

SOUTH AFRICA / JUDGMENT

F&I Services (Pty) Ltd v Fumiel Transport and Projects (M113/2022) [2024] ZANWHC 244 (13 September 2024) [2024] ZANWHC 244

COURT

North West High Court, Mafikeng

BEFORE

M S Moagi

CASE / FILE NUMBER

M113/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTH WEST DIVISION,
MAHIKENG)
CASE
NO: M113/2022

Reportable:

YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO
In the matter between: -
F&I
SERVICES (PTY) LTD
Applicant
And
FUMIEL
TRANSPORT AND PROJECTS
Respondent
This
judgment was handed down electronically by circulation to the
parties' representatives via e-mail. The date and time
for
hand-down is deemed to be 13 September
2024.

JUDGMENT

MOAGI AJ

Introduction

- [1] The Applicant brought an application for the winding-up of the Respondent in terms section 344(f) read with section 345(1)(a)(i) and section 345(1)(c) of the Companies Act, 61 of 1973 (“the Act”), on the grounds that the Respondent is deemed to be unable to pay its debts or is commercially insolvent.
- [2] The Respondent opposed the application on the basis that the amount claimed by the Applicant was not due and payable in terms of the agreement concluded by the parties and raised seven objections in limine (*lis pendens alibi*; *locus standi* and *non-joinder*; premature application and no cause of application; defective demand in terms of section 345 of the Act; service affidavits; Rule 41A notice and mediation, foreseeable dispute of facts on oral agreement which are discussed in detail below.
- [3] This court is required to determine the points of law raised above, and whether the Applicant has made out a case for the winding-up of the Respondent.

Factual

Background

- [4] During May 2017, the Respondent was awarded a tender by the North West Investment (“NTI”) to provide scholar transport in the North West Province for a period of five years.
- [5] The genesis of the Respondent’s alleged insolvency may be traced from an agreement which was concluded between the Applicant and Respondent on 24 July 2017, wherein the Applicant agreed to rent out buses to the Respondent to transport scholars and non-scholar passengers (“private hire”).
- [6] The terse and salient terms and conditions of the above agreement are the following:
- 6.1 The Applicant shall rent out buses to the Respondent to transport scholars in the North West Province for NTI. The Respondent was authorised to utilise the rented buses for private hire;
- 6.2 The monthly rental payable for the use and employment of the buses is set out in clause 11 of the agreement. The parties agreed that rental amount shall be 70 percent of the amount invoiced by the Respondent to NTI;
- 6.3 In terms of clause 11.1.3, the Applicant shall render invoices to the Respondent on a monthly basis, and payment to the Applicant was effected within 7 days from the date of receipt of payment from NTI;

6.4 In the event the Respondent utilises the buses for private, the net profit made from the private hire would be distributed equally between the parties and such payment will be due and payable to the Applicant within 7 days after the monies for the private hire has been collected.

6.5 In terms of clause 9, the Respondent “shall be responsible to liaise with all the relevant stakeholders and ensure that payment from NTI is received timeously.

Applicant's case

- [7] The Applicant averred that it complied with the terms of the agreement and duly delivered the buses to the Respondent and rendered invoices on a monthly basis to the Respondent. On 23 October 2017, the Applicant demanded through a letter sent to the Respondent, payment of the outstanding amounts. The Respondent only made its first rental payment on 26 October 2017, three months after the Applicant had issued its first invoice to the Respondent.
- [8] At the end of 2018, the Respondent was indebted to the Applicant and on 10 October 2018, the Applicant delivered a letter to the Respondent demanding payment of issued invoices. During the year 2019, only two payments were made by the Respondent. The Applicant contended that the Respondent failed to make payment of an amount of R 2,542, 44.20 (two million, five hundred and forty-two thousand four hundred and forty rands and zero cents) (“the debt”), for unpaid invoices between the period 2017 to 2021, for both scholar and private hire transport.
- [9] On 12 November 2019, the Applicant served a letter to the Respondent in terms of subsection 345(1)(a) and 345(1)(c) of the Act, demanding payment of the debt. The Respondent failed to settle the debt owed to the Applicant, despite the demand to do so.
- [10] On 30 March 2021 the Applicant through its attorneys, served a notice in terms of section 345 of the Act, on the Respondent. The Respondent did not respond to the demand for payment nor provide security as contemplated in section 345 of the Act. In the circumstances, the Applicant contended that the Respondent is deemed to be unable to pay its debts as contemplated in section 344(f) read with s 345(1)(a)(i) of the Act. Alternatively, it appears that the Respondent is unable to pay its debts or is commercially insolvent as contemplated in section 345(1)(c) of the Act.
- [11] The Applicant was therefore a creditor of the Respondent for a significant amount of more than R100.00 and as such it had the locus standi to seek an order sought in the notice of motion. The notice of demand in terms of section 345 of the Act was served by the sheriff at the Respondent's registered address on 1 April 2021. The Respondent failed to make good to the debt owed despite the demand to do so.
- [12] The Applicant contended that it does not hold security for the debt owed by the Respondent and the Respondent does not seem to possess movable assets exceeding the claimed amount. It would be to the benefit of other creditors if the Respondent is liquidated.

Respondent's case

- [13] The Respondent raised numerous points in limine, but anchored its main defence on the fact that, this application was premature, relying on clause 11 of the agreement. The Respondent contended that, payment of the amount claimed by the Applicant was due and payable within 7 days after receipt of payment from the NTI. The Respondent alleged that it did not receive payment from the NTI despite reasonable steps it took to secure the payment from NTI and as such, the alleged debt was not due and payable.
- [14] The section 345 notice received from the Applicant was defective as the Respondent was not invited to put security. The Applicant is aware that the Respondent owned 4 buses which could have been put up as sufficient security. The Applicant failed to exercise its right in terms of clause 9.1(e) of the agreement to view the Respondent's account to verify that payment has not been processed by NTI.

Discussion

- [15] Below, I deal with each point in limine raised by the Respondent. I will first address the point in line on premature application.

Premature application

- [16] It was contended on behalf of the Respondent that the application was premature as the amount claimed by the Applicant was only due and payable within 7 days after receipt of payment from NTI, relying on clause 11 of the agreement.
- [17] The Applicant, in response to the above point of law, contended that the payment history of the NTI falls exclusively within the knowledge of the Respondent and denied that the NTI has not paid the Respondent and that the Respondent may have misappropriated the funds. The Respondent has failed to explain to this court which amounts of the issued invoices are not due and payable to the Applicant and steps taken to recover the money from NTI. The amount claimed is for both scholar transportation under NTI and income generated from private hire.
- [18] It is trite that "the winding up (liquidation) is not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. Where, however, the Respondent's indebtedness has been established, the onus is on the Respondent to show that the indebtedness is indeed disputed on bona fide and reasonable grounds".(Badenhorst v Northern Construction Company (Pty) Ltd 1956 (2) SA 346 (T)).
- [19] In casu, the Applicant was required to establish first that, the amount claimed was indeed a debt due and payable, having regard to the provisions of clause 11.1.3 of the agreement referred to above.

[20] The difficulty with the Applicant's claim regarding payment of scholar transport arise from the reading of clause 11 of the agreement, which seem to suggest that, the amount owed to the Applicant only became due and payable within 7 days after receipt of payment from the NTI. The Respondent on the other hand asserts that it did not receive payment from the NTI.

[21] In my view even if this court is to accept the Respondent's interpretation of clause 11, that the amount claimed is not due and payable until such time that NTI has paid the Respondent, the averments made in the answering affidavit do not exonerate the

Respondent from the Applicant's uncontroverted version that, the invoices for private hire transportation were also not settled by the Respondent. This court noted that none of amounts listed in the invoice dated 29 February 2020 are less than R100.00 in value.

[22] The Respondent did not dispute how the amounts claimed by the Applicant were computed, for both scholar and private hire invoices. The Respondent did not address the Applicant's claim regarding the invoices issued for private hire. In the circumstances, the Applicant has prima facie established the Respondent's indebtedness, and the onus is on the Respondent to show that the indebtedness is disputed on bona fide and reasonable grounds, which in my view, the Respondent has failed to do so. In the result, I find that the point in limine raised herein has no merit and is dismissed.

Lis alibi pendens

[23] At the hearing of this matter, Counsel for the Respondent confirmed that the Respondent does not persist with the point in limine on lis pendens in light of the judgement in *Electro South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd* (194/2022)[2023] ZAWCHC, handed down on 10 August 2023.

[24] Subsequent to the hearing of this matter, the legal representatives of the Respondent adopted an unconventional approach and addressed a letter to me, wherein the Respondent confirmed that it abandoned a point in limine of lis pendens, however, "subsequent to the hearing of the matter, the Respondent became aware of the judgement in the matter of *World Focus 754 CC v Business Partners Ltd* 2013 JRD 0512 (KZP) [2013] JOL 30095 paras 31-42, wherein the court upheld the same objection on the similar facts and in similar circumstance, with specific reference to the same cause of action requirement. On this basis, the Respondent's stand by its point in limine on lis alibi pendens".

[25] I had sight of the Respondent's letter after my acting sting. This court being mindful of the submission made by the parties in the affidavits and during the hearing of this matter, I considered the case of *World Focus* without inviting the parties to make further submissions. In my view, the merits in *World Focus* are distinguishable from the merits in *casu*.

[26] The court in World Focus fortified the principle enunciated in Electro South Africa regarding the courts discretion in deciding matters of this nature. Pillay J in World Focus stated that:

“[39] However a plea of lis alibi pendens is not necessarily an absolute bar to the proceeding in which it is raised. Interference occurs to stay one of the proceedings only because it is prima facie vexatious to bring two actions in respect of the same subject matter. The Court has discretion in each case on whether to uphold the plea or not.” (emphasis underlined)

[27] The Respondent contended in the answering affidavit that the Applicant instituted an action for recovery of the same debt that is the subject of this application. Thus, there is a pending litigation, between the same parties, which is based on the same action or arising from the same cause of action and in respect of the same subject matter. The Respondent relied on the simple summons which were issued by Applicant on 18 August 2021. The Applicant claimed payment in the amount of R 2,542, 44.20, before this court.

[28] I am satisfied based on the papers before this court, that the merits of this case do not warrant the stay or dismissal of this application. In the circumstances, this point in limine is dismissed.

locus standi and non-joinder

[29] Counsel for the Respondent correctly abandoned the above point in limine as at the time the liquidation proceedings were launched, the Applicant was not under business rescue and as such, it was not necessary to join the business rescue practitioner.

Ad defective demand in terms of section 345 of the Act

[30] The crux of this point in limine is that the section 345 letter of demand is defective as the Applicant failed to invite the Respondent to provide security. Further that, the Applicant was aware that the Respondent owns 4 (four buses), which the Respondent bought from the Applicant, of which the combined value thereof exceeds the amount claimed.

[31] The Applicant contended that, it met the jurisdictional requirements of section 345 of the Act in that, (i) the debt claimed is more than R100, (ii) a letter of demand requiring the Respondent to pay the sum due was served (iii) at the Respondent's registered address. Section 345 of the Act, does not oblige the creditor in a letter of demand to state that the Respondent may give security for the debt. In any event the letter delivered to the Respondent made reference to section 345 of the Act.

[32] Section 345(1) of the Act provides that, “ a company [...] 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 at its registered office, a demand requiring the company to pay the sum so due; or

(ii) ...

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;”

[33] It is not in dispute that the Respondent received the section 345 letter. In deciding whether a company carrying on business should be wound up, *Berman J in ABSA Bank Ltd v Rhebokskloof (Pty) Ltd And Others 1993 (4) SA 436 (C) at 440 paras F-I* stated that:

“The primary question which a Court is called to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company’s assets, fairly valued, far exceed its liabilities” (emphasis underlined)

[34] In my view, the Respondent failed to advance a bona fide explanation on why it did not offer to tender security or make good of the debt, even after it was invited by the Applicant in a letter dated July 2022 to provide security. There is no merit in this point in limine.

Service affidavits and Rule 41A notice mediation

[35] The above points of law do not advance the Respondent’s case any further and in any event, the service affidavit was filed prior to the hearing of this matter.

Foreseeable dispute of facts (oral agreement)

[36] The Respondent alleged that the parties entered into an oral agreement during February 2021 at Wimpy Rustenburg. It was agreed that the Applicant will take necessary steps to collect the money from NTI, on behalf of the Respondent. The verbal agreement indemnified the Respondent from any responsibility to request or secure payment from NTI. Consequently, the Applicant, in breach of the oral agreement and failed to meet its obligations. The Applicant denied the oral agreement and the meeting

alleged to have taken place during February 2021.

[37] There is no merit in this point in limine, based on my finding regarding “indebtedness” of the Respondent discussed under the point in limine on “premature application” above.

Conclusion

- [38] In light of the above, the Applicant has, established the Respondent's indebtedness and the Respondent has failed in rebuttal, to show that its indebtedness is indeed disputed on a bona fide and reasonable grounds. (See: *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980C and *In Afgri Operations Limited v Hamba Fleet (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017)).
- [39] I am persuaded that the Applicant has met the jurisdictional requirements set out in section 345(1)(a) in that (i) the company is indebted in an amount of not less than R100.00; (ii) the Respondent as the creditor has served on the Respondent, a demand requiring it to pay; and (iii) a period of three weeks has elapsed, and the Respondent has neglected to pay or provide security for the amount claimed.
- [40] On the facts placed before this court, the Applicant has established that, it is a creditor of the Respondent in the sum of no less than R 100.00. 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) for more than three weeks. All the requirements for a liquidation order have been met, including the formalities prescribed by section 346 of the Act.
- [41] The Respondent has failed to show that its indebtedness is genuinely disputed on reasonable grounds and the Respondent is deemed to be unable to pay its debts on demand, and is, as a result, liable to be wound up. In the exercise of my discretion under section 347 of the Act, a proper case has been made for the granting of a provisional winding up order.

Order

- [42] In the result, I make the following order:
- (1) The Respondent, FUMIEL TRANSPORT AND PROJECTS 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 respondent operates.
- (4) The costs of the application shall be costs in the winding-up

M S MOAGI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

DATE OF HEARING: 24 November 2024 DATE OF JUDGMENT: 13 September 2024 APPEARANCES
FOR THE APPLICANT: Adv Maree INSTRUCTED BY: Nienaber and Wissing C/O Tintiners Inc FOR
THE RESPONDENT: Adv Smit INSTRUCTED BY: Labuschagne Attorneys

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Prepared on 13 October 2026 · Esheria