IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	SIGNATURE

CASE NO: 57915/2010

In the matter between:-

MANAGEMENT INFORMATION TECHNOLOGY (PTY) LTD

t/a IVOR LEE & ASSOCIATES Applicant

(Reg Nr.: 1994/010115/07)

ALLEN PATRICK FROST N.O. First Supporting Intervening Applicant

LINDA ANNETT FROST N.O. Second Supporting Intervening Applicant

(In their capacities as trustees of the

A&L Family Trust, IT 3387/08)

VS

STROCAM PROJECTS (PTY) LTD Respondent

(Reg Nr.: 2000/024260/07)

JC MSOLWANE First Intervening Employee

E LESUFI Second Intervening Employee

MD PHALENG Third Intervening Employee

W MOKOTSI Fourth Intervening Employee

A HLUNGUANE Fifth Intervening Employee

EN MADONDO Sixth Intervening Employee

Coram: Kooverjie J

Heard on: 26 October 2023, 7 November 2023 and 18 & 19 January 2024

Delivered: 21 February 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 21 February 2024.

Summary:

- **The entire indebtedness of the amount due and owing has been placed in dispute.**

- **On this premise alone, liquidation proceedings are not appropriate. The pursuance of this application constituted an abuse of this court's time.**
- **Punitive costs are justified.**

ORDER

It is ordered:-

1. The liquidation application is dismissed.
2. The applicant is ordered to pay costs on an attorney and client scale.

JUDGMENT

KOOVERJIE J

THE APPLICATION

[1] The matter in the main constitutes a liquidation application. The liquidation of the respondent, Strocam Projects (Pty) Ltd is being sought by the applicant. The initial liquidation application already instituted way back in 2010 is being pursued once again. There is an extensive litigious history between the parties spanning for over a decade in this matter. The winding-up proceedings were premised on the allegation that the respondent was unable to pay its debts when they were due and payable (by virtue of Section 345(1) of the Companies Act. The applicant persists with this application on the basis that the defence is not *bona fide* and that the respondent's conduct is merely dilatory.

[2] The current role players in this matter are the applicant, Management Information Technology (Pty) Ltd t/a Ivor Lee & Associates, the respondent, Strocam Projects (Pty) Ltd ("Strocam") against whom the liquidation is sought, and the intervening parties being the existing employees of the respondent (cited as the first to the sixth intervening employees) who support the respondent. The first and second intervening parties, who represented the A&L Family Trust withdrew from the proceedings.

[3] The dispute between the parties relates to labour broker service fees that were rendered by the applicant to the respondent on a project in Port Elizabeth. Way

back in 2010, when the liquidation application was instituted, the applicant contended that an amount of R 5,433,312.91 was due and owing to the applicant.

CHRONOLOGY

[4] In order to appreciate the context in which the liquidation proceedings is now once again before court, I deem it necessary to portray the relevant chronology. In summary, the events were as follows:

4.1 **8 October 2010**

The applicant issued a main application for liquidation and the respondent opposed same.

4.2 **17 January 2011**

Since Strocam failed to file its answering papers, the matter was enrolled on the unopposed motion court roll. Strocam however sought a postponement which was granted by the court. Strocam was then ordered to file its answering affidavit within 10 days.

4.3 **February – May 2011**

The matter was once again set down on the unopposed roll. Shortly before the hearing Strocam filed its opposing affidavit on 4 April 2011. The matter was then removed from the roll. On 19 May 2011 the applicant filed its replying affidavit.

4.4 **3 October 2011**

Strocam's accountant, Mr Nel, intervened in the liquidation and instituted an application for business rescue. The applicant opposed the business rescue proceedings.

4.5 **30 April 2012**

The liquidation application was re-enrolled. Strocam in fact paid the applicant an amount of R581,000.00. The matter was then postponed pending the outcome of the business rescue application.

4.6 **3 May 2012 and 4 May 2012**

The employees of Strocam intervened in order to support the business rescue process. However such application for business rescue was dismissed by the court. The court allowed the application for intervention by the employees and the application for liquidation was postponed *sine die* to enable the employees to file an answering affidavit.

4.7 **June 2012**

The applicant filed an action against Strocam under case nr. 35757/2012 for the payment of an amount of R5,454,359.50.

4.8 **28 February 2014 and 4 March 2014**

Strocam commenced with its intended voluntary business rescue process and Muller was appointed as the business rescue practitioner.

4.9 **6 March 2014 and 24 April 2014**

The applicant's attorneys instituted action proceedings for a judgment debt so as to avoid its claim from prescribing. The trial action was postponed *sine die*.

4.10 **7 January 2016**

The applicant then interdicted the implementation of the business rescue plan pending the finalisation of the action which was instituted by the applicant.

4.11 **11 March 2016 and 14 March 2016**

The business rescue practitioner filed a notice of termination of the business rescue proceedings in terms of Section 141(2)(b) of the Companies Act. On 11 March 2016 Strocam applied for a postponement of the trial proceedings. The new trial date was set down for 14 March 2016. However the trial was again postponed *sine die* and Strocam was ordered to pay the wasted costs.

4.12 **26 October 2016**

All Steel Services CC, another alleged creditor of the applicant, launched an application once again to put Strocam under business rescue.

4.13 **15 November 2016**

This was the new date for the trial. The applicant persisted in proceeding with the trial and the matter was allocated to Basson J. On the said day, the legal representatives of Strocam withdrew and Basson J heard evidence of the applicant and granted judgment in favour of the applicant in an amount of R4,873,359.50. Strocam appealed this judgment.

4.14 **30 March 2017**

Basson J refused the leave to appeal.

4.15 **May 2017**

Although Strocam filed an application for leave to appeal to the Supreme Court of Appeal, it did not persist therewith, thus causing the appeal to lapse. The order of Basson J stands at present.

4.16 **August 2017**

The business rescue application, instituted by All Steel Services CC was dismissed as well as their leave to appeal which was brought in April 2018.

All Steel Services' application for leave to appeal to the SCA was also not persisted with and therefore it lapsed.

4.17 **23 April 2019**

Mabuse J granted an order postponing the liquidation application *sine die* and further granted the fifth and sixth intervening employees leave to intervene.

4.18 **17 May 2019 and 28 May 2019**

Strocam filed an affidavit in reply to the applicant's supplementary affidavit. The first and second intervening employees filed their affidavits.

4.19 **May 2019**

Strocam instituted action proceedings to rescind the order by Basson J (rescission action).

ISSUES FOR DETERMINATION

[5] The salient issue for determination is whether a liquidation order is justified. The respondent has raised various defences, including technical defences. For the purposes of this judgment I deem it appropriate to deal with the main issue.

[6] The nub of the respondent's opposition to the liquidation is premised on two main grounds, namely that there is a dispute regarding the entire amount due and owing to the applicant and secondly, this application constitutes an abuse as an undertaking furnished by the applicant not to proceed with this application until the outcome of the rescission action.

ANALYSIS

[7] The issue concerning the indebtedness came about when the applicant and the respondent entered into an agreement where the applicant was to render labour services to the respondent at its business premises outside Centurion. This contract was concluded in June 2008 and the arrangement was entered into orally.

[8] Mr Ivvor Lee alleged that he was invited by the respondent to become a director of the respondent. He was mandated to procure business for the respondent in the Western Cape region and he was promised a shareholding in the respondent's business. At all relevant times the contract between the parties was

premised on an oral agreement. For some time the business relationship between the parties went smoothly. The respondent regularly paid the applicant the amount that was claimed as per the invoices issued.

[9] The mutual agreement that payment would be made upon delivery of an invoice was adhered to but after some time payment was only made within 30 days. The respondent started experiencing financial difficulties. On 16 November 2009 the respondent advised the applicant due to an economic downturn in its business, Strocam had to obtain a loan to ensure that its creditors are paid. It also undertook to pay 70% of the balance that was owed to the applicant. The balance due and payable, at 30 September 2009, was an amount of R1,203,362.43. Such correspondence was attached as Annexure 'B' to the founding papers of the applicant.

DISPUTE re INDEBTEDNESS

[10] Before 5 March 2009 the respondent in fact paid the amounts owed to the applicant. The difficulty came about with the payments following after March 2009. The invoices that were issued thereafter reflected that an outstanding amount of R5,433,312.91 for the period March 2009 to December 2009 was owed. The respondent thereafter made certain payments between April 2009 to

August 2009 amounting to a total of R1,480,189.88. The invoices were attached as ‘C1’ to ‘C20’ to the founding papers.

[11] The applicant maintains that an outstanding balance of R4.8 million remained outstanding. At the time, on 5 July 2010, the respondent acknowledged that it was only indebted to the applicant in an amount of R1,263,630.25 and would pay in monthly instalments of R30,000.00.

[12] The applicant, at that time, motivated that since the respondent was unable to settle its debt since inception, it was entitled to have the respondent liquidated. The respondent then procured an auditor’s report which illustrated that the respondent owed only an amount of R563,630.05, thereby disputing the amount of indebtedness.

[13] In its supplementary answering papers, the respondent alleged it was in fact entitled to a credit of R2,257,742.00 due to being overcharged. In this vein it instituted the rescission action proceedings. It was pointed out that oral evidence was necessary in order to resolve the indebtedness dispute. At paragraph [39] (of the respondent’s answering affidavit) it was alleged:

“The contents hereof is noted but it is submitted that the respondent did initially on delivery of invoices paid the applicant but it later became apparent that the

applicant overcharged the respondent with exorbitant amounts and is on its own version amounting to approximately R2.2 at the time…."

[14] At paragraph [43] the respondent alleged that only an amount of R560,000.00 was due to the applicant. Further at paragraph [44] it was alleged that this was an abuse of Mr Lee's previous position as director as he has attempted to put himself in the position by extorting money from the respondent.

[15] The applicant, on the other hand, persists with its view that the order of Basson J stands and there can be no dispute on the amount due and owing.

[16] Additional arguments that were raised was that the applicant failed to effect payment or put up security in respect of the demand in terms of Section 345 of the Companies Act. Furthermore when the applicant issued the Section 345 statutory notice, the respondent offered payment by making monthly instalments.

UNDERTAKING

[17] The second main contention centers on the alleged undertaking. It cannot be disputed that the applicant undertook to suspend the liquidation application, under case number 57915/2010. In Annexure 'X2' the respondent sought confirmation from the applicant that they will not proceed with steps in executing the judgment

(Basson J's judgment) pending the adjudication of the action to set aside the judgment instituted under 34364/2019. On 17 May 2019 the respondent instituted legal action to set aside the default judgment and issued a summons under 34364/2019 which was defended by the applicant.

[18] I have further noted that on 5 December 2022 the applicant undertook in writing not to proceed with any execution steps. The letter, attached as Annexure 'X3', read:

"Our client will be inclined to provide you with the necessary undertaking and no further execution steps will be taken against the movable assets of your client…."

Thus the respondent's understanding is that the applicant undertook neither to proceed with the execution nor persist with the main liquidation application. The applicant contended that this was the arrangement. In its view no undertaking was given not to pursue the liquidation proceedings. What is evident and cannot be disputed, in my view, is that after obtaining the order (judgment debt), the applicant proceeded to liquidate the applicant.

[19] Even if the undertaking is disputed, a further obstacle stands in the way of the applicant. It cannot be ignored that the respondent's case since inception was that the applicant was overcharging the respondent. I emphasize that the respondent raised this contention already in its answering affidavit in 2011. In fact

before the winding-up proceedings were instituted, the respondent informed the applicant of the overcharging issue.

[20] The discrepancies arose when the applicant invoiced the respondent for services rendered in Port Elizabeth. The respondent suspected certain irregularities and learnt that the actual correct timesheets were not made available to the respondent. The amounts were based on fictitious timesheets that resulted in inflated amounts being charged.

[21] Thereafter in April 2019, the respondent alleged that it has evidence of the fraudulent discrepancies concerning broadly hours of work performed together with the skill level rates charged.

[22] Ms Scheepers, who was previously in the employment of the applicant, disclosed certain irregularities. She had been tasked to compile the spreadsheets at the time. It was alleged that she was in possession of various documents, namely the accurate timesheets of each respective employee, the full file of the “clock in’s formula” and hours of work of each individual timesheet presented, the employees list of the applicant’s stated hours worked per skill level and spreadsheets of the project at Port Elizabeth Manganese Terminal as well as skill level rates, the list of MEIBC Employee benefits and employee-employer deductions and fortnightly timesheets of all employees for the main applicant.

[23] It was therefore argued that Ms Scheepers and other witnesses would be summoned to appear at the rescission trial to testify on the said fraudulent activities of Mr Lee.

[24] In essence it was alleged that the invoices and timesheets presented to the respondent were false, the timesheets were fabricated by Lee as such services were never rendered and the personnel were employed at higher rates than what was contracted.

[25] With the culmination of the indebtedness dispute between the parties, it must be appreciated that the applicant's claim is dependent on the outcome of the findings pertaining to the alleged fraud. It is trite that where the amount of the claim or its very existence is uncertain, liquidation proceedings are not appropriate.[1]

[26] It cannot be gainsaid that the dispute regarding the amount of indebtedness was central to the dispute between the parties and raised from the outset. On this basis alone the liquidation proceedings cannot proceed. Surely the evidence pertaining to the fraudulent allegations would have to be ventilated fully in the rescission proceedings.

[1] Gobel v Gobel (6935/13) [2013] ZAWCHC 91 (28 June 2013) at para 16

[27] I am mindful that at this stage the respondent does not have to prove that it is not indebted to the applicant. It is sufficient if it is able to demonstrate that the indebtedness is disputed on *bona fide* and reasonable grounds.[2]

[28] I find it apt to refer to the matter of ***Hülse–Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 219*** where the court held:

"Apart from the fact that they dispute the applicant's claim and do so bona fide … what they must establish is no more and no less than 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 claims. They do not … have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their claims and the company's disputing these claims are not unreasonable."[3]

[29] The said principle was enunciated in ***Badenhorst***[4] where it was held that the respondent is only required to satisfy the court that its defence is *bona fide* and reasonable. As the current proceedings stand, I find that the defence raised has

[2] Desert Star Trading 1945 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another 2011 (2) SA 266 (SCA)
[3] my underlining
[4] Badenhorst v Northern Construction Company (Pty) Ltd 1956 (2) SA 346 (T)

met the aforesaid requirements. On this ground alone, this liquidation application cannot succeed. I reiterate that winding-up proceedings are most certainly not designed for the enforcement of disputed debts.[5] In my view, based on the aforesaid findings, the setting down of the application was an abuse of process.

[30] Surely common sense should have prevailed. The applicant was well aware of the dispute between the parties as well as the pending action proceedings which are not finalized. The applicant's persistence in this application was inappropriate in light of the present facts before me.

[31] Moreover it should have dawned on the applicant that so much had transpired since 2010 causing the factual landscape to be altered. Before proceeding with the liquidation application, the applicant was required to assess whether its initial Section 345 application could be sustained. The refusal to pay cannot result in a finding that the respondent is insolvent.

[32] I further deem it appropriate to echo that when determining if a party is commercially insolvent, the test is - whether such party is able to meet its current liabilities including contingent and prospective liabilities as they become due. In ***Murray***[6] the court echoed that determining commercial insolvency requires the examination of the position of the company at present and in the immediate future

[5] Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd 2016 JDR 2216 (SCA)
Imobrite (Pty) Ltd v DTL Boerdery CC (100720) [2022] ZASCA 67 (13 May 2022)
[6] Murray and Others NNO v African Global Holdings (Pty) Ltd and Others 2020 (2) SA 93 (SCA) at para 31

to determine whether it will be able to, in the ordinary course, to pay its debts, existing as well as contingent and prospective, and continue trading.

[33] As circumstances are presently portrayed, it appears that the respondent remains in business. Currently it employs various employees (including those who intervened). It has become evident that the respondent refuses to pay the alleged outstanding amount due to the dispute between the parties which it alleges can only be resolved in the rescission action.

[34] I reiterate that the initial winding-up application was premised on Section 345(1)(a) of the Companies Act (1973) on the pretext that the respondent was unable to pay its debts. Such notice was issued in 2010 for the court to consider if the liquidation process had merit. However the respondent is entitled, in law, to have its present circumstances considered as emphasized in ***Murray***. At this point in time I find that the liquidation application cannot succeed.

[35] Furthermore, I find that it is inappropriate to postpone the liquidation proceedings pending the outcome of the rescission action. There is no sound reason for the liquidation application to hang in the air whilst the rescission action proceedings have not been dealt with. The applicant would have recourse to initiate the liquidation proceedings if circumstances warrant it.

COSTS

[36] I have considered the applicant's contentions in seeking a punitive costs order. In the exercise of my discretion I am of the view that a punitive cost order is justified.

[37] The applicant was advised of the dispute regarding the amount since allegations of overcharging were made from the outset. There can be no doubt that pursuing the liquidation constituted an abuse. It was inevitable that this dispute regarding the indebtedness had to be ventilated. The rescission action seeking to rescind Basson J's order was instituted way back in May 2019. Pending the outcome of the rescission action, the applicant would be in a position to assess its standing in the liquidation proceedings. In my view, persisting with the liquidation application constituted an abuse. The applicant is burdened with a punitive costs order.

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H KOOVERJIE

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the applicant:	*Adv. F Arnoldi SC*
Instructed by:	*Barnard & Patel Attorneys*
Counsel for the supporting intervening applicants:	*Adv MP van der Merwe SC*
Instructed by:	*Couzyn Hertzog & Horak*
Counsel for the Respondent:	*Adv R de Leeuw*
Instructed by:	*Jan Kriel Attorneys* *C/o Riskfin*
Counsel for the first and second intervening employees:	*Adv JJ Scheepers*
Instructed by:	*Morne Coetzee Attorneys*
Counsel for the third intervening employee:	*Adv. SJ van Rensburg SC*
Instructed by:	*J Malan Attorneys*
Date heard:	*26 October, 7 November 2023 & 18 & 19 January 2024*
Date of Judgment:	*21 February 2024*