

SOUTH AFRICA / JUDGMENT

Engen Petroleum Limited v Don Kissoon Group (D60/23) [2024] ZAKZDHC 73 (17 October 2024) [2024] ZAKZDHC 73

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Ntlokwana

CASE / FILE NUMBER

D60/23

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL LOCAL
DIVISION, DURBAN
Case No: D60/23

In the matter between:

ENGEN PETROLEUM
LIMITED
APPLICANT
and
DON KISSOON GROUP
RESPONDENT
ORDER
The following order is

made:

1.
The Respondent is placed under provisional winding up in the hands of the master of this court.
2.
A rule nisi is hereby issued, calling upon the respondent and any other interested persons to show cause, if any, to the court on 28th day of January 2025 at 09h30 or so soon thereafter as counsel may be heard, why the Respondent should not be finally wound up.
3.
A copy of this order is to be published once in the Government Gazette and once in the Mercury on or before 22nd day of November 2024.

	4.
A copy of this order is to be served upon:	4.1 The Respondent at its registered office situate at 182 Elf Place, Clare Hills, Durban, KwaZulu-Natal.
	4.2 The South African Revenue Services, Durban;
	4.3 The Master of the High Court, Durban;
	4.4 The employees of the Respondent at its principal place of business; and
	4.5 The registered trade union that represents the Respondent's employees, if any.
	5. The costs of this application be costs in the liquidated estate of the Respondent,

JUDGMENT

INTRODUCTION

- [1] The Applicant, Engen Petroleum Ltd is seeking to place Don Kissoon Group, the Respondent under provisional winding up order. The matter was in court on 12 April 2023 on the unopposed roll, and was adjourned to 26 May 2023 whereupon on that day, it was removed from the roll for it to be enrolled on the opposed roll. It then was served before me on the opposed roll, on 17 April 2024. The Respondent is alleged to have received a credit facility from the Applicant, which has now become an issue of dispute, where the Respondent is said to be unable to pay the Applicant.
- [2] The winding up application against the Respondent is brought in terms of Section 344(1) and 345(1)(a) of the Companies Act 61 of 1973 ("the Act") read with item 9(1) of Schedule 5 of the Companies Act 71 of 2008 ("the 2008 Act") on the basis that the Respondent is unable to pay its debts as contemplated in Section 344(1) of the Act.

FACTUAL BACKGROUND

- [3] On 13 March 2022, the Respondent made an application to the Applicant for credit facilities for the supply of Applicant's products such as fuels, gas, lubricants and or chemicals on credit for R4 000 000.00 (four million rands). On 18 March 2022 and 29 March 2022, the Applicant and the Respondent concluded a written credit agreement referred to as Engen Diesel Club Agreement (EDCA). On 1 July 2022, the Respondent obtained a demand guarantee for the sum of R500 000.00 (five hundred thousand rands) from Hollard Insurance in favour of the Applicant to secure the credit facility for maximum amount of R500 000.00. The Respondent was granted a credit limit of R500 000.00, thereupon the Respondent started

trading with the Applicant. The Respondent was obliged to trade with the Applicant within the limit of the credit guarantee.

- [4] On 8 August 2022, the Applicant notified the Respondent of alleged irregularities on purchases made by the Respondent, where transactions were declined due to 'out of sequence' odometer reading and seemingly irregular usage. Mr Nivesh Don kissoon, on behalf of the Respondent, responded stating that, 'all transactions are good and legit'. On 15 August 2022, the Respondent was notified that it had exceeded its credit limit and requested to rectify the breach. The Applicant demanded the Respondent to make a payment of R3 636 347.84 (three million, six hundred and thirty-six thousand, three hundred and forty-seven rand and eighty-four cents) before close of business on that day, alternatively to increase its guarantee in favour of the Applicant. No payment was received by close of business on that day. The following day, on 16 August 2022, the Respondent was in excess of R4 126 347.84 (for million, one hundred and twenty-six thousand, three hundred and forty- seven rand and eighty-four cents). Applicant sent an email to Respondent advising it of its exceeding the limit and its failure to make payment. Mr Hassan Sheik, the Respondent's Chief Financial Officer, responded to the email advising that the Respondent was in the

process of increasing its guarantee and requested time to effect the guarantee.

- [5] On 17 August 2022, the Respondent was trading in excess of R5 000 000.00 (five million rands). After failing to contact Respondent telephonically, the Applicant, again requested payment through email, again no payment was made. On 18 August 2022, the Applicant blocked the Respondent's account. On 15 September 2022, the Applicant addressed a letter to the Respondent demanding payment of the full outstanding amount and withdrawal of the Diesel Club cards in Respondent's possession. After calling up the guarantee, the total outstanding amount was R5 452 366.22 (five million, four hundred and fifty-two thousand, three hundred and sixty-six rand and twenty-two cents).
- [6] Subsequent to failure to make payment, the Applicant issued various notices in terms of Section 345 of the Act, demanding payment within 21 days thereof. The first notice was issued on 11 October 2022 addressed to the Respondent's chosen domicilium citandi et executandi address at 1[...] U[...] Road, Clare Hills, Durban, KwaZulu-Natal. Further, on 17 October 2022, the Applicant's attorneys served, through the Sheriff, another notice in terms of Section 345 of the Act at its registered place of business, demanding payment of the amount owed within 21 days from receipt of the notice. Respondent's attorneys addressed a letter on 19 October 2022 to the Applicant's attorneys requesting a breakdown of the amount owed and a settlement proposal from the Applicant. The Applicant's attorneys responded the following day, on 20 October 2022. with a letter advising of the settlement proposal and enclosing a statement on Respondent's purchases. The Respondent did not respond thereafter. On 28 October 2022, the Applicant served another notice in terms of Section 345 of the Act, through the Sheriff. The period of 21 days referred to in the notice lapsed on 25 November 2022, and there was no response from the Respondent regarding payment of the sum demanded from it. The Applicant consequently came to the conclusion that, the

Respondent is unable to pay its debts, and that the only possible inference is that the Respondent is commercially insolvent.

- [7] In answering to the Applicant's case, the Respondent raised two points in limine. The first is that the Applicant has no locus standi and has no authority to institute legal proceedings. The second point in limine was that the letter of demand delivered to the Respondent did not comply with the peremptory provision of Section 345 of the Act, however, at the hearing of the matter, the Respondent abandoned this point in limine, therefore nothing more to be said on this issue.
- [8] In support of its claim of no locus standi and lack of authority to institute legal proceedings, the Respondent relies on the provision of the Engen Diesel Club Agreement on the basis that, under the sub-heading of 'understanding' para 3.4 provides as follows:

"In order to relieve the Member of the burden of having to deal directly with the Supporting Bank, Engen hereby offers the Member the facility of having Engen contract with the Supporting Bank as agent for and on behalf of the Member, and to pay the Supporting Bank on the Member's behalf. In such case, Engen will collect from the Member the amounts due in terms of this agreement in due course. However, such facility does not detract from the position that the Member is the party liable to pay the Supporting Bank, and that the Supporting Bank pays the supplying outlet on behalf of the Member, not on behalf of Engen."

Further, the Respondent also relies on the definition of the Supporting Bank, para 1.1(l) where it defines the Supporting Bank to mean, "in relation to a token, shall mean the bank which issues or administers the use of the token."

- [9] The Respondent goes on to state that based on the above two paragraphs, the relationship between the Applicant and the Respondent is one of agency and principal, where the Applicant is the agent, and the Respondent is the principal. According to the Respondent, this is so as in terms of clause 3.4 the parties agreed that the Applicant will contract with the Supporting Bank on behalf of the Respondent to obtain a credit facility on behalf of the Respondent. On this basis, the Respondent claims that it is liable to the Supporting Bank and not to the Applicant. The Respondent further submitted that, as things stand, it is the Supporting Bank who is the creditor, not the Applicant. Therefore, it is the Supporting Bank that will pay the outlets on behalf of the Respondent and not the Respondent.
- [10] It is on this basis that the Respondent maintains that the Applicant has no locus standi, nor authority to institute the legal proceedings. That said, the Respondent claims that debt is disputed on bona fide grounds.
- [11] According to the Respondent, the EDCA was concluded for 2 (two) reasons. The first was an agreement for the Applicant to supply fuel related products and the second was to appoint the Applicant as the Respondent's agent to obtain a credit facility with a bank on Respondent's behalf. The Applicant in its reply disputed this averment noting that the EDCA followed from the application from the Respondent to the Applicant for credit facility. The

Applicant further stated that the EDCA and the granting of the credit facility by the Applicant to the Respondent, were not conditional upon a Supporting Bank offering credit facilities as alleged by the Respondent.

- [12] The Respondent denies that the notices in terms of the Act were properly served on it, stating that the Applicant was not authorised to serve the notices in terms of Section 345, alleging that the Respondent was not able to pay on the basis that the EDCA was conditional upon conclusion of an agreement with the Supporting Bank. According to the Respondent, this then rendered the agreement unenforceable.

ISSUES TO BE DETERMINED

- [13] The following are the issues to be determined:

13.1 Point in limine on locus standi and whether the Applicant is a creditor to the Respondent.

13.2 Whether the Respondent's indebtedness exists, and if so, whether it is disputed on reasonable grounds.

13.3 Whether the Respondent is deemed unable to pay its debts as contemplated in section 345 (1) (a) of the Act.

DISCUSSION

- [14] The Respondent claims that the Applicant has no locus standi to institute the proceedings on the basis that Applicant acted as the agent of the Respondent in concluding the credit facility with the Supporting Bank, thus it is the Supporting Bank that is owed by the Respondent, not the Applicant. In support of this, the Respondent relies on two clauses of the EDCA, clauses 1.1(l) and 3.4. Clause 1.1(l) defines what is meant by 'Supporting Bank' under the sub-headings 'Definitions' and it states that:

"1.1(l) "Supporting Bank" in relation to a token, shall mean that the Bank which issues or administers the use of the token."

Under the sub-heading 'Understanding', clause 3.4 provides that:

"3.4 In in order to relieve the Member of the burden of having to deal directly with the Supporting Bank, Engen hereby offers the Member the facility of having Engen contract with the Supporting Bank as agent for and on behalf of the Member, and to pay the Supporting Bank on Member's behalf. In such a case, Engen will collect from the Member the amount due in terms of this agreement in due course. However, such facility does not detract from the position that the Member is the party liable to pay the Supporting Bank, and that the Supporting Bank pays the supplying outlet on behalf of the Member, not on behalf of Engen."

- [15] These clauses are contained in the EDCA, the Applicant disputes that the EDCA created an agency agreement by inclusion of these two clauses, stating in its replying affidavit that the covering page of the EDCA clearly states that the agreement is concluded between the Applicant and the Respondent, the Supporting Bank is not a party to the agreement and

cannot be bound by an agreement it was not a party to. Further, the Applicant states that it is the Applicant that granted the Respondent a credit facility for the purchase through tokens of the Applicant's products. Despite that there was no exchange of physical money, the products that were purchased using the token, were the property of the Applicant, and were purchased based on the credit facility granted by the Applicant. From the definition of the Supporting Bank, it is clear that the Supporting Bank carried out an administrative function in respect of the transactions emanating from this agreement between the Applicant and the Respondent, specifically in respect of purchases using tokens issued in terms of the credit facility agreement.

- [16] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1], the Supreme Court of Appeal held that:

“Interpretation is the process of attributing meaning to the words used in the document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in light of the circumstances attended upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

- [17] The Respondent applied to the Applicant for a credit facility to purchase the Applicant's products on credit. The Applicant and the Respondent entered into a credit facility agreement and concluded a contract in the form of the EDCA. There has never been a discussion for the Applicant to be an agent for Respondent in facilitating a credit facility with a Supporting Bank. It is inevitable and very clear that from the language used in referred provisions of the EDCA, read in context with the application made by the Respondent, and the purpose of the EDCA, together with the background to preparation and concluding of the EDCA the Applicant granted credit facilities to the Respondent.
- [18] The Respondent's interpretation of the agreement as an agency agreement is misguided and is an opportunistic twist by the Respondent to avoid liability. The Applicant is a creditor to the Respondent and has a locus standi to institute the legal proceedings against the Respondent. This is supported by reading of the EDCA, clause 10.1, read with 10.4, where these provide for a monthly Engen account to be submitted to the Member reflecting an amount owing for that particular month, as well as that, payment of the full amount reflected as owing on any Engen Account will be made by the Member to Engen within 30 (thirty) days and that, the rendering of an Engen Account by Engen to the Member will constitute a demand for payment of all amounts reflected in such account.

- [19] For proof of indebtedness, clause 14.2 provides that, ‘a certificate signed by the Manager of Engen reflecting the amount owing by the Member to Engen under this agreement will be prima facie proof of the amount of the Member’s indebtedness to Engen as reflected on such certificate.
- [20] There is, therefore, no doubt that the Respondent entered into an agreement with the Applicant to obtain Applicant’s products using credit tokens issued by Engen, through a Supporting Bank.
- [21] The next issue to be determined is whether prima facie, the Respondent’s indebtedness exists, and if so, whether it is disputed on reasonable grounds. The Respondent denies its indebtedness to the Applicant stating that, the Applicant acted as its agent with the Supporting Bank, therefore, the Respondent is indebted to the Supporting Bank, not to the Applicant. On this basis, the Applicant according to the Respondent, has no locus standi, therefore the Applicant has no claim against the Respondent. The Applicant in its letter of final demand for payment, dated 5 September 2022, it is stated that:

“We hereby advise you that your indebtedness to Engen, which presently amounts to the sum of R5 952 366.22 in respect of goods sold and delivered (Petroleum Products) at your special instance and request, is now overdue and payable immediately.”

Through its attorneys, the Respondent made attempts to have a payment proposal from the Applicant, the Respondent failed to honour the proposed payment plan. A certificate of balance dated 13 December 2022 reflecting the total amount outstanding of R5 386 801.12 was issued by Engen.

- [22] The EDCA provides that the certificate of balance will be prima facie proof of the amount of indebtedness owed. It is settled law that where parties have agreed to the use of the certificate of balance, they may agree that it constitutes prima facie proof of what is stated therein. If the prima facie proof remains unrebutted at the close of the case, it becomes sufficient proof of the facts which are required to be established by the party bearing the onus of proof.[2]
- [23] There seems to be no real genuine and bona fide dispute of facts. The Applicant did not act on an agency basis in concluding the credit facility agreement. The EDCA was concluded between the applicant and Respondent. The respondent’s assertions that the agreement is between itself and supporting bank is rejected. I am satisfied that there is no dispute of facts which would call for the matter to be referred for oral evidence or trial as claimed by counsel for Respondent. The Respondent’s counsel’s submission that the applicant should have issued summons is thus rejected.

- [24] As pointed by the applicant in its replying affidavit, the supporting bank merely carried out administrative functions in respect of transactions between applicant and respondent, and did not enter into an agreement with the respondent. The Respondent's defence is entirely opportunistic in its nature, mis-interpreting certain EDCA clauses to justify its claim for agency agreement, which neither of the parties envisaged in concluding the agreement.
- [25] That said, I accordingly find that the applicant has established that it is a creditor of the respondent in excess of the statutory threshold amount, and that the Applicant served a demand upon the respondent in terms of the provisions of section 345 (1) (a) of the Act and that the Respondent failed to pay the amount demanded or to secure or compound it to the reasonable satisfaction of the applicant, and is thus deemed to be insolvent. I am satisfied that the respondent has not demonstrated the existence of a bona fide defence to the Applicant's claim.

Order

[26] In the result, I therefore grant the following order:

2. A rule nisi is hereby issued, calling upon the respondent and any other interested persons to show cause, if any, to the court on the 28th day of January 2025 at 09h30 or so soon thereafter as counsel may be heard, why the Respondent should not be finally wound up.
3. A copy of this order is to be published once in the Government Gazette and once in the Mercury on or before day of 22 November 2024.

4.5 The registered trade union that represents the Respondent's employees, if any.

NTLOKWANA AJ

APPEARANCES:

Heard: Delivered: 17 April 2024 17 October 2024 For the Applicant: Instructed by: C/o: Ref.: Tel: Mr S.S. Mdletshe Hughes-Madondo Inc Messenger King - Neeraj Ghazi Attorneys Chanelle Pieters/sg/ENG44 031- 584 69 69 For the respondent: Instructed By: C/o: Ref.: Tel: Ms A. Baijnath Ashieka Naidoo & Company Messenger King – Aesha Ramchander Attorneys AN/DKG00031/-23-CIVH 083 777 22 18

[1] (2012(4) SA 593 (SCA) 18)

[2] *Salmons v Jacoby* 1939 DD 588 at 593.

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