

SOUTH AFRICA / JUDGMENT

Fleurmax Konstruksie (Pty) Ltd v Zacon Projects (Pty) Ltd (006278-2025) [2025] ZAGPPHC 502 (16 May 2025) [2025] ZAGPPHC 502

COURT

North Gauteng High Court, Pretoria

BEFORE

N L Moila

CASE / FILE NUMBER

006278-2025

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 006278-2025

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE:16/05/2025

SIGNATURE

In

the matter between:

Fleurmax
konstruksie (PTY)
Ltd
Applicant
(Registration
number:2008/012/49907)
and
Zacon
projects (PTY)
Ltd
Respondent
(Registration
number:2019/295577/07)

Delivered:

The judgment was prepared and authored by the judge whose name is reflected and handed down electronically. It was circulated to the parties and their legal representatives via email and uploaded to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 16 May 2025.

JUDGMENT

Moila, AJ

Introduction

- [1] This is an unopposed application for the winding up of the Respondent in terms of sections 344(f) and 344(h), read with section 345(1)(c) of the Companies Act 61 of 1973 as amended (“the Companies Act”), and the Insolvency Act 24 of 1936.
- [2] The Application papers refer to the Companies Act 71 of 1963; it might be a typo error.
- [3] The Applicant is Fleurmax Konstruksie (Pty) Ltd, a limited liability company with its principal place of business at Plot 1[...] T[...] Street, Wolmaranspoort, Pretoria. The Respondent is Zacon Projects (Pty) Ltd, a company with limited liability incorporated in terms of the company laws of South Africa, with its registered address at Plot 9[...], H[...], Centurion, Pretoria.
- [4] The Applicant’s grounds for winding up the Respondent is that it is virtually and commercially insolvent and cannot pay its debts.

Factual

background

- [5] On or about November 2023, the Applicant rendered goods to the Respondent for R 87 687.50. The goods were sold and delivered to the Respondent at the Respondent's special instance and request. The Applicant supplied the Respondent with their respective invoice while delivering the goods. The Applicant complied with all its obligations regarding the goods delivered to the Respondent. The Respondent was required to pay the total amount outstanding as per the invoice. The amount became immediately due and payable by the Respondent, and despite numerous undertakings by the Respondent to make payments, the Respondent failed and/ or neglected to pay the outstanding amount.
- [6] The Applicant's attorney informed or notified the Respondent, in terms of Section 345 of the Companies Act, that if the Respondent does not pay the outstanding amount within 21 days, the Applicant will apply for the Respondent's liquidation.
- [7] The Respondent then sent an e-mail on 5 November 2024 to the Applicant's attorney of record requesting for down payment of the amount. The Applicant did not accept the offer and asked his attorney to make a counteroffer on 6 November 2024. The Respondent did not respond to the counteroffer and only forwarded the first proposal to the Applicant's attorney on 23 December 2024. The Respondent offered to pay R 5 000 monthly, payable on the 10th of every month starting from January 2025.

Submissions by Applicant's Counsel

- [8] Counsel for the Applicant, Advocate S. Barreiro, submitted that the Respondent's company is factually insolvent and commercial. It is unable to pay its debts. The Applicant supplied the Respondent with steel products. The invoice of goods sold was delivered with the goods on or about November 2023. The value of goods amounts to R 87 687.50. Despite numerous undertakings to make payments by the Respondent, the Respondent failed and/or neglected to pay. Respondent's failure to pay the amount due constitutes an act of insolvency. It will be just and equitable if the Respondent is wound up.

The issue to be determined

- [9] Did the Applicant make out a case for a provisional or final order of liquidation?

Relevant Legal principles and discussions

- [10] Section 344(f) and (h) of the Companies Act provides circumstances in which the Court may wind up company: if the Company is unable to pay its debts as described in section 345 and it appears to the Court that it is just and equitable that the company should be wound up.
- [11] Section 345 of the Companies Act deals with statutory demands and the circumstances under which a company can be deemed unable to pay its debts. It allows a creditor to send a formal letter of demand to a company demanding payment. If the debts are not paid within 21 days, the company is deemed unable to pay them.

- [12] Virtually insolvent means when the company is on the brink of insolvency, with liabilities exceeding assets and insufficient resources to pay debts. Commercial insolvency primarily focuses on a company's inability to meet its financial obligations due to cash flow issues, even though its assets may exceed its liabilities.[1]
- [13] The letter in terms of section 345 of the Companies Act was served on the Respondent on 28 November 2024. On 23 December 2024, the Respondent replied to the letter, offering to pay R 5 000.00 per month, payable on the 10th of each month. The Applicant refused the offer and gave a counteroffer of R 10 000. The purpose of liquidation is to dissolve a business and distribute assets to the creditors
- [14] As per the Badenhorst rule, as stated in *Badenhorst v Northern Construction Enterprises (Pty) Ltd*,^[2] Liquidation proceedings shouldn't be used to enforce payment of a bona fide and reasonable debt. The court retains the discretion to decide whether the company is insolvent.
- [15] Liquidation is intended to resolve the financial state of a company that cannot meet its obligations, not to resolve disputes about debts. If that is allowed, it will amount to an abuse of the court process. Liquidation proceedings should be carefully considered, as opposed to action proceedings for collecting debts.
- [16] Winding up proceedings ought not to be resorted to in order to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds; the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt.^[3]
- [17] It is trite that when the debtor company owes money and is not insolvent, a creditor must utilise action proceedings and issue summons for payment of a debt. Section 347(2) of the Companies Act provides that on an application for winding up, the applicants are entitled to be granted the order unless the court is satisfied that there are some other remedies available to the applicants and that they are acting unreasonably in seeking to have the company wound up.
- [18] In *Absa Bank Ltd v New city Group (Pty) Ltd* and another related matter,^[4] the court stated that:
- "Upon application of this approach, it must therefore be asked if liquidation in this particular case can reasonably be avoided, a question that is independent of the prospect of a business rescue option, as addressed earlier. In my view, despite some wrinkles in the substance of what Newcity advances, there is a sufficient body of fact and rationality in what is on offer to result in a reasonable, pragmatic programme of payments that could avoid the extinction of Newcity."*

- [19] The Respondent made an offer to pay, but the Applicant refused it. There are many ways of resolving a dispute of this nature. Winding up a company is the most extreme process. The Applicant did not file proof that the Respondent cannot pay its debts. In this case, liquidation can be avoided. The Applicant can utilise action proceedings to issue a summons.
- [20] Accordingly, in my view, the Applicant has failed to show that the company is to be dissolved in terms of Section 344 of the Companies Act or Section 345 of the Companies Act.
- [21] It is trite that a winding up order will not be granted where the sole motive or purpose of seeking the winding up order is something other than the bona fide bringing about of the company's liquidation.

Order

- [21] In the result ,I make the following order :

The application is dismissed. No order as to costs.

N L MOILA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant: Advocate S Barreiro Instructed by: Hendrik Haasbroek Attorneys Date of hearing: 25 March 2025 Delivered: 13 May 2025

- [1] Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited 2014 (2) SA 518 (SCA) at para 16 and the cases cited therein.
- [2] 1956
- (2) SA 346 (T). See also more recently Imobrite (Pty) Ltd v DTL Boerdery CC
- [2022] ZASCA 67 (13 May 2022) at para 14.
- [3] See Meskin Henochsberg on the Companies Act 61 of 1973 5 ed Vol 1 at 693-694.
- [4] [2013] 3 All SA 146 (GSJ) at para 33.

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