

SOUTH AFRICA / JUDGMENT

Advent Oil (Pty) Ltd v Vuletjeni Trading & Projects (Pty) Ltd (4262/2019) [2022] ZAMPMHC 3 (30 March 2022)

[2022] ZAMPMHC 3

COURT

Middelburg High Court, Mpumalanga

BEFORE

S S Mphahlele

CASE / FILE NUMBER

4262/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG

CASE

NO.: 4262/2019

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED.

30 MARCH 2022

In

the matter between:

ADVENT

OIL (PTY)

LTD

Applicant

versus

VULETJENI

TRADING & PROJECTS (PTY) LTD

Respondent

JUDGMENT**MPHAHLELE J**

- [1] This is an application for the final winding up of the respondent in terms of section 344(f) and section 345(1) of the Companies Act 61 of 1973 read with item 9 of schedule 5 of the Companies Act 71 of 2008, on the ground that the respondent is deemed to be unable to pay its debts.

CONDONATION APPLICATION

- [2] The application was issued on 18 November 2019 and subsequently served on the respondent on 20 November 2019.
- [3] In terms of the Uniform Rule 6(5)(d)(i) & (ii) the respondent was required to deliver its notice of intention to oppose not less than 5 days from the date of service of the application and within 15 days thereafter to deliver its answering affidavit.
- [4] Due to the respondent's failure to deliver its papers, the applicant set the matter down for a hearing on an unopposed motion roll on 31 January 2020. On the day of the hearing, the respondent made an appearance to oppose the application, the matter was removed from the unopposed roll and accordingly referred to case management.
- [5] The judicial case management conference order directed the respondent to deliver its answering affidavit by no later than 21 February 2020 and the matter was set down for a hearing on the opposed motion court roll of 05 May 2020. Due to the declaration of the State of Disaster in relation to the COVID-19 pandemic, the hearing could not be proceeded with and the matter was referred back to case management.
- [6] The respondent failed to file its answering as directed by the judicial case management order and the applicant's attorneys requested the respondent's attorneys to file its answering affidavit by 30 October 2020.
- [7] The respondent's answering was eventually served on the applicant's attorneys on 05 May 2021.
- [8] Under the circumstances, the respondent seeks condonation for the late delivery of its answering affidavit.
- [9] In the absence of an agreement between the parties, the court has the power in terms of Rule 27 of the Uniform Rule of Court to allow a party an extension of time to file its answering affidavit even after the expiry of the time so prescribed, on application by the party seeking an indulgence. In the exercise of these powers the court is given a wide discretion, which must be exercised judicially on consideration of the facts of each case. The guiding principles were succinctly set out in *Grootboom v National Prosecuting Authority* where the court stated that good cause shown is couched on the following: "the nature of the

relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success". It is now trite that condonation is not for a taking. [1]

[10] In *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited*[2], the court stated that:

"[26] What calls for an explanation is not only the delay in timeous prosecution of the appeal, but also the delay in seeking condonation.

An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay.[10] a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility.[11] factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor [sic], the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

[11] Under the circumstances, the respondent has an obligation not only to explain the late delivery of the answering affidavit, but also the delay in bringing the condonation application. Furthermore, the respondent has to establish the prospects of success in its defence against the applicant's claim.

[12] The respondent failed to deliver its notice of intention to oppose within 5 days from 20 November 2019, being the date of service of the application and 15 days thereafter to deliver its answering affidavit in compliance with Rule 6(5)(i) & (ii).

[13] Notwithstanding its non-compliance with Rule 6(5)(d)(i) & (ii) as stated above, on the date of postponement of the application, on 31 January 2020, the matter was case managed and the court directed that the respondent's answering affidavit be delivered by 21 February 2020.

[14] Rule 37A(2)(a) provides that case management through judicial intervention shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases; however the provisions of Rule 37A(2)(c) clearly state that notwithstanding the provisions providing for case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication. Therefore, the direction issued by the court on 31 January 2020 did not excuse the respondent from applying for the condonation of the late delivery of its answering affidavit.

- [15] In dealing with the delay in delivering its answering affidavit, the respondent states that shortly after the postponement of the application on 31 January 2020, the COVID-19 national lockdown occurred and as a result thereof it could not consult with its attorneys for the purpose of preparing an answering affidavit.
- [16] The short explanation proffered by the respondent failed to explain the respondent's reasons for the non-compliance with rule 6(5)(d)(i) & (ii) which required the respondent to deliver its notice of intention to oppose within 5 days from the date of service of the application and thereafter within 15 days to deliver its answering affidavit.
- [17] In addition, the respondent failed to deal with the failure to deliver its answering affidavit by 21 February 2020 as directed by the case management judge on 31 January 2020. The State of Disaster in relation to the COVID-19 pandemic was declared on 15 March 2020, which is clearly a date after 21 February 2020. Under the circumstances, it cannot be correct that the respondent could not comply with the judicial case management order due to the COVID-19 lockdown regulations.
- [18] The applicant in correspondence, in particular on 26 February 2020 and 05 March 2020 respectively, raised its concerns with the respondent's attorneys regarding the failure to deliver the answering affidavit. The respondent eventually served its answering on 05 May 2021, over a period of more than a year since the service of the application.
- [19] Despite the inordinate delay, the respondent in its answering affidavit dismally failed, or rather, there was not even an attempt, to address his failure to deliver the answering affidavit timeously as well as the delay in bringing the condonation application.
- [19] Therefore, the condonation application for the late filing of the respondent's answering affidavit stands to fail.

MAIN APPLICATION

- [20] I now turn to the main application. On or about June 2018 the applicant and the respondent concluded an oral agreement ("the agreement") in terms of which the applicant undertook to supply diesel products to the respondent on a cash on delivery basis.
- [21] The agreement was later amended to grant a 14 (fourteen) day account for the respondent to remit payment for the services duly rendered by the applicant being for the products sold and delivered to the respondent by the applicant.
- [22] During the period 20 August 2018 to 14 February 2019, the applicant sold and delivered to the respondent the diesel products and provided the respondent with regular invoices and statements setting out the amounts due in terms of the agreement.

- [23] The respondent failed to comply with its obligations under the agreement. Accordingly, on or about 25 March 2019 the applicant sent a letter of demand requiring the respondent to pay the amount due in terms of the agreement. Despite the demand, the respondent has refused and/or neglected to pay the outstanding amount in terms of the agreement being R907 777-18.
- [24] Accordingly, on or about 30 September 2019 the applicant delivered a demand in terms of section 345 of the Companies act of 1973 to the respondent, in which it claimed payment of the indebted amount as at 29 February 2019. Notwithstanding the due delivery of the demand, the respondent has failed to pay the amount demanded. In the circumstances, the applicant submitted that the respondent is deemed to be unable to pay its debts.
- [25] For the sake of convenience, at this point, I am going to comment on the defences raised by the respondent. I had regard to these defences in consideration of the respondent's application for condonation for the late filing of its answering affidavit.
- [26] The respondent on the relevant occasions in this matter, requested the applicant to deliver amounts of diesel to Impofu Mining in Mpumalanga. On or about January 2019 Impofu Mining apparently informed the respondent of the true amounts of diesel that the applicant has been delivering. The respondent maintains that it then became apparent that the invoices issued by the applicant have in fact not been correctly reflecting the delivered amount of diesel. On the basis of this discrepancy and the applicant's breach of its obligations in terms of the agreement, the respondent refused and still refuses to pay the applicant the amount that the applicant alleges the respondent owes to it. On or about 10 April 2019, the respondent's attorneys informed the applicant of the alleged discrepancy between the amount of diesel that the applicant delivered, its obligations in terms of the agreement and the invoices it should issue.
- [27] The respondent maintained that, until the amount of diesel that the applicant delivered, and the invoices issued by the applicant are properly reconciled, and the discrepancies removed or explained, or until such time a court determines the true liability of the respondent, the amount that the applicant alleges the respondent owes to it remains in serious dispute on bona fide and reasonable grounds.
- [28] The respondent acknowledges that, pursuant to its request, Impofu Mining informed it that a reconciliation was conducted and a report was prepared and provided to the applicant. It is odd that the respondent failed to obtain the report from Impofu Mining or at the least establish the outcome of the report with Impofu Mining under the circumstances where it is challenging its indebtedness to the applicant.
- [29] This is puzzling because it is the respondent who instructed the applicant to deliver the diesel directly to Impofu Mining and it is on the basis of information received from the same Impofu Mining that the indebtedness is in issue. Impofu Mining has a contractual relationship with the respondent and not the applicant. Thus the respondent could just have established from Impofu Mining the outcome of the reconciliation and used it in these

proceedings to show that the applicant was not a creditor of the respondent as required by section 345(1) of the Companies Act.

- [31] Under the circumstances, the respondent has failed to show that the amount owed to the applicant was not due and payable as required by section 345(1)(a).
- [32] The respondent averred that it was an economically and socially integrated company, which was trading very well. Further, the respondent in its answering affidavit stated the following:
- “38. It has an annual turnover beyond R15 million, and is currently valued in the region of R50 million, with readily realisable assets, as well as large, valid and active contracts.*
39. Other than the three secured creditors for some of the respondent’s trucks, and the applicant as an alleged creditor, the respondent has no other creditors. It operates largely on a cash basis.
40. I can categorically state that its readily realisable assets far exceed its liabilities, and that the respondent can pay all its debts as and when they become due”.
- [33] The aforementioned averments are bald and lack detail and not supported in anyway. The respondent further failed to explain his inability, if any, to produce evidence in support of these averments.
- [34] I, therefore, find that the respondent has failed to show that the applicant’s contention that it was unable to pay its debts was not correct.
- [35] Under the circumstances of this case, I am of the considered view that there is the prospect that the whereabouts of assets may be traced which would be to the advantage of creditors.
- [36] I therefore find that the respondent falls to be wound up and placed under provisional liquidation.
- [37] In the result I hereby make an order in the following terms:
1. The respondent is hereby placed under provisional winding-up;
 2. A rule nisi is hereby issued calling upon the respondent and/or all persons who have a legitimate interest to show cause why this court should not order the final winding-up of the respondent on Monday, 20 June 2022 at 10h00;
 3. A copy of this order must be served upon the the respondent’s employees and/or upon any trade union representing the respondent’s employees, if any;
 4. A copy of this order must forthwith be forwarded to each known creditor by prepaid registered post;
 5. A copy of this order must also be served upon the respondent at its registered address and be published in the government gazette and in one local newspaper;

S S MPHAHLELE

JUDGE OF THE HIGH COURT,

MIDDELBURG

FOR THE APPLICANT: Adv Masombuka

INSTRUCTED BY: Madlela Gwebu Mashamba Inc.

FOR THE RESPONDENT: Attorney Mboweni and Attorney Maluleke

ISTRUCTED BY: Mboweni Maluleke Inc.

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of the hand-down is deemed to be on 30 March 2022.

[1] GROOTBOOM v NATIONAL PROSECUTING AUTHORITY AND ANOTHER 2014 (2) SA 68 (CC)
at para 22 and 23

[2] 2017

(6) SA 90 (SCA)

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Prepared on 12 October 2026 · Esheria