respondent. It submits that the Applicant lacks *locus standi*. The Respondent also submits that the Applicant has not proved that the Respondent is unable to pay its debts.

[22] It is trite as between attorney and client, that a mandatory claim for payment ordinarily becomes due upon termination of the relationship or when the work is completed. See **Benson and Another v Walters and others**.¹

¹ 1981 (4) SA 42 (C) at 48G

Ordinarily, prescription begins to run when the mandate of an attorney is terminated.²

- [23] In the present matter, prescription was made conditional upon the quantum thereof being determined by agreement or taxation subsequent to the letter dated 15 April 2019 and section 12(3) of the Prescription Act 68 of 1969 provides “a debt shall not be deemed to be due until the creditor has knowledge . . . of the facts from which the debt arises . . .”

In the present application, that knowledge would only arise after taxation.

- [24] The amount contained in the original account was disputed by the Respondent and the condition for making payment raised by the Respondent’s attorney was the presentation of the account for taxation. The amount payable, therefore, became uncertain and could be due once it was ascertained through taxation.

- [25] A similar situation was dealt with in **Santam Ltd v Ethwar**³ where debt was conditional upon the quantum thereof being determined by agreement or taxation.

- [26] The amount due was agreed upon and fixed on 13 April 2021 by an attorney instructed on behalf of the Respondent. The Respondent accepted liability on the basis of the taxed Bill of Costs. The Applicant also became aware of the amount which was due to him on that date, namely 13 April 2021 and prescription had become interrupted and would become effective on 12 April 2024.

² *Benson* at 50C

³ 1999 (2) SA 244 (SCA)

[27] It does not behove the Respondent, so the Applicant argued, to refuse to make payment until the amount is quantified on taxation and after such taxation, to raise prescription when further legal processes were kept in abeyance until such taxation.

Prima facie case for provisional winding-up

[28] After the taxation of the Bill of Costs and the amount was fixed at R250 000,00. The debt was no longer in dispute. In a situation where factual disputes are raised, the question to be answered is whether with regard to the evidence tendered in all the affidavits, a prima facie case has been established on a balance of probabilities.

[29] The question whether the applicant had proved the inability to pay its debts by the Respondent can be answered as follows:

“A company is unable to pay its debts when it is unable to meet its current demand on it, or its day to day liabilities in the ordinary course of business, in other words, when it is commercially insolvent. The test is therefore not whether the company’s liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter the company will be in a position to carry normal trading, in other words whether the company can meet the demands on it and remain buoyant.”⁴

[30] “Liquid Assets” are assets which are available to the company for the purpose of meeting its obligations, when, for whatever reason, a company is

⁴ LAWSA 4(3) LAWSA 2 ED (2014), paragraph 74

unable to access any liquid assets, it is illiquid and unable to pay its debts as they fall due.

[31] The Respondent, acting through its attorneys, undertook to settle its debt to the Applicant after taxation of the Bill of Costs. After taxation it could still not pay. It meets the LAWSA definition of commercial insolvency referred to above.

[32] A creditor has a right, *ex debito justitiae*, to a winding-up order against a respondent company that has failed to discharge its debt. The discretion of a court to refuse to grant a provisional winding-up order, when an unpaid creditor applies therefor, is a “very narrow one”, which is rarely exercised and then in special or unusual circumstances only.⁵

[33] I am satisfied that the Applicant has proved its case on a balance of probabilities and that the following order should ensue:

Order

33.1 The late filing of the replying affidavit by the Applicant is condoned.

33.2 The Respondent and Morné Coetzee Attorneys are ordered to pay the Applicant’s costs for the condonation application jointly and severally on a scale as between attorney and client.

33.3 The Respondent be provisionally wound up and a provisional order is issued with a return date being: 4 September 2023 in terms whereof any person may approach the Court on the return date to give reasons why the Respondent should not be liquidated;

⁵ See *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at para 12

33.4 That the costs of the main application be costs in the liquidation of the Respondent, same to be taxed on a scale between attorney and client.

SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 5 June 2023

DECIDED ON: 5 June 2023

For the Applicant: Adv H P Wessels
Instructed by van der Merwe & Associates

For the Respondent: Adv A P Ellis
Instructed by Morné Coetzee Attorneys