

SOUTH AFRICA / JUDGMENT

Jumalu Fencing (Pty) Ltd v Tshwaragenelwe Construction (M3/2019) [2020] ZANWHC 7 (21 February 2020) [2020] ZANWHC 7

COURT

North West High Court, Mafikeng

BEFORE

P.L. Nobanda

CASE / FILE NUMBER

M3/2019

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO. M3/2019

In the matter between:-

JUMALU FENCING (PTY) LTD Applicant

and

TSHWARAGENELWE CONSTRUCTION

Respondent

REASONS

FOR JUDGMENT

NOBANDA AJ

INTRODUCTION

[1] The Applicant brought an application for the winding up of the respondent in terms of section 345(1)(a) and (c) of the old Companies Act[1] and/or section 344(f) and/or section 345(h) read with section 81(1)(c)[2] of the New Act on the basis that the respondent:-

- (a) Is unable to pay its debt; or
- (b) It will be just and equitable that the respondent be wound up

even if the respondent is found to be solvent.

[2] On 14 November 2019 Petersen AJ gave a judgment provisionally winding up the respondent with a rule nisi returnable on 13 December 2019 for any interested party to show cause why a final order winding up the respondent should not be granted.

[3] On 13 December 2019 (return date) Petersen AJ's order was confirmed by this Court and the following order was granted:-

(i) The Respondent is hereby finally wound-up and placed in the hands of the Master.

(ii) Costs of the application to be costs in the liquidation.

[4] On 27 January 2020 the respondent requested reasons for the order in terms of Uniform Rule 49(1)(c). I provide the reasons hereunder.

[5] In his judgment, Peters en AJ found inter alia,

5.1 Mr Boyisa, the respondent's sole director, on his own version, allowed Mr Khoza to fraudulently utilize the respondent to secure a bid from the Department of Social Development, in lieu for receiving a consideration;

5.2 Although Mr Boyisa alleged he had laid a charge of fraud against Mr Khoza for fraudulently utilizing the respondent to obtain goods from the Applicant on credit, Mr Boyisa failed to provide any details about the case, including the case number and the details of the investigating officer;

5.3 Mr Boyisa failed to provide, at the very least, the respondent's business records for the period in question that the respondent is able to pay its debts;

5.4 The respondent failed to provide related documents relating to Cochrane Fencing's credit facility supporting the respondent's allegation that no credit facility was applied for from the Applicant but from Cochrane Fencing.

[6] On these bases, Petersen AJ found that the respondent has failed to provide any evidence or facts demonstrative of a real, genuine or bona fide dispute of facts. Accordingly, Petersen AJ found that the Applicant had made out a prima facie case for the provisional winding up of the respondent.

[7] On the return date, the respondent, notwithstanding the concerns raised by Petersen AJ in his judgment, failed to address those concerns. The respondent did not file any supplementary affidavit and/or further heads of argument addressing the issues raised in the Petersen AJ's judgment. Instead, the respondent relied on the same papers and heads of argument.

- [8] I agree with the findings of Petersen AJ more particularly relating to Mr Boyise, in his own version, authorising Mr Khoza to utilize the respondent to fraudulently secure a bid with the Department of Social Development. The Applicant alleged that the respondent, represented by Mr Khoza, obtained supplies on credit from the Applicant in respect of a bid from the Department of Social Services.
- [9] Although Mr Boyise denied authorising Mr Khoza to obtain supplies on credit from the Applicant and alleged he had opened a fraud case against Mr Khoza, he failed to provide proof even after Petersen AJ's judgment, on the return date. In addition, the respondent still failed to supply documents relating to Cochraine Fencing's credit facility the respondent alleged it utilised to secure goods and supplies for the Department of Social Development's bid.

Neither did the respondent submit any business records for that period to support its allegations that it was solvent and merely

refused to make payment to the Applicant because it disputed the debt.

- [10] In the light thereof, I aligned myself with Petersen AJ's judgment confirming that the respondent had failed to raise a real, genuine or bona fide dispute of facts showing on a balance of probabilities that it was not indebted to the Applicant. Accordingly, I found that the respondent was unable to pay its debts as contemplated in section 345(1)(a) and (c) of the old Act.

- [11] It is for the aforementioned reasons that Petersen AJ's provisional order was confirmed.

P.L. NOBANDA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE REASONS REQUESTED : 27 January 2020

DATE REASONS WERE HANDED: 21 February 2020

COUNSEL FOR APPLICANT : Adv. B D Stevens

COUNSEL FOR RESPONDENT : Adv. X Nyoka

ATTORNEYS

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[1] 61 of 1973 (the Act)

[2] Companies Act 71 of 2008 (the New Act)

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