

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISIION, PIETERMARITZBURG

CASE NUMBER: 9139/2021P

In the matter between:

INNOVATIVE FLEXIBLES (PTY) LTD

APPLICANT

and

LOPAC TISSUES CC

RESPONDENT

JUDGMENT

BEZUIDENHOUT J:

[1] The said application is being opposed by Respondent. After all the affidavits had been filed Applicant also brought an application in terms of Rule 23 set down for the hearing at the same time as the application to wind up Respondent that certain portions of the answering affidavit be struck out in that it was alleged that it was either scandalous, vexatious or irrelevant. In paragraph 6 of the affidavit in respect of the said application it was contended:

“If such are not struck, such will cause prejudice to the applicant in the context of the main application.”

It then sets out the various portions of the affidavit which it contends are scandalous and vexatious and needs to be struck out. I will refer to this again later in the judgment.

[2] It is common cause that Applicant supplied Respondent with various paper products which Respondent required. It is also common cause that Respondent applied for credit and that such was granted in the sum of 1 million rand payable within 60 days.

[3] From the papers it is apparent that various products were delivered to Respondent by Applicant and that there is a dispute as to what products and what quantities were indeed ordered. Applicant relies on a letter addressed to Applicant by Respondent wherein it stated "From our findings as at the end of 31 July 2021. We have a liability of R 3 240 579.88 which would reduce further under completion of our analysis in terms of incorrect pricing from Innovative. It also relies on a letter dated August 2021 where it was stated:

"Whilst I concur that you might have delivered all the goods as you claimed, the goods should have been delivered in future months with the liability to be paid over the future months and not immediate."

[4] Applicant therefore contends that this indicates that indeed the goods were delivered to Respondent who accepted the said goods and which admitted that there was money owing to Applicant. It is contended by Applicant that from the above

quotations in the said letters it is proved that Respondent owes Applicant at least R 100.00 and therefore it is entitled to an order to wind up Respondent as Respondent has failed to pay the outstanding amount. It is contended that Respondent has therefore indeed admitted an indebtedness of at least R 100.00 and in this regard I was referred to the decision of *Lamprecht v Klippeiland (Pty) Limited* [2014] 4 All SA 279 (SCA) at paragraph 16. It is further contended that Respondent has failed to set forth any evidence to prove its solvency. The financial statements that were attached to the answering affidavit has no elaboration thereof and there is no confirmatory affidavit from the auditor. These financial statements must therefore be disregarded.

[5] On the issue to strike out it was contended that the portions of the answering affidavit which is referred to in the said application are scandalous and vexatious and that they need to be struck out.

[6] It was contended on behalf of Respondent that prior to the application being brought Respondent had provided a reconciliation which indicated that Applicant in actual fact was indebted to Respondent. It was further contended that the winding up application should not have been pursued where it is known that the claim is disputed and that Applicant should have proceeded by way of an action. I was referred to *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC). It was further submitted that if it was found that a debt did exist but that it was *bona fide* disputed on reasonable grounds a winding up order should not be granted. In

this regard I was referred to *Badenhorst v Northern Construction Enterprises Ltd* 1956 (2) SA 346 (T).

[7] It was further contended that if facts alleged can be proven at trial it constitute a good defence that is sufficient that it has a claim that is *bona fide* and on reasonable grounds. It has not been shown that Respondent is unable to pay its debts or is commercially insolvent. In respect of the application for striking out of certain averments it was contended that Applicant has refuted what is alleged as offensive and that whatever there is is not vexatious or scandalous and is not relied upon by Respondent in its opposition to the liquidation proceedings.

[8] The question that arises is whether Applicant has shown that Respondent is indebted to it for an amount exceeding R100.00 which it refuses to pay and further that Respondent is incapable of paying its debts as it is commercially insolvent and then the further issue of whether it would be just and equitable for Respondent to be wound up. Respondent must prove that it is either not indebted to Applicant; that it is not commercially insolvent or that there is a dispute as to the amount which is owing to Applicant.

[9] It was submitted on behalf of Applicant that all the formal requirements had been satisfied and that Respondent had admitted that it owed Applicant more than R 100.00. In *Lamprecht v Klipeland (Pty)* [2014] 4 All SA 279 (SCA) it was held at paragraph 10:

“All he wanted was to assert or establish his *locus standi* under section 345(1)(a) of the Act, as a creditor owed an amount of no less than R100.00 which amount was due and payable. The dispute as to what is owed will be settled either by the liquidator after the appellant has lodged his claim or by court in the event that the creditor and liquidator are unable to agree on the amount payable.”

In paragraph 11 of the judgment it refers to the fact that Respondent conceded that Appellant was a debtor as contemplated in section 345(1)(a) with a claim of no less than R100.00 and further that the money was due and payable. As set out in paragraph 15 of the said judgment to meet the threshold of section 345(1)(a) Applicant must prove that he is a creditor of Respondent in the amount of not less than R100.00; that it is due and payable and it must be liquid. Thirdly notwithstanding service of the section 345(1)(a) notice the debtor has not paid the amount claimed nor secured or compounded to the reasonable satisfaction of the creditor.

[10] It is contended by Applicant that the portions of the said letters referred to in paragraph 3 above indicate an admission by Respondent that it is indeed indebted to Applicant in the sum of at least R 100.00. It is submitted that the fact that the exact amount is not proved is not a barrier against the granting of the order as all that Applicant has to prove is that there is at least an amount of R 100.00 owing which has not been paid after notice had been given in terms of section 344(1)(a) of the Companies Act.

[11] In *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) it was held at 347H:

“Where a company disputes the validity of the amount claimed and this is done *bone fide* a liquidation order should not be granted.”

It then refers at 348A to a quotation from *Buckly on Companies* 11th ed page 357:

“A winding up petition is not a legitimate means of seeking to enforce payment of debt which is *bona fide* disputed by the company. A petition presented ostensibly for a winding up order but really to execute pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the court.”

[12] From the two letters which I have referred to above it is not possible to establish whether indeed there would be an amount of at least R 100.00 owing. There is also no admission by Respondent thereof. Respondent contends there is a dispute and in actual fact that Applicant owes it money.

[13] As submitted by Respondent, Applicant is not relying on the total amount which it alleged is payable to it but is placing reliance on the letters to which I have referred and which Applicant contends indicates that at least R 100.00 is due, owing and payable. It is contended by Respondent that a reconciliation was provided to Applicant which must have been received by Applicant as it responded to it on 30 August 2021. After this

additional investigations were undertaken by Respondent and resulted in Respondent alleging that in fact it was owed the sum of R 572 759.65 by Applicant. It was therefore submitted that the last schedule showed no indebtedness to Applicant but in actual fact an amount owing to Respondent. Therefore it was submitted that Applicant had not proved that there was an amount of at least R 100.00 owing.

[14] The financial statements which were attached to Respondents answering affidavit indicate that Respondent is not commercially insolvent. Applicant referred me to the decision of *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) at paragraph 171 where it dealt with the issue of an affidavit to which an auditor's report was attached but was an affidavit not from the respondent. In my view it is distinguishable from the facts of the present case where the person who attested to the affidavit on behalf of Respondent is a member of the close corporation and confirmed the financials which were attached to his answering affidavit.

[15] It is not necessary for Respondent to prove it will succeed in any action. It only has to prove that the grounds advanced are not unreasonable. *Hulse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998(2) SA 208 (C).

[16] From all the documentation attached to the papers which are too voluminous to deal with in detail it is clear that there is a dispute between Applicant and Respondent as to the basis firstly upon which the goods were ordered. Secondly whether invoices were produced. Thirdly whether there were order forms. Fourthly whether the prices were correct. Fifthly a reconciliation of the said deliveries due to the large amounts delivered which Respondent indicated it could never have been able to use. It is accordingly apparent that there are major disputes between Applicant and Respondent as to the deliveries whether they should have been delivered at certain times the quantities delivered etc.

[17] Considering all these factors it would appear to me that because there are many disputes between the parties and from what I have set out above that it cannot be found that Applicant has proved that indeed there is an amount of R 100.00 which is owing and payable and there is no admission in that regard from Respondent who in actual fact contends that Applicant owes Respondent more than R 500 000.00. Taking these factors into account it would also appear to me that it would not be just and equitable in these circumstances to liquidate Respondent and it would be more appropriate that Applicant pursue an action against Respondent if it is of the view that there is money outstanding to it.

[18] Due to the conclusion which I have reached it is not necessary to deal with the issue of the striking out of certain portions of the answering affidavit as they are

scandalous and vexatious. It was set out in the affidavit of Applicant that it will prejudice Applicant in the main application if they are not struck out. It is therefore due to the conclusion reached not necessary to deal therewith and accordingly no order is made in that regard.

I accordingly make the following order.

The application is dismissed with costs. Such costs to include the costs of senior counsel.

BEZUIDENHOUT J.

JUDGMENT RESERVED ON: 12 SEPTEMBER 2022

JUDGMENT HANDED DOWN ON: 4 NOVEMBER 2022

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