

SOUTH AFRICA / JUDGMENT

Engineered Mining Solutions (Pty) Ltd v E and M Tshwaragano Joint Ventures (Pty) Ltd (UM 119/2023) [2023] ZANWHC 194 (25 October 2023)

[2023] ZANWHC 194

COURT

North West High Court, Mafikeng

BEFORE

Mfenyana

CASE / FILE NUMBER

UM 119/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTHWEST DIVISION,
MAHIKENG
CASE NO: UM 119/2023

Reportable:	NO Circulate
to Judges:	NO Circulate
to Magistrates:	NO Circulate
to Regional Magistrates:	NO In the matter between:- ENGINEERED MINING SOLUTIONS (PTY) LTD Applicant and E & M TSHWARAGANO JOINT VENTURES (PTY) LTD Respondent
CORAM:	MFENYANA J

Summary:

Winding

up of a company – inability to pay debts – ss 344(f) and 345(1)(a) of the Companies Act 61 of 1973 – urgency.

This

judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 25 October 2023.

ORDER

(1)

The respondent, E & M Tshwaragano Joint Ventures (Pty) Ltd is placed under provisional winding-up in the hands of the Master.

(2)

A rule nisi is issued calling upon the respondent and all interested parties to show cause, if any, within 30 (thirty) days of date of this order, why the respondent should not be finally wound up.

(3)

Service of the provisional winding-up order shall be effected

on:

(i)

the respondent at its registered office;

(ii)

the employees of the respondent by affixing a copy thereof to any notice board which the employees and the applicant have access to; alternatively by affixing a copy to the front gate of the premises or the front door of the premises where the respondent conducts its business;

(iii)

any registered trade union, as far as it may be ascertained, representing any of the employees of the respondent;

(iv)

the offices of the South African Revenue Service (SARS);

(v)

The provisional winding-up order shall be published in the Government Gazette and in the newspaper circulating in the area where the area where the respondent operates.

(4)

The costs of the application shall be costs in the winding-up.

JUDGMENT

Mfenyana J

Introduction

- [1] In this application the applicant, Engineered Mining Solutions (Pty) Ltd, seeks an order for the final winding up of the respondent, E & M Tshwaragano Joint Ventures (Pty) Ltd, on the basis that the respondent is unable to pay its debts as contemplated in s 344(f) of the Companies Act 61 of 1973 (the Act). The application has its genesis in a written loan facility agreement concluded between the parties in October 2022, in terms whereof the applicant lent and advanced an initial amount of R754 973.31 to the respondent.
- [2] The conclusion and existence of the loan facility agreement are common cause, so are the terms of that agreement.
- [3] The respondent is resisting the application on two bases. First, it contends that it is not indebted to the applicant in the amount claimed, but in a lesser amount. Second, it asserts that it is, as a matter of fact, able to pay its debts.
- [4] Accordingly, this Court is required to determine as an antecedent question whether the respondent is indebted to the applicant. If not, that will be the end of the matter. If the antecedent question is answered in the affirmative, the second question will arise, namely whether the respondent is unable to pay its debts and has therefore committed an act of insolvency, which renders it susceptible to be wound up.

Applicant's case

- [5] In the founding affidavit, Mr Paul Joseph Khourie the deponent asserted that the applicant is a creditor as contemplated in s 344(f) of the act by virtue of it having lent and advanced various sums of money to the respondent.
- [6] The genesis bears very little relevance to the present dispute. It is recounted in this judgment purely for the sake of completeness. On 21 June 2022 the parties concluded a sub-contractor's agreement. In terms of that agreement, the respondent, as a special purpose vehicle, was created for the sole purpose of facilitating and carrying on a mining contract (drilling contract) awarded to the applicant by the Pilanesberg Platinum Mine. According to the applicant, the drilling contract is the only asset owned by the respondent and was ceded to the applicant together with all rights accruing thereto. The applicant proceeded to state that it is the respondent's own conduct, in clandestinely passing resolutions which sought to undermine the contractual arrangements between the parties, which precipitated the present litigation.
- [7] Prior to this application being instituted, the applicant brought anti dissipation proceedings in the Gauteng Division of the High Court, Pretoria, and obtained appropriate relief which was granted in February
2023. Subsequent thereto, and in spite of the anti-dissipation order, the respondent entered into a sub-contractor's agreement with another drilling contractor, that is, Super L, to carry on the drilling contract. In doing this, so the applicant contended, the respondent sought to

divert proceeds derived from the drilling contract to Super L, as the new contractor brought on board by the respondent, in breach of the anti-dissipation order. As the respondent, has no other income, the respondent's continued trading would be prejudicial to the applicant and the general body of creditors.

- [8] Consequently, on 20 February 2023 the applicant served a demand upon the respondent in terms of ss 345(1)(a) and 345(1)(c) of the Act, demanding payment of an amount of R2 515 127.34 owed to it in terms of the loan facility agreement.
- [9] The respondent did not respond to the demand. The applicant avers that as a consequence, the respondent is, in terms of s 344(f) read with s 345(1)(a)(i) deemed to be unable to pay its debts.

Respondent's case

- [10] In opposing the application, the respondent avers, in limine, that the matter is pending in the Gauteng Division of the High Court. In those proceedings, the applicant seeks payment of a sum of R10 817 393.45 pertaining to payment of invoices in terms of the drilling contract.
- [11] At the hearing of the matter, counsel for the respondent submitted that he would not be persisting with the *lis pendens* defence. Rather, he would simply rely on the fact that there is pending litigation. Following upon the exchanges between counsel and the Bench, counsel for the respondent abandoned this point in limine. In my view counsel acted wisely in making this concession. The point was devoid of merit and therefore manifestly doomed to fail.
- [12] However, counsel had another string to his bow. He submitted that the application is not urgent as the agreement between the parties only allows either party to seek only urgent interim relief and not final relief. Thus, so the argument went, the applicant is precluded from seeking final liquidation, and that to the extent that the applicant relies on urgency, such urgency was self-created.
- [13] The law relating to urgency is settled. An applicant who seeks urgent redress from a court must make out a case for urgency in its founding affidavit. The applicant states that it cannot obtain substantial redress in due course. It states that the degree of urgency with which the application was brought is related to the facts of this matter. Those facts are *inter alia* that the respondent is a special purpose vehicle with only one asset, namely the drilling contract. Therefore, it would cause prejudice to the applicant and disadvantage the creditors if the status quo were to prevail. There can be no doubt that the applicant made out a case for urgency in the founding affidavit as set out in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers) 1977(4) SA 135(W)*. The degree of urgency with which the present application was brought is in my view, commensurate with the exigency presented by the facts of this case.

- [14] In these circumstances, all the points in limine, relied upon by the respondent, to the extent that they were persisted with, have no merit and therefore do not avail the respondent.
- [15] Turning to the merits, the respondent avers that the original loan was an amount of R754 973.31, and yet the applicant ‘now claims an amount of R2 515 127.34.’ In this regard, the loan facility agreement stipulates that the applicant would advance the initial amount of R754 973.31 ‘as well as any subsequent amounts that may be advanced’. The remainder of the respondent’s averments relate to the applicant’s accounting methods and the computation of the amount claimed by the applicant. The respondent contends that some of the amounts which form part of the claim, were not authorised by the respondent. It goes into elaborate detail about the various items of the agreement that were not agreed between the parties, and circumstances that led to its indebtedness.
- [16] Notably, the respondent raises disputes in respect of the invoices issued by the applicant. These have very little to do with the present application. The respondent does not dispute its indebtedness to the applicant. Its opposition is on the basis that the amount is incorrect. The basis upon which this assertion is made, has curiously, not been articulated by the respondent. Section 344(f) of the Act, in the relevant part, provides:

“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;...”

[17] Section 345, in turn, reads:

“345 When company deemed unable to pay its debts.

(1) A company or body corporate shall be deemed to be unable to pay its debts if-

(a) a creditor, by cession or otherwise, to whom the company is

indebted in a sum not less than one hundred rand then due-

(i) has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

- (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
- (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.”
- [18] The crux of the dispute according to the respondent is that the applicant has overcharged for the drilling services and thus every invoice has to be re-assessed. It contends that this Court will not be able to grant an order for its liquidation due to a dispute in relation the loan amount. By the respondent’s own admission, the dispute pertains only to a portion of the amount.
- [19] With regard to the allegation that the respondent is unable to pay its debts, as contemplated in the Act, the respondent avers that when it received the demand on 20 February 2023, it ‘accepted’ that the applicant would institute action proceedings, as opposed to motion proceedings, presumably in view of the alleged disputes of facts. It further avers that it has an amount of R2 606 365.33 from which the applicant’s claim can be settled. I pause to observe that the law is settled in this regard. ‘It matters not that the company’s assets, fairly valued, far exceed its liabilities’[1]. The relevant question is whether the company has realisable assets available to meet its liabilities as they fall due. This enquiry is not disturbed by the respondent’s averments concerning its arrangements and disputes with the applicant.
- [20] It was argued on behalf of the applicant that the drilling contract is the only asset that the respondent has, which has been ceded to the applicant in accordance with the arrangements pertaining to the drilling contract. The respondent does not gainsay this. The applicant further argued that the funds held in the trust account are to the credit of the applicant in respect of the anti-dissipation order and invoices pertaining to the drilling contract and have nothing to do with the loan agreement.

Analysis

- [21] In *Standard Bank of South Africa v R-Bay Logistics* 2013 (2) SA 295 (KZD), the court stated:

“... if there is evidence that the respondent company is commercially insolvent (i.e. cannot pay its debts when they fall due) that is

enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court’s residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f).”[2]

- [22] There is no dispute that the applicant is a creditor of the respondent in the sum of no less than one hundred rand. There is also no dispute that the respondent has not paid or secured any amount to the applicant after receiving the demand in terms of s 345(1)(a). It therefore does not avail the respondent to state that its attorneys are sitting with funds in their trust

account. The jurisdictional requirements set out in s 345(1)(a) are that: (i) the company is indebted in an amount of not less than R100.00; (ii) the creditor has served on the company, a demand requiring it to pay; and (iii) a period of three weeks has elapsed, and the company has neglected to pay or provide security for the amount claimed.

- [23] During the hearing of the matter, counsel for the applicant argued that the deeming provision of s 345(1)(a) cannot be escaped by the respondent as the amount which the respondent has admitted to be owing is more than R100.00. I agree. The following extract from *Body Corporate of Fish Eagle v Group Twelve Investments* 2003 (5) SA 414 (W) is instructive.

"The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts." [3]

- [24] I align myself with the passage quoted in the preceding paragraph. In terms of s 345(1)(a), by failing to heed the demand for payment, the respondent is deemed to be unable to pay its debts when they fall due, and is, as a result, liable to be wound up. That, in my view, should be the end of the matter. It should then follow that the application should succeed.

- [25] It bears mentioning that from the outset, the applicant sought a final winding-up order in this case. In the ordinary course it is so that the Act does not require a final order to be preceded by a provisional order. However, in *Kalil v Decotex (Pty) Ltd* 1988(1) SA 943 (A) at 976, Corbett JA noted that the practice is 'well established, of granting a provisional order of winding-up and a rule nisi calling upon [the] persons concerned to show cause why a final order of winding-up should not be granted.' Nevertheless, this practice is not cast in stone and courts enjoy a wide discretion, in an appropriate case, to grant a final order which is not preceded by a provisional winding-up order.[4] A provisional winding-up order would, in my view, afford an opportunity for the interests of any potential creditors to be

ventilated under the tutelage of a liquidator to be appointed by the court. In the exercise of my discretion in terms of s 347 of the Act, I am satisfied that from what has emerged from the papers a provisional winding-up order would be appropriate.

Costs

- [26] Something needs to be said in regard to the costs of opposition in view of the success of the application. As a general rule, the position is that an unsuccessful respondent must bear the costs of the opposition especially where the opposition was not bona fide but manifestly doomed to fail from the onset. In the context of the facts of this case, all indications are that any order that the respondent pay the costs of opposition will not have any practical effect. Therefore, the costs of opposition must, ineluctably, be costs in the liquidation.

Order

[27] In the result, I make the following order:

(1) The respondent, E & M Tshwaragano Joint Ventures (Pty)

Ltd is placed under provisional winding-up in the hands
of the Master.

(2) A rule nisi is issued calling upon the respondent and all
interested parties to show cause, if any, within 30 (thirty) days of date of this order, why the
respondent should not be finally wound up.

(3) Service of the provisional winding-up order shall be effected on:

S MFENYANA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

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July 2023 Handed down: 25 October 2023

[1] Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993

(4) SA 436 (C) at 440F.

[2] Paragraph 27.

[3] Paragraph 428B-C.

[4] See in this regard: Johnson v Hirotec (Pty) Ltd [2000] ZASCA 131; 2000

(4) SA 930 (SCA) at 934-935.

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Prepared on 12 October 2026 · Esheria