

SOUTH AFRICA / JUDGMENT

Pillay v Lopdale Energy (Pty) Ltd (2024/127178) [2025]

ZAGPJHC 681 (15 July 2025)

[2025] ZAGPJHC 681

COURT

South Gauteng High Court, Johannesburg

BEFORE

Johann Gautschi

CASE / FILE NUMBER

2024/127178

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2024-127178

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED:

In the matter between:

SUMENTHREN
POOBALAN PILLAY
Applicant
and
LOPDALE
ENERGY (PTY) LTD
Respondent

Coram:

Johann Gautschi AJ

Heard:

11 June 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 15 July 2025

JUDGMENT

JOHANN GAUTSCHI AJ

- [1] This is an opposed application for the final winding up of the Respondent in which the Applicant relies on the inability of the Respondent to pay its debts in terms of section 344 (f) and 345 (1) (c) of the Companies Act 61 of 1973 (the Act).
- [2] The Applicant conducts business as an importer and distributor of petroleum products from Mozambique to Johannesburg. Its sole director and 100% shareholder is Edward Mwanandimandi (Edward), a Zimbabwean national.
- [3] The debt of the Respondent upon which the Applicant relies has its origin in a business relationship in terms of which the Applicant lent substantial amounts to the Respondent by way of three investment agreements concluded in the first quarter of 2021 (the investment agreements) in terms of which the Applicant lent a total of R7.7 million to the Respondent as an investment in the Respondent's business of importing and distributing petroleum products and processing substantial amounts of diesel at its diesel processing plants in Glen Austin, Johannesburg.
- [4] Following the Respondent's breach of the investment agreements, the Applicant and Respondent on 18 October 2021 concluded a written settlement agreement and an acknowledgement of debt in respect of which Edward also signed as co-principal debtor and surety for a total indebtedness of R18.75 million.
- [5] In January 2022 the Respondent breached the settlement agreement by failing to pay the amount of R1.5 million which was due on 4 January 2022. In a letter dated 4 January 2022 to the Applicant, Edward advised that the Respondent was unable to pay the full amount 4 January 2022 and undertook to pay R1 million on that day and the balance of R500,000 within 14 days.
- [6] The Applicant responded by letter dated 5 January 2022. He advised that because the Respondent's breaches of the agreement the Applicant would be forced to borrow an amount of R500,000 which would only be advanced to him at an extra charge of R50,000. Consequently, he advised his preparedness to grant the indulgence sought on condition that the Respondent pay by no later than 2 PM on 4 January 2021 the R50,000 which the Applicant would be charged for borrowing the R500,000. He stipulated that the indulgence

would only be for a period of 14 calendar days which meant that the outstanding R500,000 would then be due and payable by not later than 18 January 2022, that no further indulgence would be granted and if the Respondent should fail to make payment legal action would be commenced without further notice to it.

- [7] The Respondent having failed to pay the R500,000 by 18 January 2022, his present attorney of record addressed a letter dated 2 February 2022 to the Applicant advising of the Respondent's inability to pay the R500,000 and requested a restructuring of the agreement to allow the Respondent to pay off the debt at the rate of R500,000 before the seventh day of each month. That led to the signing of a new acknowledgement of debt on 14 February 2022 (the AOD). The AOD shows details of the opening balance of R15.5 million and the monthly payments which had to be made in a schedule, annexure A to the AOD. In terms of the AOD varying amounts would be paid until 15 April 2022. Thereafter the balance outstanding would be paid at the rate of R500,000 per month commencing on 15 May 2022 and no later than the 15th of each succeeding month. Interest would accrue on the outstanding amount on the reducing balance at the rate of 8.25% per annum
- [8] The Applicant's case is that the Respondent failed to pay the R500,000 that was due on 15 September 2024 as well as the R500,000 that was due on 15 October 2024. Consequently, by reason of clause 6 of the AOD which provides that "– – in the event of default, the full balance outstanding at date of default, shall immediately become due and payable", as at 15 September 2024, the date of default, the full amount due and owing and payable was R1,446,916.
- [9] The Applicant says that he "engaged Edward the following day to follow up on the payment. Edward was unable to make payment". Then he engaged Edward again on WhatsApp on 19 September 2024 requesting to be advised on payment. In response Edward referred to payments that he was expecting from others which the Applicant understood to be creditors of the Respondent. The following day, 20 September 2024 the Respondent again sent a WhatsApp stating "– – we are waiting for some payments to come in soon then will pass on to you ASAP sorry for the delay people have let me down – –".
- [10] The Applicant then by WhatsApp sent a letter of demand dated 26 September 2024 in terms of section 345 (1)
- (c) of the Act to the Respondent. The Respondent responded "let me push payment in the coming week and endeavour to pay around the 20s the other payments and going to the client's office now". Despite that, no further payment from the Respondent was received by the Applicant.
- [11] The Applicant then launched an urgent application for liquidation of the Respondent (the urgent application). The Applicant explained that the urgent application was withdrawn on 15 October 2024 by reason of erroneous documentation which had been attached to that application. The Applicant in his founding affidavit in the present application drew attention to the contents of the answering affidavit filed by the Respondent in that urgent application

and, inter alia, to the fact that the Applicant had included an erroneous payment schedule as annexure FA26 to the founding affidavit in the urgent

application. Its significance lies in the statements made by Edward in the answering affidavit filed for the Respondent in the urgent application which contradict the contents of the defences raised by the Respondent in the answering affidavit in the present application.

[12] In the Respondent's answering affidavit in the urgent application Edward stated at paragraph 25 that "I must start off by clearly stating that I acknowledge that as of February 2022 the respondent was indebted to the applicant in the amount of R15,500,000 (fifteen million five hundred thousand rand) the underlying basis being the failed investment agreement that was followed by the signed acknowledgement of debt".

[13] Further in paragraph 30 of that answering affidavit he stated that: "From 25 February 2022 to August 2024, I have in total actually paid the Applicant an amount of R15,800,000, being R300,000 in excess of the R15,500,000 that was brought forward on 14 February 2022 according to his annexure FA 26".

[14] Moreover, in the urgent application the Respondent attached the financial statements of the Respondent for the year ended February 2023, two pages of which were attached to the founding affidavit in the present application. The full financial statements were attached to the answering affidavit in this application as annexure LE 3. The Applicant points out that the auditors qualified the financial statements by stating that "we do not express an audit opinion on these financial statements" and that the financial statements reflect the position at 28 February 2023, almost 2 years earlier. They do not reflect the Respondent's

admitted liability to the Applicant which, according to the Applicant, stood at R9,726,735 as at 28 February 2023, the date of

the financial statements, whereas the financial statements show no liabilities as at 28 February 2023.

[15] In addition, far from proving the Respondent's solvency as at the time of launching of this application, even as at 28 February 2023 the full financial statements annexed to the answering affidavit in this application show total current assets consisting of cash and cash equivalents of only R62,152, the remaining assets being non-current assets consisting of property, plant and equipment and loan to group company totalling just under R43 million.

[16] The Respondent's answering affidavit submitted in limine that the application had been served on the Respondent by WhatsApp and that it should be dismissed for lack of proper service of the application by the sheriff. That was without substance as the Respondent filed an answering affidavit and appeared by counsel to oppose the application also on the merits. In the result this argument was, understandably, not persisted in during oral argument

by Respondent's counsel.

- [17] The thrust of oral argument by Respondent's counsel was that the Applicant's repeated use of winding up proceedings constituted an abuse of process to enforce payment of a debt in respect of which, according to the Respondent's affidavits, the Respondent had raised a genuine and bona fide defence to the Respondent's alleged liability based on reasonable grounds and involving factual disputes that require reference to oral evidence; that the February 2023 financial statements showed that the Respondent is commercially solvent; and finally, that even if I were to find that the requirements for a final winding up had been met, I should exercise a discretion to dismiss the application, alternatively, refer the matter for the hearing of oral evidence.
- [18] The genuine and bona fide defence contended for was based on the submission that the AOD incorrectly reflected in opening balance of R15.5 million, whereas it should only have been reduced by R500,000 because it failed to take into account a payment of R500,000 which had been made by the Respondent on the very day of signing of the AOD, namely 14 February 2022. Proceeding on that basis it was submitted by reference to a schedule of payments attached to the answering affidavit that: firstly, the 14 February 2022 payment of R500,000 (the first payment) should have been shown as a payment in reduction of the R15.5 million and that there were a further three payments which had incorrectly not been reflected in reduction of the amount owing on the AOD, namely, secondly, R50,000 on 20 February 2022 (the second payment), thirdly, R350,000 on 14 March 2022 (the third payment) and fourthly, R289,800 on 17 May 2022 (the fourth payment). I shall now address these individually by reference to the detailed contents of the Applicant's replying affidavit where these four payments were dealt with and where it was, in my view, convincingly demonstrated that none of them could credibly be taken into account in reduction of the AOD debt. That being so the Applicant in my view proved that the Respondent has not raised a genuine and bona fide defence based on reasonable grounds.
- [19] The first payment: the R500,000 paid on 14 February 2022. There is no substance in this alleged defence. Not only was it contradicted by the aforementioned statements made under oath by Edward on behalf of the Respondent in the urgent application in which he acknowledged that the amount owed under the AOD was R15.5 million, but also the timeline explained in detail by the Applicant in its replying affidavit showed that the R500,000 payment made on 14 February 2022 was made at 12:24:06 as reflected on the proof of payment annexed to the answering affidavit. It was thus paid prior to signing of the AOD later that afternoon after a draft thereof had been emailed to the Respondent's attorney at 15:45 that afternoon. Importantly, the attorney responded to the draft by letter dated Accordingly, that payment served to reduce the existing outstanding balance from R16 million to R15.5 million as is borne out by the exchange of WhatsApp messages and correspondence annexed to the replying affidavit. Moreover, an adverse inference must be drawn against the Respondent for failing to deal with the further contents of the replying affidavit by way of a rejoining affidavit when it could and should have done so if indeed it was able to counter the contents of the replying affidavit.

[20] The second payment: the Respondent's own schedule (annexure LE1b) shows that the R50,000 payment relied upon was made on 20 February

2022. The Applicant's replying affidavit explained that it was made for legal services rendered to Edward in respect of a SAE Revenue Services matter. He annexed screenshots of his conversation

with Edward on 18 February 2022 and on 20 February 2022 which support the Applicant's version on the probabilities. Given the relationship between the parties as illustrated by the multiple WhatsApps attached to the papers, the absence of an invoice from the Applicant as submitted in argument for the Respondent does not in my view detract from the explanation given by the Applicant. Here again the Respondent's failure to file a rejoining affidavit to counter the foregoing must count against the Respondent.

[21] The third payment: the schedule of payments annexed to the Respondent's answering affidavit shows two payments of R350,000 each, both on 14 March

2022. That was obviously an error as was conceded in oral argument on behalf of the Respondent, correctly in my view.

[22] The fourth payment: in this instance the WhatsApp messages attached by the Applicant to his replying affidavit provide overwhelming and convincing proof that this payment was merely reimbursement by the Respondent to the Applicant for US\$18,000 in cash which the Respondent had received from the Applicant. The Respondent's counsel was not able to provide any argument to counter that evidence. Also in this instance an adverse inference must be drawn from the Respondent's failure to file a rejoining affidavit to counter the Applicant's evidence in its replying affidavit.

[23] In the result the Applicant has in my view convincingly shown that the Respondent is insolvent and unable to pay it states as contemplated by section 344 (f) of the Act and that the defences raised by the Respondent are without merit and do not constitute genuine and bona fide defences. In the circumstances the Applicant is, in my view, entitled to an order for the final winding up of the Respondent.

IT IS ORDERED THAT:

1. The estate of the Respondent is placed under final liquidation in the hands of the Master of the High Court;
2. The costs of this application are costs in the liquidation of the Respondent's estate.

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: Adv N Strydom

Instructed By: SP Attorneys Inc

For the Respondent: Adv KL Kelaotswa

Instructed By: Alibi Inc. Attorneys

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