IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **037680/2023**

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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SIGNATURE **DATE**

In the matter between:

IMVULA QUALITY PROTECTION (AFRICA) PTY (LTD) Applicant

and

DONTSA PROPERTY INVESTMENTS (PTY) LIMITED Respondent

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] An urgent application for liquidation was brought against the respondent who it is said had since January 2023, over a period of three and a half months, been owing money to the applicant in an amount of R254 030, 85. The money owed was in respect of security services rendered by the applicant to the respondent in terms of an agreement entered into between them for the provision of such security services at a building owned by the respondent. The only tenant to the building is a firm of attorneys, Poswa Inc Attorneys, of which the director of the respondent, Luyolo Poswa, an attorney by profession, is a partner.

[2] The application was served by the sheriff upon the respondent on 25 April 2023. The respondent paid the full amount owed as full and final settlement of the debt owed to the applicant on the same day of the service, and in addition, delivered its notice to oppose the application. On 26 April 2023, the respondent's attorneys of record sent a letter to the applicant's attorneys, amongst others, demanding the immediate withdrawal of the application against the respondent and that they make a tender to pay costs. When the applicant failed to withdraw the application, the respondent on 2 May 2023 delivered its answering affidavit. On 3 May 2023 the applicant served the respondent with a notice of removal of the matter from the urgent court roll of 9 May 2023. In the notice it was stated that '*the matter is removed on the basis that the respondent has paid the capital claim. The only issue to be determined is the costs, and the matter will be set down and argued in the normal court in due course'*. The matter was removed from the roll on 8 May 2023 and on 23 May 2023 the applicant delivered its replying affidavit. The matter has now been re-enrolled in the normal opposed motion court, the issue being the determination of costs.

[3] Before this court, the applicant's proposition is that it is no longer pursuing prayer 1 to 4 of the notice of motion but seeks only an order for costs that can be granted in terms of prayer 5 of the notice of motion as it makes provision for further and alternative relief. The reason provided by the applicant for no longer pursuing the aforementioned prayers is because the payment of the debt extinguished the

ground upon which the liquidation application was founded. The applicant seeks an order for costs on the ground that even though the application was not proceeded with, the applicant is the successful party and since costs follow the results, as a successful party it is entitled to costs.

[4] The respondent is opposing the prayer for costs on the ground that the applicant is not entitled to the costs of the application. The respondent based its ground of opposition on a number of defences, the main one being that the applicant is not the successful party in these proceedings.

ISSUES

[5] The issue for determination by this court is whether the applicant is entitled to the costs it is contending for. Underlying that issue is whether the payment of the debt extinguished the ground on which the liquidation application was founded; and whether the applicant is the successful party in that application, which entitles it to the costs it seeks.

DISCUSSION

Did the Payment of the Debt Extinguish the ground upon which the liquidation application was founded?

[6] Liquidation proceedings are instituted in terms of sections 344[1] and 345 of the Companies Act ("the Companies Act").[2] In oral argument it was argued on behalf of the applicant that the applicant has invoked the provisions of section 345(1)(c) of the Companies Act in instituting the application. In terms of section 345(1)(c) of the Companies Act, a company or body corporate shall be deemed to be unable to pay its debts if, amongst others, it is proved to the satisfaction of the court that the company is unable to pay its debts. It was argued further that a company can be liquidated if it is factually insolvent or commercially insolvent, in other words.

[7] In its founding affidavit the applicant gives the phrases ‘factually insolvent’ and ‘commercially insolvent’ the following meaning:

[1] Section 344 **Circumstances in which company may be wound up by Court.** – A company may be wound up by the Court if – (a) . . . (f) the company is unable to pay its debts as described in section 345.
[2] Act 61 of 1973.

"32 I would respectfully submit that the respondent is factually and commercially insolvent. By virtue of its intent to repay the applicant in instalments and by virtue of the fact that it is seeking to dispose of its assets, purportedly to pay creditors but has not disclosed this to its creditors.

33 As indicated above the respondent is clearly commercially insolvent as it is not able, on its own admission referred to above, to pay the debts as they become due.'

[8] It is common cause that at the time of the institution of the application, the respondent owed the applicant an amount of R254 030.85. It is also not in dispute that the said amount was paid immediately after the application was served upon the respondent. The applicant's contention is that the payment of the debt extinguished the basis upon which the application was founded, and, thus, making prayers 1 until 4 of the notice of motion moot. The applicant argued that it could, therefore, not proceed with the application because in accordance with the requirements of law the amount owed to found a liquidation application, should not be less than R100, and since the whole amount owed had been paid, there was no reason to proceed with the application. Hence, only the issue of costs remained for adjudication.

[9] In response thereto, it was argued on behalf of the respondent that the payment of a debt due does not stop a liquidation application since the ground upon which the application is launched is the insolvency and not the debt due. The contention is that by not proceeding with the liquidation application when the debt is paid meant that the applicant used liquidation proceedings for the purpose of collecting a debt thereby abusing the court process. Similarly, so it was argued, by withdrawing prayers 1 to 4 of the notice of motion it meant that the applicant was not able to prove to the satisfaction of the court that the respondent was unable to pay its debts.

[10] It is trite that an application for a winding-up order is not a legal proceeding for the enforcement of a right relating to the applicant's debt, and it is not a process whereby the applicant claims payment of that debt. See *Heilbron Roller Mills Holdings (Pty) Ltd v Nobel Street Central Investments (Pty) Ltd*,[3] where the court

[3] 1979 (2) SA 1127 (W) at p1129C.

held that winding up proceedings are not proceedings relating to the enforcement of a right relating to a creditor's debt.

[11] In this instance, the applicant's contention is that it relied on section 345(1)(c) of the Companies Act in instituting liquidation proceedings against the respondent. Section 345(1)(c) required the applicant to prove to the satisfaction of the court that the respondent is unable to pay its debts. Now that the respondent has paid the debt it owed to the applicant, the applicant has withdrawn the application claiming that it cannot proceed further with the application because the debt has been extinguished. The purpose of the application was not to claim the debt due but was to seek an order for the liquidation of the respondent. If it has always been the intention of the applicant to have the respondent declared insolvent, it would have continued with the application despite the fact that the amount owed has been paid.

[12] The applicant contended that even though the money owed had been paid, at the time of the institution of the application the respondent was unable to pay its debt. The applicant, furthermore, stated in its replying affidavit that the debt owed was paid by Poswa Inc on behalf of the respondent. This, according to the applicant, was again, indicative of the respondent's insolvency, a fact that was emphasised in argument by the applicant's counsel in court.

[13] It is evidently clear from the applicant's papers that it sought an order to have the respondent liquidated. In order to do so, it was incumbent on the applicant to prove to the satisfaction of the court that the respondent was unable to pay its debts. This, the applicant contended it could not do because the respondent had paid off the whole amount that it was alleged the respondent was unable to pay. What the applicant seemed to overlook was that the whole purpose of liquidation is to vest a *concursus creditorum,* in order that all creditors be treated equally and be paid what is owed to them or a portion thereof, once any money is collected. The applicant clearly states in its founding affidavit that the respondent had intended to sell its property, purportedly to pay off its debt, without informing the creditors. This is the same thing done by the applicant when it accepted payment of its debt from the respondent without informing other creditors, whilst it had already instituted liquidation proceedings.

[14] The aforementioned is indicative that the payment of the debt did not extinguish the existence of the liquidation application. See *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*,[4] where it is held that a company's inability to pay its debts may be proved in any manner. Evidence that a company has failed on demand to pay a debt payment of which is due, is cogent *prima facie* proof of inability to pay. An inference that can be done, in circumstances such as these, is that the proceedings in this matter were instituted for purposes of collecting a debt. And, for this reason alone, the applicant's prayer for costs cannot be sustained.

Is the Applicant the Successful Party?

[15] For the same reasons as set out above, it cannot be said that the applicant is the successful party. It is, thus, not entitled to costs in this application.

CONCLUSION

[16] For the ruling that is reached in respect of the two issues that were determined, it is not necessary to deal individually with all the other defences raised by the respondent in opposition to prayer 5 of the notice of motion. The prayer ought to be dismissed.

[17] And for the reasons alluded to, the applicant is not entitled to the costs in this application.

ORDER

[18] The following order is made:

1. Prayer 5 of the notice of motion is dismissed.
2. No order of costs is made for the hearing thereof.

M KUBUSHI J

Judge of the High Court

Gauteng Division

[4] 1962 (4) SA 593 (D) at 597.

Appearances:

For the plaintiff:	Advocate HJ Basson
	Cell: 072 765 0597
	Email: heila.basson@gmail.com
Instructed by:	Mr Hood MJ Hood & Associates
	Tel: (011) 234 7520/1
	Cell: 082 553 9252
	Email: martin@mjhood.co.za
For the defendant:	Advocate V. Notshe SC
	Cell: 082 446 5243
	Email: vina@iafrica.com
Instructed by:	Poswa Incorporated
	Tel: 011 783 8877
	Cell: 082 535 4854
	Email: masebala.motimele@poswainc.co.za
Date of argument:	18 March 2024
Date of judgment:	