

SOUTH AFRICA / JUDGMENT

Kipp Consulting Engineers (PTY) Ltd v OLT Engineers and Project Managers (PTY) Ltd (56323/2021; 57319/2021) [2022] ZAGPJHC 953 (7 November 2022) [2022] ZAGPJHC 953

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strijdom

CASE / FILE NUMBER

56323/2021; 57319/2021

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IN

THE HIGH

COURT OF SOUTH-AFRICA

GAUTENG

LOCAL

DIVISION,

JOHANNESBURG

CASE

NO: 56323/2021 and

57319/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

7/11/2022

IN

THE MATTER

BETWEEN:

KIPP

CONSULTING ENGINEERS (PTY) LTD

APPLICANT

AND

OLT

ENGINEERS & PROJECT MANAGERS (PTY) LTD

RESPONDENT

JUDGMENT

Strijdom AJ

1. In this matter, two applications to obtain a winding-up order were consolidated (case no: 56323/2021 and case no: 57319/2021).
2. The Applicant's entitlement to obtain a winding-up order in case no: 56323/2021 arises out of an indebtedness of:
 - 2.1 R 2 282 005,00-which is currently due, owing and payable;
 - 2.2 R 22 772 915,40 - which constitute a contingent liability, which were allegedly unlawfully paid to the Respondent, instead of the Applicant, to whom the paying party/ies was/were in fact indebted through various fraudulent schemes.[1]
3. On 20 October 2021, the Applicant caused to be served upon the Respondent a written demand for payment of the sum of R 2 282 005,00, requiring payment to be made within five (5) days. Notwithstanding the lapse of five (5) days, the Respondent has failed to pay, secure or compound for the indebtedness within such period or at all.[2]
4. The Applicant's entitlement to obtain a winding-up order in case no: 57319/2021 arises out of an indebtedness of:
 - 4.1 R 3 000 000,00
 - which is currently due, owing and payable;
 - 4.2 R 17 188 132,00 - which constitutes a contingent liability, which were allegedly paid to the Respondent, instead of the Applicant to whom the paying party/ies was/were in fact indebted, through various fraudulent schemes.[3]
5. On 20 October 2021, the Applicant served upon the Respondent a written demand for payment of R 3 000 000,00, requiring payment to be made within five (5) days. The Respondent failed to pay, secure or compound for the indebtedness within such period, or at all.[4]
6. The Applicant is therefore a creditor of the Respondent as envisaged in Section 346(1)(b) of the Companies Act, 1973 ('the 1973 Act').
7. Applicant avers that the Respondent is factually unable to pay its debts as envisaged in Section 345(1)(c) and falls to be wound up in terms of Section 344(f) of the Act.
8. Applicant further avers that it has a right ex debito justitiae to seek the Respondent's provisional winding-up.

9. In or during 2008, a business opportunity arose for one Mr Ngwenya and his erstwhile co-director and 50% shareholder, Mr Patrick Metene ('Metene'), to go into a business venture doing engineering consultancy work for various State departments in Limpopo and Gauteng Province.[5]
10. Mr Ngwenya and Metene formed a close corporation for this purpose - whereby they would be akin to equal partners. In or during 2015, the close corporation was converted to a private company, viz the Applicant.[6]
11. Mr Ngwenya passed away on 28 June 2021. At the time of his death the directors of the Respondent were Mr Ngwenya and his sister, Anna Ngwenya ('Anna'). Metene is accordingly the sole director of the Applicant.
12. Mrs Ngwenya, who is the widow of the late Mr Ngwenya, has been appointed as a director of the Respondent, together with Anna - although it is contended by the Applicant that Anna is no longer a director.[7]
13. Applicant avers that the claim against the respondent arises out of the fraudulent conduct of Mr Ngwenya, which led to the Respondent receiving the payment of monies as part of a money laundering scheme. In consequence of this scheme, the Respondent has been the unlawful beneficiary of various payments which should have been received by the Applicant.
14. It was stated by the Applicant that in order to facilitate the theft and fraud of monies, Mr Ngwenya caused to be registered a number of entities:
 - 14.1 I P T Civils and Supply (Pty) Ltd in September 2005 ("I P T Civils");
 - 14.2 The Respondent in June 2016;
 - 14.3 M I C Mining and Geological Services (Pty) Ltd ("MIC") registration number 2016/035855/07 in February 2016;
 - 14.4 OLT Engineers and Project Managers (Pty) Ltd in December 2017 ("OLT");
 - 14.5 Kipp Group (Pty) Ltd ("Kipp Group") (registration number 2019/068913/07 in February 2019), (collectively known as "the Ngwenya's entities").[8]
15. On 31 March 2021, the Applicant and Metene issued a summons out of this Court against Mr Ngwenya, I P T Civils, I P T Group and M I C ("the defendants") under case number 16235/2021 ("the action proceedings").[9]
16. In terms of the action proceedings the sum of R34 838 071.00 was claimed against certain of the defendants and R17 188 132.00 against I P T Group, arising out of various alleged acts of fraud and theft. The action proceedings currently pend. [10]

17. At time of the action proceedings the Applicant was unaware of the involvement of the Respondent in the alleged fraudulent scheme, and it was thus not cited in the action proceedings.
18. It was stated inter alia by the Applicant that, Mr Ngwenya utilized the Ngwenya's entities for the purpose of siphoning funds but also eliciting the assistance of his close friend Antony Marunga ("Mr Marunga"), and Mr Marunga's entity, Prociv Consulting and Project Management (Pty) Ltd ("Prociv") to facilitate the money laundering scheme[11]. In this way Mr Ngwenya was able to conceal from Mr Metene as his co-director and shareholder payments that should have been made to the Applicant, in order that he could be the sole beneficiary without having to take into account Mr Metene's 50% shareholding in the Applicant. [12]
19. Prociv's involvement was necessary in order for it to be presented as a legitimate sub-contractor. The next stage was to cede and assign Kipp Consulting's entitlement to receive payments from the Tshwane and Mogale Municipalities to Prociv, in order to disguise the true source of the funds.
20. At all material times the Tshwane and Mogale Municipalities were indebted to the Applicant in respect of tax invoices rendered for various civil and consulting work undertaken, materials supplied, and services rendered.[13]
21. Notwithstanding that the Applicant, through its duly appointed employees and representatives, had performed the work and was entitled to be paid therefor, Mr Ngwenya, in most instances with the assistance if an erstwhile employee of the Applicant Mr Lekalakala, (who is currently employed by Respondent as ("a project engineer") in conspiracy with the Respondent purported to conclude cession and assignment agreements and other arrangements ceding the entitlement to receive the proceeds of the amounts due to the Applicant by inter alia the Tshwane and Mogale Municipalities to Prociv and therefore filtered through to the Respondent and I P T Group.[14]
22. A sum of R11 917 258.08 has been paid to Prociv and Mr Marunga by inter alia the Tshwane and Mogale Municipalities, instead of to the Applicant[15].
23. In each instance when a payment was made Mr Ngwenya would submit the request for payment to either the Tshwane or Mogale Municipality as the case may be, together with a number of attachments[16].
24. The final stage of the alleged fraudulent scheme was the kick back of monies to the Ngwenya entities, including the Respondent, by Marunga and Prociv.
25. On 15 October 2021, this Court per Barit AJ granted an order in which the Respondent's bank account was frozen up to the amount of R2 282 005.00, being the sum, which had been transferred[17] to it unlawfully by Prociv, pending the institution of liquidation proceedings to be brought against the Respondent.

26. Mr Marunga in his affidavit annexed to the supplementary founding affidavit set out the amounts that Prociv received from Mogale Municipality and the amounts paid to the Respondent.[18]
27. At the time the above payments were made the Respondent had not done any work on behalf of Mogale Municipality entitling it to be paid any monies[19].
28. There was no agreement concluded between either Prociv or Mogale Municipality with the Respondent entitling it to be paid any monies[20].
29. The only party that was entitled to receive any monies as far as Mr Marunga was aware, was the Applicant[21].

THE RESPONDENTS' DEFENCE TO THE ALLEGED INDEBTEDNESS IN THE AMOUNT OF R22 772 916.40

30. It was submitted by the Respondent that any payments that the Respondent may have received from Sibanye Stillwater have been received as a result of various contracts that were concluded by the Applicant and Sibanye Stillwater and that those contracts have not been set aside. It was argued that such payments cannot be classified as a debt due and payable to the applicant.
31. It was further submitted that only an amount of R2 609 453.09 and not the alleged R22 772 916.40 was received by the Respondent from Sibanye Stillwater[22].

THE RESPONDENT'S DEFENCE TO THE ALLEGED INDEBTEDNESS OF R2 282 005.08

32. The Respondent stated that the alleged indebtedness of an amount of R11 917 228.08 is between the Applicant, Mr Marunga, and/ or Prociv Consulting and Project Management and not the Respondent. The Applicant and Prociv Consulting and Management entered into various session agreements which gave rise to Prociv Consulting and Management allegedly receiving the amount of R11 917 228.08[23].
33. The Applicant has already been granted an order to the effect that the said amount be frozen in the bank account of Mr Marunga and/or Prociv Consulting Project Managament (Pty) Ltd. [24]

THE RESPONDENT'S DEFENCE TO THE ALLEGED INDEBTEDNESS IN THE AMOUNT OF R3 000 000 AND R17 188 132.00

34. It was submitted by Respondent that the amount of R3 000 000 is part of an amount of R11 917 258.08 which the Applicant is being owed by Mr Marunga and I or Prociv Consulting and Project Managers. The Applicant has already had the relevant agreements declared null and void. The amount of R17 188 132.00 is a subject of an ongoing dispute between the parties. The Applicant together with Mr Metene instituted an action proceeding in this Court, under case number 16325/2021 against the Respondent as the third defendant.

35. The contracts which Mr Ngewnya is alleged to have unlawfully ceded from the Applicant to the Respondent are the following:

35.1 the Bapong Project;

35.2 the Segwaelane Road Upgrade Project;

35.3 the Majakeng Road Upgrade Project;

35.4 the Majakaneng School Project and

35.5 the Majakaneng Community Health Care Centre Project.

36. The Respondent contended that according to Sibanye Stillwater there are only (2) two of the 6 (six) pleaded contracts that may have been ceded to the Respondent and those are:

36.1 the Segwaelane and Majakeneng Road Upgrade Project; and

36.2 the Majakaneng School Project

37. It was argued by the Respondent that neither O LT nor I PT Group had done any work on behalf of Mogale City and Tshwane Municipalities respectively entitling them to be paid any monies and there was no agreement concluded between Mogale / Tshwane Municipalities with O LT/ I PT Group entitling them to be paid any monies.

38. It was submitted by Respondent that Mr Marunga alleges that he was informed by Mr Ngwenya to submit invoices to Mogale City and thereafter make several payments to O LT and that those allegations constitute inadmissible hearsay evidence. It was also submitted that the evidence of Mr Marunga lacks credibility, and his evidence should be tested in cross examination because there is a dispute of facts.

THE LAW

39. "It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it would be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in the affidavits." [25]

40. I have carefully perused the affidavits and after considering the nature and extent of the factual disputes arising from the affidavits. I have come to the conclusion that the affidavits do not disclose real, genuine or bona fide disputes.

41. Section 346 (1) (b) of the Companies Act 61 of 1973 provides that:

"An application to the Court for the winding - up of a company may subject to the provisions of this section, be made

(a) ...

(b) By one or more of its creditors (including contingent or prospective creditors)"

42. The onus is on the Applicant to prove on a balance of probabilities the ground upon which it relies namely that it is a creditor with locus standi and that the Respondent is unable to pay its debts (ie. it is commercially insolvent alternatively that it is just and equitable that the company be wound-up).
43. The Respondent bears the onus to show that the debt upon which the Applicant relies is disputed on bona fide and reasonable grounds.
44. The Applicant brought this Application in terms of Section 344 of the Companies Acts 61 of 1973, alleging that the Respondent is unable to pay its debts as described in Section 345 of the Act.
45. Section 345 (1) of the Act provides as follows:

"A company or body corporate shall be deemed 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 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."

46. For the applicant to be entitled to the relief sought, the Applicant must prove that it is a creditor to whom the Respondent is indebted in a sum not less than hundred rands.
47. Determining commercial insolvency required an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent prospective and continue trading.
48. The Respondent did not attempt to establish any basis on which it disputed the liability. It badly denied the debt.
49. The liability has not thereafter been paid, secured or compounded as contemplated by Section 345 (1) (a) of the 1973 Act.
50. On a conspectus of the evidence before me the Respondent is not only unable to pay its debts and thus commercially insolvent but also factually insolvent.
51. The Respondent does not own any fixed property or own any assets of substance and is thus at the very least commercial insolvent. There are no liquid funds available to pay the amounts claimed by the Applicant. [26]

52. In deciding whether the Respondent is unable to pay its debts under Section 345 (1) (C) of the Act the Court must take into account the contingent and prospective liabilities of the Respondent in terms of Section 345(2) of the Act.
53. A contingent liability is one which by reason of an existing vinculum juris between the creditor and the company will become an enforceable liability on a future date determined by future events[27].
54. I concluded that a proper case has been made out by the Applicant for an order that the Respondent be placed under Provisional Liquidation.
55. The costs of this application shall be costs in the liquidation.
56. In the result:
- 56.1 The Draft Order marked X is made an order of court.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION'

PRETORIA

Heard on:

17 August 2022

Judgement:

7.11.2022

Appearances:

For the Applicant: Adv RA Solomon SC and Adv M Gumbi

Instructed by:

Michael Raphela Attorneys

For the Respondent: Adv MA Dewrance SC and CM Shongwe

Instructed by: Mashiane, Moodley E Monama Inc

[1] Caselines: 002-3 para 9

[2] Caselines: 002 -4 para 14; 003-2 - 003 -7 Annexure "FA2

[3] Caselines: 001-9 para 10

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- [4] Caselines: 001-10 para 15
- [5] Caselines: 001-11 para 19
- [6] Caselines: 001-11 para 21
- [7] Caselines: 001-12 para 25
- [8] Caselines: 001-11 para 23
- [9] Caselines: 002-6 para 23
- [10] Caselines: 002-6 para 23
- [11] Caselines: 002-7 para 27
- [12] Caselines: 002-7-002-8 para 28
- [13] Caselines: 002-8 para 30
- [14] Caselines: 002-8 para 31
- [15] Caselines: 002-12-002-14 paras 34.1-34.13 A
- [16] Caselines: 002-14 para 41
- [17] Caselines: 002-17 para 51
- [18] Caselines: 18 -18 para 57; annexure "SA 32" Caselines 19-95
- [19] Caselines: 18-19
- [20] Caselines: 18-20
- [21] Caselines: 18-20
- [22] Caselines: 27-123 to 125
- [23] Caselines: 27 p36
- [24] Caselines: 27 p36
- [25] See *Soffiantini V Mould* (1956] 4 ALLSA 171 [E]; 1956 (4) SA 150 [E] 154 E - H and *Room Hire Co (Pty) Ltd V Jeppe Street Mansions (Pty) Ltd*, 1949(3) SA 1155 (T)
- [26] Caselines: 001-25 para 59
- [27] *Chaise Holdings (Pty) Ltd v Yabeng Investment Holdings Company Limited* (2001) 2 ALL SA 539 (W) *Taylor and Steyn NO V Koekemoer* 1982
- (1) SA 374 (T) 380

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