

SOUTH AFRICA / JUDGMENT

Umsobomvu Coal Proprietary Limited v Transasia Mineral SA Proprietary Limited (50816/2020) [2022] ZAGPPHC 893 (15 November 2022)

[2022] ZAGPPHC 893

COURT

North Gauteng High Court, Pretoria

BEFORE

NQUMSE

CASE / FILE NUMBER

50816/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 50816/2020

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In

the matter between

UMSOBOMVU

COAL PROPRIETARY LIMITED Applicant

(Registration

number: 1996/016229/07)

And

TRANSASIA

MINERALS SA PROPRIETARY LIMITED

Respondent

(Registration

number: 2006/020576/07)

JUDGMENT

NQUMSE AJ:

- [1] This is an application for a final order of winding up of the respondent on the grounds that it is unable to pay its debts as contemplated in section 344(f) read with section 345(1)(a) of the Companies Act 61 of 1973 (“the 1973 Companies Act”) as read with item 9 of schedule 5 of the Companies Act 71 of 2008 (“the 2008 Companies Act”).

Parties.

- [2] The applicant is Umsobomvu Coal Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at 21 Botanic Avenue, Berea, Durban.
- [3] The respondent is Transasia Minerals SA Proprietary Limited. A private company registered and incorporated in accordance with the Company Laws of the Republic of South Africa, having its registered address at 1257 Justice Mohamed Street, Menlo Park, Pretoria.
- [4] Before dealing with the merits of this application, I find it necessary to set out the history of the application since when the matter appeared on 14 February 2022 before me and allocated to be heard on the Opposed Motion Court roll on 16 February 2022. This background is succinctly laid out on the latest heads of argument of the applicant dated 22 July 2022. I briefly set it out as follows:
- [5] On 16 February 2022 the counsel for the respondent sought to move two additional applications, namely, the application for substitution of affidavits (“the substitution application”) and the application for the supplementation of the answering affidavit (“the supplementation application”). Both applications were opposed by the applicant. The defence pursued by the respondent in affidavits to be substituted and supplemented were the following:

5.1 The cost orders on which the applicant relied in pursuing the liquidation application were not ordered to be paid jointly and severally, but rather jointly, therefore the respondent is liable for only one half of those costs;

5.2 The respondent contended that it had taken cession of various costs orders obtained by various of its affiliate companies (specifically, an entity by the name Transasia 1 (Pty) Ltd, which then stood to be set-off against the debt owed by the respondent to the applicant, and

5.3 The respondent was entitled to compensation of certain costs of arbitration it had previously paid, in the amount of approximately R65 000.

- [6] As already indicated the applications were opposed by the applicant. Furthermore, the applicant contended that the unliquidated claim for the amount of R65 000 cannot be raised as a defence. Moreover, the applicant remained set on its reasons to oppose both

applications for substitution and supplementation along the lines articulated in its counsel's practise note[1] and set out in its answering affidavit in the application to substitute various affidavits[2] which were deposed to and delivered fraudulently in this application as well as prior applications on behalf of the respondent by a Ms Roytblat. I shall not deal with the said answering affidavit in this application and will only do so where it has become necessary to do so.

- [7] On 16 February 2022, counsel for the applicant submitted that the respondent could move its applications under the caveat that the applicant reserves the right to argue that the applications were not properly before court and warrant to be struck from the record.
- [8] Counsel for the respondent commenced with a full argument in respect of the substitution application and when afforded the opportunity to proceed with the second application for supplementation, he responded that he would prefer for the court to make a ruling on the substitution application before arguing the second leg of his applications. In effect, the respondent sought a postponement of the liquidation application pending a determination on the application for substitution. A move that was opposed vehemently by the applicant, and instead beseeched the court to hear all three applications and for the court to consider a judgment that will be all encompassing with a ruling on each application.
- [9] Subsequently, counsel for the respondent indicated that the respondent intended to make a tender of an amount of money to the applicant, the written tender would be made to the applicant overnight and as a consequence thereof requested the matter to stand down in order to present the proof of payment to the court. In response, the applicant's counsel indicated that it would be considered once received. This caused the matter to stand down until Friday, 18 February 2022.
- [10] By noon on 17 February 2022, no tender had been received by the applicant, however, a payment of an amount of R66 000 had been paid into the applicant's attorneys bank account. The receipt of the payment absent a formal written tender from the respondent prompted the applicant to dispatch a letter to the respondent in which it was recorded:
- "Despite your client's volte face on the undertaking to provide us with a formal written tender with terms, it is clear from the payment received that your client has capitulated on the question of indebtedness to our client in an amount exceeding R100. Please advise whether a tender of costs will be forthcoming or whether the parties will be required to argue costs tomorrow. This is not only a matter of collegial courtesy but also a matter of courtesy to the court. We await your urgent advice in relation to the above".*
- [11] Prior to close of business on Thursday, 17 February 2022 the respondent's attorney replied through correspondence marked "without prejudice" and advised the applicant that the payment of R66 000 is made "under protest" and that the respondent would tender the costs of the liquidation, the substitution application or the supplementation application. Since the applicant was not satisfied with the fact that the respondent refused to tender the costs, despite the payment that was effected, on Friday 18 February 2022, the parties argued the

question of costs in full and judgement on costs was reserved.

- [12] Shortly after the appearance of the matter before me on 18 February, on 24 February 2022, Transasia 1, sought to execute a writ against the applicant on one of the costs orders which had supposedly been ceded by it to the respondent for the purposes of extinguishing the respondent's acknowledged indebtedness to the applicant[3] . However, it must be noted that the writ of 24 February 2022 at the instance of Transasia 1 is at the backdrop of what was submitted

before court by counsel for the respondent as follows:

“your Lordship may have noted from the paper that, and I specifically referring to the replying affidavit of the respondent in the

application to substitute, that contends that now look the is now R17000 that he has also been taxed; there is a dispute about a R65000, and on that basis a R47000 balance will be paid. Now my instructions are that the respondent will now pay R66000 just to put all the disputes aside. What I will ask your Lordship is just a small indulgence, to enable the respondent to make that payment, and to enable me to hand it up to your Lordship. Payment will be made now. I do not know if it will reflect immediately on the applicant's banking statement, but just properly so that your Lordship can have proof of that payment.[4] “

- [13] Furthermore, the applicant disclosed to the court further facts by way of affidavits from Mr Boitumelo deposed to on 1 April 2022 which disputes the payment of R65000 it claimed to have paid. Since the introduction of the new evidence is protested by the respondent I shall return to this aspect later in the judgement. As a result of these developments and the contentions that the respondent has misled the court regarding the payment of R65000, the applicants sought the permission of the Deputy Judge President, Ledwaba for the re-enrolment of the matter and to request me to defer any ruling on costs in order to hear the entire liquidation application and to deliver a judgement only thereafter.

- [14] The Deputy Judge President advised the parties to liaise directly with myself. After hearing the request to hear the whole application I directed the parties to appear on 22 July 2022 for a full hearing. However, it has come to my attention as per the applicant that two days prior the hearing of the matter, the respondent's attorneys addressed correspondence to the applicant's attorneys, together with a payment of R24 735, 75[5] . The payment is made under the caveat that the respondent reserves its rights to recover the amount in question. Not surprisingly, the applicant rejects the payment ostensibly on the basis that it's a conditional payment, absent any explanation or calculation of the interest amount coupled with a threat of future recovery. The applicant contends that the payment is not a payment since the respondent will seek to reverse it. Consequently, the applicant persists with its relief for a final order of liquidation. the applicant

- [15] Having set out the background I now turn to the merits of the liquidation application is sought in the notice of motion.

- [16] According to the applicant's founding affidavit deposed to by Lingani Kunene (Mr Kunene), the applicant's claim against the respondent arises out of taxed bill of costs which have not been settled by the respondent despite demand being made and having complied with the provisions of the 1973 Companies Act as read with the 2008 Companies Act. During June 2010, the applicant and Transasia 1 ,11Miles Investments Property Limited and the respondent "the Companies" concluded an agreement for the sale of certain prospecting rights ("the sale agreement") from the applicant as seller and the rights were to be purchased by Transasia 1 or 11Miles. Mr Kunene stated that pursuant the conclusion of the sale agreement there were numerous instances of breach and repudiation resulting in the applicant cancelling the sale agreement. Following the cancellation, the applicant demanded that the companies should vacate the properties from which the mining rights were being mined and to allow the applicant access therein.
- [17] He further stated that following several requests for the respondent to allow the applicant access to the properties, those attempts were not successful and they led to the applicant and the respondent to enter into arbitration proceedings. Following an arbitration award in favour of the applicant, the applicant referred the award to the Johannesburg High Court to have it made an order of court on 29 March
2019. The judgement of the court became a subject of appeal to the Full Bench of the Johannesburg court refused the leave to appeal. There after two applications were launched with the Supreme Court of Appeal (SCA) in terms of section 18 (4) and section 17 (2) (b) of the Superior Courts act 10 of 2013. Both applications were unsuccessful.
- [18] Subsequently, the applicant prepared a bill of costs in respect of the applications that were unsuccessful in the SCA. Despite this service of the bill of costs on the companies, they never attended the taxation. According to the taxed bill of costs the respondent and 11 Miles are to make payments to the applicant jointly and severally, the one paying the other to be absolved, (copies of the taxed bills of costs were annexed as FA5 and FA6). In respect of the section 18
- (4) application which was unsuccessful, the taxed bill of costs is R48 025.99 and in respect of the section 17(2)(b) application which was unsuccessful the taxed bill of costs is R49 302.41.
- [19] Despite demand by the applicant for the respondent to pay the taxed bill of costs together with the accrued interest, no payment was made. According to the applicant letter of demand was in compliance with the provisions of section 345 of the 1973 Companies Act read with schedule 9 of the 2008 Companies Act.
- [1] See Caselines 040-3
- [2] See Caselines 039-3
- [3] see case lines 045-5 paragraphs 10 – 11 and at case lines 045 – 14.
- [4] See proceedings of 18 February 2022 on case lines 043 – 69.

- [5] See case lines 047 – 4 paragraphs 8 – 9.
- [6] 2013 (SA) 295 at 300 – 301 paragraph 27.
- [7] South Peninsula Municipality v Evans 2001 (1) SA 271 (C) at 283 A-H.
- [8] Transvaal Racing Club V Jockey of South Africa 1988 (3) SA 549 (L) at 604 A-E.
- [9] 1973
- (4) SA 667 (N) at 680 B.
- [10] 2005
- (4) SA 148 (C).
- [11] Caselines 045 -1.
- [12] At 425 B-C.
- [13] 2002
- (3) All SA 223 (T).
- [14] 1988
- (1) SA 943 (A).
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Prepared on 11 October 2026 · Esheria