

SOUTH AFRICA / JUDGMENT

Gapp Architects and Urban Designers Proprietary Limited v Environmental Process and Mining Consultants Proprietary Limited (388/2018) [2018] ZAFSHC 149 (11 September 2018)

[2018] ZAFSHC 149

COURT

Free State High Court, Bloemfontein

BEFORE

Mathebula

CASE / FILE NUMBER

388/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 388/2018

In

the matter between:

GAPP
ARCHITECTS AND URBAN DESIGNERS
PROPRIETARY
LIMITED Applicant
and
ENVIRONMENTAL PROCESS
AND MINING
CONSULTANTS
PROPRIETARY
LIMITED Respondent
HEARD
ON: 31 MAY 2018

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: 11 SEPTEMBER 2018

- [1] This is an application for the winding-up of the respondent on the basis that it is unable to pay its debts.[1] Before me appeared Mr Choate for the applicant and Mr Coetzer for the respondent.
- [2] The brief narration of the background facts to the matter is as follows. On 31 January 2017 the applicant represented by Kenneth Wood and the respondent by Christopher Mumby entered into a written architectural services agreement. The crux of the agreement was that the applicant would render architectural services to the respondent in respect of a proposed new university and community library development in Kolwezi, Democratic Republic of the Congo. The total amount payable for the services to be rendered on the project was set at R830 155, 83.
- [3] The applicant rendered services and submitted invoices to the respondent of R179 068, 82 on 31 March 2017 and R227 130, 64 on 30 April 2017 respectively. The respondent did not settle both invoices despite numerous demands and a letter of demand sent in terms of section 345(1)(a)(i) of the Companies Act dated 17 October 2017 from the applicant's attorneys.
- [4] The respondent is denying liability and maintain that it was only acting as an agent of an entity named Technobuild of Katanga based in Lubumbashi, Democratic Republic of the Congo. The essence of its case is that it merely created a legal tie between Technobuild and the applicant. The services were rendered by the applicant to this entity not the respondent. Accordingly, the applicant was at all times aware of the situation. As a result, the respondent was under no obligation to respond positively to the notice dispatched to it.
- [5] It was argued on behalf of the applicant that the application is premised on the inability of the respondent to pay the invoices as rendered to it. That the signatures appended to the written agreement are those of the representatives of the parties to this matter. No reference is made to any other party(ies). At no stage when numerous reminders for payment were made did the respondent deny liability.
- [6] He argued that this court has jurisdiction to hear this matter. He submitted that the registered address, even if different from the principal place of business contrary to the requirements of section 23 of the Companies Act, is the residence of a company for jurisdictional purposes.
- [7] He contended that the respondent is unable to pay its debts. He pointed out that the respondent has not attached inter alia financial statement(s) to demonstrate that it is able to pay its debts. The failure to do so is an indication that the respondent is unable to pay its debts.

[8] Mr Coetzer on behalf of the respondent relied on the well-known Badenhorst rule that the application of this nature should not be used to collect debt.[2] He added that the application for liquidation should not be resorted to enforce a claim which is bona fide disputed by the respondent.[3] He submitted that there was no onus on the respondent to disprove any element.

[9] On the issue of the existence of agency, he submitted that the principal was known to the applicant at all times. Invoices

were initially issued to the respondent but later amended to reflect the correct party. This is a clear indication that the

applicant was aware of the involvement of Technobuild. He pointed out the applicant has not made out a case for the granting of the relief sought. He raised the issue that the application has not been served on the employees of the respondent. Finally he referred to the factual dispute in existence between the parties and that the application be dismissed with costs.

[10] The principal place of business of the respondent is The Arena, Capital Hill, 67 Morkel Close, Halfway House, Johannesburg. The registered address is situated at 33 Murray Street, Harrismith.

Section 23 (3)(a) and (b) of Act 71 of 2008 provides that:-

“Each company or external company must-

- (a) continuously maintain at least one office in the Republic; and
- (b) register the address of its office, or its principal office if it has more than one office-
 - (i) initially in the case of-
 - (aa) a company, by providing the required information on its Notice of Incorporation; or
 - (bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and
 - (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.”

[11] It appears that the respondent did not comply with the abovementioned section by not changing its address. It now seeks to rely on its non-compliance with the Act to escape the jurisdiction of this court.

[12] However this matter is settled. In *Sibakhulu Contract (Pty) Ltd v Wedgewood Village Gold Country Estate (Pty) Ltd*, the court explained this question as follows:-

“I consider that it would give effect to the purposes set out in s 7(k) and (l) to interpret s 23 of the Act to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office). The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business

rescue matters. I think it admits of no doubt that winding-up and supervision for business rescue purposes are both matters going to the status of the subject company, and that the power to make a determination on a question of status involves a ratio jurisdictionis exercisable only by the court within whose jurisdiction the company 'resides' or is domiciled (I do not perceive there to be scope for any distinction within South Africa between a local company's residence and its domicile.)"[4]

It is therefore my considered view that the argument advanced in this respect falls away.

[13] The next issue relate to whether the applicant is seeking to recover a debt whose existence is disputed on bona fide and reasonable ground. There is no doubt that the applicant invoiced the respondent for the combined sum of R406 199. 46. This amount remains unpaid the defence is that this amount is owed by a third party not the respondent.

[14] The dealings leading to the conclusion of the agreement were conducted by the duly appointed representatives of the two (2)

entities. The agreement was signed by both of them. In that regard literal interpretation of the agreement will be applied to the document. In their communication with each other, there was no mention of the existence of the third party. The invoices that were sent to the respondent were not queried on the basis that they are not liable for payment. The issue of agency was not raised. This later surfaced in response to the application. I find the version of the respondent ingenuous in this regard.

[15] Although the respondent does not have to disprove any element, the details of the aforementioned agency is not disclosed. It is on these basis that I consider this version to be rejected. I do not consider that there are dispute of fact between the parties as raised by counsel for the respondent.

[16] The correct approach to be followed in circumstances where there are disputes of fact where succinctly elaborated in Wightman t/a J W Construction v Headfour. On paragraph 13 Heher JA explained himself in the following manner:-

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional

circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”[5]

[17] In the exercise of my discretion I am satisfied that the applicant is entitled to some kind of relief. However, I would not grant the final order of winding-up but a provisional order with a return date. A proper case has been made out for the provisional winding-up of the respondent as contemplated in section 344(f) read with section 345 (1)(c) of the Companies Act. The applicant need only to establish a prima facie case. In this matter it will be just equitable that the respondent be placed under provisional winding-up.

[18] In the circumstances I make the following order:-

18.1. The respondent is provisionally wound-up.

18.2. A rule nisi is issued calling upon all persons to appear and show cause, if any, to this Court on/or before 9H30 am on Thursday 24 October 2018, why the respondent should not be finally wound-up, and why the costs of this application should not be costs in the winding-up.

18.3. This order, together with a copy of the Notice of Motion and annexures thereto, must be served upon the respondents.

18.4. The copy of this order must be served on:

18.4.1. Any registered trade union that as far as the Sheriff can reasonably ascertain represents any of the employees of the respondent;

18.4.2. The respondents' employees, if any, by affixing a copy of the order and the application to any notice board, to which the employees have access inside the respondents' premises, or if there is no access to the premises by the employees, by fixing copy to the front gate, where applicable, failing which, to the front door of the premises from which the respondents reside and/or conduct any business;

18.4.3. The South African Revenue Service;

18.4.4. This order shall be published once in the Government Gazette and the national newspaper.

18.5. The costs of this application to be costs in the administration of the estate of the respondents.

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MATHEBULA, J

On behalf of Applicant: Adv. L. Choate

Instructed by: Symington & De Kok

Bloemfontein

On behalf of Respondent: Adv. C. Coetzer

Instructed by: Honey Attorneys

/roosthuizen

- [1] Section 344 of the Companies Act 61 of 1973 provides:- Circumstances in which company may be wound up by Court. – A company may be wound up by the Court if – a)..... b).....
- f) the company is unable to pay its debts as described in section 345
- [1] Section 344 of the Companies Act 61 of 1973 provides:- Circumstances in which company may be wound up by Court. – A company may be wound up by the Court if –
- a).....
- b).....
- f) the company is unable to pay its debts as described in section 345
- [2] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 T at 347 H – 348 B.
- [3] Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A) at 980 B-D.
- [4] 2013
- (1) SA 191 (WCC) at 199 F-G.
- [5]
- [2008] ZASCA 6; 2008
- (3) SA 371 (SCA) at 375 G - 376 B.

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