

SOUTH AFRICA / JUDGMENT

Voltex (Pty) Limited t/a Atlas Group v Resilient Rock (Pty) Ltd (A5058/2022) [2023] ZAGPJHC 675 (8 June 2023)

[2023] ZAGPJHC 675**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Mudau, Keightley, Farber

CASE / FILE NUMBER

A5058/2022

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Source record**FLYNOTE:****COMPANY**

– Winding up – Two winding-up proceedings –
Provisional winding up granted while appeal against dismissal
of
another party's winding-up application proceeding – Full
court having appellate function and if upholding the appeal
it would
not be granting a winding up order, whether provisional or otherwise
– It would simply be setting aside the order
of the court of
first instance and substituting for it an order for the winding up,
which order would antedate the provisional
winding up order.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Appeal

Case Number: A5058/2022

Case

No: 2021/29872

[1]

REPORTABLE: YES

[2]

OF INTEREST TO OTHER JUDGES: YES

[3]

REVISED: YES

DATE: 08/06/2023

In

the matter between: VOLTEX
(PTY) LIMITED T/A ATLAS
GROUP Appellant
and
RESILIENT
ROCK (PTY)
LIMITED Respondent

Neutral citation: Voltex (Pty) Limited v Resilient Rock (Pty) Limited (Case No 29872/2021) ZAGJHC 675 (08 June 2023)

Coram: Mudau, Keightley
JJ and Farber AJ

Heard
on: 31
May 2023

Summary: On
26 April 2022, the Gauteng Local Division, Johannesburg dismissed an application for the winding-up of the respondent. Leave was granted to the appellant to note and prosecute an appeal to the Full Court against the dismissal, which appeal was set down for hearing on 31 May 2023. In the interim and arising from proceedings which had been instituted after the institution of the proceedings which were to be considered in the appeal, a creditor had sought and obtained a provisional winding up order against the respondent returnable on 12 June 2023.

At
the hearing of the appeal the respondent sought a postponement pending the outcome of the return day of the provisional winding up proceedings. The postponement was sought on the basis that it was not competent for the Full Court to grant a final winding up order in circumstances where the respondent was already being wound up under the provisional winding up order. The Full Court however directed that the appeal was to be argued.

It
was held that the Full Court was charged with the exercise of an appellate function and that in the event of it upholding the appeal it would not be granting a winding up order, whether provisional or otherwise. It would simply be setting aside the order of the court of first instance and substituting for it an order for the winding up of the respondent, which order would antedate the

provisional winding up order.

The

appeal was thereafter upheld and the order of the court of first instance was set aside and substituted with an order placing the

respondent under a final winding up order.

This

judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to

CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 09 June 2023.

ORDER

On

appeal from: Gauteng

Division of the High Court of South Africa, Johannesburg
(Movshovich AJ,

sitting as court of first
instance):

1. The

appeal is upheld with costs, including the costs of two counsel.

2. The

order of the Gauteng Local Division Johannesburg (per Movshovich AJ) is

set aside and substituted
with the following order:

"(a)

The respondent is placed under a final winding up order in the hands of the Master of the High Court.

(b)

Costs of the application, including the costs of two counsel subsequently to the notice of appeal, will be costs in the winding up of the respondent."

JUDGMENT

MUDAU, J (KEIGHTLEY J AND FARBER AJ CONCURRING):

- [4] This is an appeal against a judgment in the High Court, Johannesburg in terms of which Movshovich AJ dismissed the appellant's liquidation application against the respondent. The appellant, Voltex (Pty) Limited ("Voltex"), launched the application to liquidate the respondent, Resilient Rock (Pty) Limited ("Resilient Rock"), on the grounds that it was unable to pay its debts as contemplated by section 344(f), read with section 345(1)(c) of the Companies Act 61 of 1973 ("the Act"). The appeal to the full court of this Division is with the leave of the Supreme Court of Appeal.
- [5] In terms of section 345(1)(c) of the Act, the onus rests upon the appellant to prove to the satisfaction of the Court that the company is unable to pay its debt. It is trite that the unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent which has not paid its debt.[1] This Court on appeal is enjoined to consider whether, in the light of

all relevant factors, the exercise of power by the court of first instance was appropriate to the circumstances of this case. If it was, the appeal must fail. If it was not, the court of appeal must exercise the discretion anew, and must substitute its own discretion for the discretion of the court a quo.

Background

facts

[6] The facts are largely common cause or not seriously contested. Voltex supplies electrical goods, and trades under several styles including "Atlas Group". On 21 September 2020, Resilient Rock, represented by its sole director, Sam Comfort Mhlaba (the deponent to the answering affidavit) entered into a credit agreement

with Voltex. In terms of the credit agreement, Resilient Rock applied to buy goods from time to time from Voltex on credit, subject to certain terms and conditions of sale contained in annexure C ("the sale agreement") to the founding affidavit.[2] It is not in dispute that Mhlaba, on behalf of Resilient Rock, initialed each page of annexure C and signed it.

[7] Clause 11 of the sale agreement makes provision that in the event of the respondent failing to object to any item appearing on the appellant's statement of account within 10 days of the account being dispatched to the respondent, the account would be deemed to be in order and correct in all respects. Clause 12.2 thereof provides inter alia that, unless otherwise agreed in writing, payment terms would be strictly 30 days from statement date. The respondent would not withhold or defer payment to the appellant for any reason whatsoever. Clause 13 made provision that a certificate of balance signed by Voltex's company secretary or any of its managers or director reflecting the amount owing by the respondent to the appellant and the fact that such amount was due, owing, and unpaid would be prima facie proof of those facts for the purposes of any legal action.

[8] Clause 19.1-2 provide that the terms of trade facilities, personal guarantees, cession and terms and conditions of sale contain the entire agreement between the parties and any other terms whether express or implied are excluded from these terms and conditions of sale. Also, that any variations, cancellations, or additions would not be of any force or effect unless reduced to writing and signed by the parties or their duly authorized signatories. Accordingly, these terms and conditions of sale would not be capable of being altered, amended, or modified in any respect unless signed by the parties to the sales agreement.

[9] Subsequently, on 16 April 2021, Shivanie Gopal from Voltex addressed a letter to the respondent stating in part: "[c]ould you please advise when will you be making payment on your account".

[10] The group financial manager, Steve Vengesa from Resilient Rock, responded to the above letter by email as follows: "[w]e had discussions with your team last week. Lionel will share the updated ageing following which we can agree on the amounts and when they will be settled. We will revert to you shortly."

[11] On 29 April 2021, Mr Lionel Pursad of the applicant's Uninsured Business Specialist Division, addressed a letter to the respondent for the attention of Mr Mhlaba stating in relevant parts as follows:

"INDEBTEDNESS TO VOLTEX (PROPRIETARY) LIMITED ("VOLTEX")

For the avoidance of doubt, we confirm the following:

1. The current indebtedness in respect of your purchases from Voltex as at OCTOBER 2020 is the amount of R 17 384 712 60. This amount is due, owing and payable in terms of your ongoing purchase/credit arrangements with Voltex.
2. Voltex requires an undertaking and confirmation from yourselves as to when to expect payment in respect of your indebtedness. For this reason, we request a breakdown of payments to be made by you and the dates when the amounts will be paid. Kindly provide us with these details as a matter of extreme urgency.

Please note that under these extreme and unique circumstances we are facing, payment of your account is obviously still required timeously. Kindly confirm all of the foregoing, by signing where indicated below and kindly provide us with proposed alternate payment arrangements where your account may be overdue.

These proposed amended payment arrangements, where the account may be overdue, will be subject to Voltex's written acceptance and approval. We will obviously make every endeavour to assist you our most valued customer where required and where possible."

[12] It is common cause that the letter dated 29 April 2021, annexure H, was subsequently signed by Mr Mhlaba, for and on behalf of the respondent, on 3 May 2021.

On 30 April 2021, Mr Mhlaba addressed a letter (attached to the answering affidavit marked "K") to the appellant

in the following terms:

"Re: Outstanding Amounts Due to Voltex (Pty) Ltd

Further to the meeting held at your offices in the 29th of April (sic) regarding the outstanding debt of R 17 384 712.80, we propose to settle the outstanding amount as follows:

31-May-21 R 4 000 000.00

30-June-21 R 6 500 000.00

31-July-21 R 6 884 712.60

May we take this opportunity to thank you kindly for the support you have rendered to the Montrose project and sincerely apologize for any inconvenience the delayed payment could have caused on your part. We hope to continue receiving your valued support in future.

Yours faithfully

Sam Mhlaba

Chief Executive Officer"

[13] Voltex alleged that the respondent failed to even effect payment of the R4,000,000.00 that it proposed to pay on 31 May 2021, or any amount, and that the respondent's debt remains due, owing, and payable. Voltex contended that the only inference that can be drawn from the above facts is that the respondent was unable to pay its debts.

The defences

[14] In the answering affidavit at para 11 it is stated that, "[t]he Respondent does not admit having received electrical goods in the sum of R17,384 712,60 from the Applicant". As the appellant submitted, the statement is designedly ambiguous. It is unclear therefrom whether it is intended to be a denial of the delivery of any electrical goods, or some, or all of them, or a denial that they were delivered by the appellant, or a denial that the indebtedness in respect of electrical goods amounted to R17384 712, 60, or that the debt is a different amount, or of all these assertions.

[15] The affidavits in motion proceedings stand as the evidence as well as the pleadings. The trite position is that the object of pleading is to ascertain what the question at issue between the parties is, which can only be attained when each party states his case with precision.[3] Accordingly, para 11 is an unacceptable way to plead and of no assistance to the respondent. In any event paragraph 11 is contradicted by the contents of the respondent's letter of 30 April 2021. The respondent in this letter confirmed the indebtedness and undertook to discharge it in three monthly installments commencing on 31 May 2021.

[16] The respondent denies the contents of annexure D, the certificate of balance and annexure E, the statement, without explaining why, or what exactly it contests in the statement. It is not alleged that the statement in question had been contested, whether within 10 days or at all and in consequence the statement is in terms of clause 11 of annexure C deemed to be correct.

[17] The respondent opposed the liquidation application alleging that the alleged debt was not due and payable. According to the

respondent it was never the intention or agreement of the parties, notwithstanding the contents of Annexure C, that the respondent would pay within 30 days from the date of statement. The difficulty for the respondent is that there is nothing in writing or signed by the parties in support of such an allegation. The respondent also denies that it is unable to pay its debts. As the appellant pointed out, the denial is, however, bland and not supported by any evidence as to the

respondent's financial position. There are no financial statements attached to the answering affidavit, as one would have expected.

[18] There is no proof whatsoever by the respondent showing solvency or liquidity to rebut the natural inference of insolvency that can be drawn. Also, the written agreement relied upon by the appellant does not, according to the respondent, reflect the true intention of the parties. In the answering affidavit, the respondent does not deny sending annexure K in its terms to the appellant but disputes its admissibility. The respondent contends that reliance by the appellant on annexure K is misplaced for the simple reason that the document is privileged and is not admissible.

[19] However, the respondent's submissions in this regard lack merit. On the face of the document, there is no suggestion whatsoever that it is privileged. In annexure K, the respondent tendered to pay the debt in full and unreservedly in instalments over time and apologised to the appellant

for the delay in payment and expressed its gratitude for the support. Annexure K properly construed, is nothing else but an acknowledgment of liability coupled with an undertaking to pay the full debt in instalments.

[20] There is more. A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation. He or she initiates a juridical process which of necessity can have extensive and indeed profound consequences for many other creditors,

some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. In instances where the respondent has admitted its insolvency, public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.^[4] Furthermore, in this case the unequivocal admission of liability by the respondent was not made in the course of any negotiations, but in response to a letter of demand for payment of the arrear instalments due in terms of the sales agreement. There is no suggestion that the parties were then in dispute and that annexure "K" was sent by the respondent in an attempt to resolve that dispute. Questions of privilege simply do not arise.

[21] A full set of invoices and signed delivery notes was attached to the appellant's replying affidavit as annexure N1. It shows how the total of R17 384 712.60 is made up. As the appellant pointed out, there was no need to attach them to the founding affidavit as there was no dispute as to the debt on the face of an acknowledgement thereof coupled with an undertaking to pay it as appears from annexures H and K. The respondent's defence as to an absence of delivery is a bare denial and accordingly falls to be rejected.

[22] The respondent contends that when it signed annexure C, it was expressly agreed by the appellant and the respondent that the electrical goods to be supplied were exclusively for a property development project. It was also agreed that any debt due by the respondent to the appellant in respect of electrical goods as might be supplied and delivered by the appellant to the respondent would not be payable until the monies due to the respondent in

connection therewith were released. Such monies were held in trust by Adams & Adams Attorneys. In support thereof, the respondent attached a letter on an Adams & Adams letterhead dated 5 May 2021.

- [23] As the appellant pointed out, the letter is not corroborated under oath by a representative of Adams & Adams Attorneys, but only confirms *ex facie* its terms (if admissible) that the said amount is held in their trust account and "is payable to the seller in terms of the agreement of sale concluded between the abovementioned parties", these being portion 80 and 81 Middelvlei (Pty) Ltd, the respondent and the Gauteng Provincial Government. The difficulty for the respondent is that the letter does not suggest that any amounts are due out of the trust account to the respondent, or when and under what conditions and in which circumstances. Neither does it identify the respondent as the seller under the sale agreement.
- [24] In addition, annexures H and K bear no reference to the allegation that there was an oral agreement between the appellant and the respondent that the debt to the appellant would not be payable by the respondent until the trust money was released to the respondent. Significantly, it is contrary to the express term contained in annexure C that payment had to be made 30 days after statement without any withholding or deferral. Another difficulty for the respondent, which the court of first instance also acknowledged, is that annexure C expresses itself to be the sole agreement between the parties and its terms were not open to variation other than in writing and signed by the parties.[5]
- [25] The court of first instance correctly found that the respondent's version is improbable on the basis that it would be odd for the credit terms to be signed when an oral agreement with different terms had been agreed upon immediately prior to the respondent's signature to the credit

terms. The version primarily militates against the Shifren principle, which is firmly entrenched in our law[6]. Therefore, the oral agreement which conflicts with the written one cannot be sustained. The former has been subsumed by the application of the parole evidence rule. The existence of the oral agreement is moreover thwarted on a proper application of Plascon-Evens. The overall allegations or denials of the respondent on material issues are so far-fetched or clearly untenable that this Court, on appeal, is justified in rejecting them merely on the papers. The alleged debt is not disputed on bona fide and reasonable grounds.

- [26] As for the complaint regarding the failure to give notice of the application, it does not take the matter further. Given the

undisputed evidence that, as far back as 16 April 2021, Voltex, in writing, as pointed out above as a precursor, enquired from the respondent when the outstanding amount could be paid. This was before the launch of the application in June 2021. This in my view constitutes sufficient notice.

[27] It is trite that sequestration proceedings so as to enforce the payment of a debt, the existence of which is disputed on reasonable grounds ought not to be resorted to.[7] For a final winding-up order, it is not sufficient to prove merely a prima facie case, as the degree of proof is higher for a final order than a provisional order. Accordingly, the court must be satisfied that a case has been made out for a final order. The trite position is that if a party in the position of the respondent cannot pay its debts as and when due and payable, insolvency is established. In the instant case, there was no evidence to rebut this. Voltex had established a case for the winding up of Resilient Rock on the papers. It is just and equitable therefore that the respondent be wound up.

[28] I turn now to deal with one final issue. On 25 May 2023, shortly before the hearing of this appeal, the attorney for the respondent

advised the full court by letter (copied to the appellant's attorney) that the respondent had been placed in provisional

liquidation by the Gauteng High Court at the instance of another creditor in the matter of Trencon Construction (Pty) Ltd v Resilient Rock (Pty) Ltd.[8]

[29] The respondent filed supplementary heads of argument on 29 May 2023, contending, on the basis of several cited authorities, that the existence of the provisional winding-up order granted on 9 May 2023, and returnable on 13 June 2023, precluded the grant of another liquidation order by the appeal court. Therefore, it was submitted by the respondent that the appeal should be postponed sine die, with costs reserved. After hearing submissions by counsel, this Court directed that the appeal should proceed, and that counsel should file supplementary heads in that regard. The heads of argument filed to the credit of counsel, are particularly useful.

[30] Section 347(5) of the Act provides that "[t]he Court shall not grant a final winding up order in the case of a company or other body corporate which is already being wound up by order of Court within the Republic". Counsel for the respondent referred us to several authorities wherein it has been held that once a provisional winding-up order has been made, there is no room for a second order to create the same result, and therefore an application for a second order should be refused.

[31] In *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd*[9] the Court referred to the situation where two winding up proceedings were brought simultaneously and stated:

"It is obviously undesirable to have two windings-up proceeding simultaneously, although it can happen. Thus, independent creditors

of a company with its registered office in Johannesburg and its ordinary place of business in Durban might, virtually simultaneously

and without collusion, launch applications for its winding-up in two different Courts, neither of which would know what the other was doing. Such incidents do occur.”

[32] The respondent's counsel, by way of example, refers in paragraph 8 of his heads to *Pat Cornick & Co (Pty) Ltd v Mimosa Meubels (Edms) Bpk; Bakker & Steyger (1960) (Pty) Ltd v Mimosa Meubels (Edms) Bpk*.^[10] This matter related to two simultaneous competing applications, which had been enrolled for hearing by a High Court on the same day. This is not the situation facing the court in this appeal. The court accepted that two provisional orders should not be granted. However, the court in *Pat Cornick* was not required to and, as counsel for the appellant pointed out, did not address the effect of a retrospective order on appeal on an existing provisional order.

[33] We were also referred to *Ex parte W J Upton Transport (Pty) Ltd; Man Truck & Bus (SA) (Pty) Ltd v W J Upton Transport (Pty) Ltd* ^[11] by Flemming J (as he then was) who suggested obiter that, once a provisional winding-up order has been granted in respect of a company, the grant of a further order is incompetent. However, *WJ Upton* is distinguishable for the simple reason that there are no competing liquidation applications in *casu*. This court exercises an appellate jurisdiction and is not precluded from doing so by virtue of the existence of a provisional order.

[34] In *FA Konstruksie CC v Mhonyini Trading Enterprise CC In Re Asphaltic (Pty) Ltd v Mhonyini Trading Enterprise CC*^[12], which counsel for the respondent again referred us to, a final order was granted in favour of one creditor on 25 October 2021. The other creditor obtained a provisional order on 10 August 2021, and the return day was extended to 19 July 2022. This was referred to as a "rare circumstance" and the court resolved the issue by granting a final winding up order on 19 July 2022. However, the case is not relevant to the present dispute because these were competing applications running at the same time. None of the cases and materials cited by the respondent in its supplementary heads of argument address the situation where the retrospective effect of an appeal is to establish a liquidation date which precedes an intervening provisional order as in this instance.

[35] Importantly, when a matter is taken on appeal as in this instance, the appeal is against the order of the High Court. If the appeal is upheld, the effect of the order on appeal is to substitute the order given by the appeal court for the order given by the court of first instance. Counsel for the appellant referred to *Weber Stephen Products Co v Alrite Engineering (Pty) Ltd & Others*^[13] in which the court, with reference to the authorities cited therein, aptly held as follows:

"It has often been laid down that, in general, this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards”.

The order

[36] For all the foregoing reasons the appeal must succeed, and in the result, the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the Gauteng Local Division Johannesburg (per Movshovich AJ) is set aside and substituted with the following order:

T P Mudau

JUDGE OF THE HIGH COURT

I agree.

R M Keightley

G Farber

ACTING JUDGE OF THE HIGH COURT

Date of Hearing:

31 May 2023

Date of Judgment:

08 June 2023

APPEARANCES

For the Appellant: S Symon SC and N Segal Instructed by: Orelowitz Incorporated Attorneys For the Respondents: Adv. Johan L Mýburgh and Adv. De Wet Keet Instructed by: Rina Rheeders Attorneys

[1] ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others 1993 (4) SA 436 (C) at 440F–441A.

[2] Annexure C, CaseLines page 003-30.

[3] Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (AD) at 107D; Sterling Consumer Products (Pty) Ltd v Cohen 2000

(4) ALL SA 221 (W).

[4] Absa Bank Ltd V Chopdat 2000

(2) SA 1088 (W) at 1094; Absa Bank Ltd v Hammerle Group 2015

(5) SA 215 (SCA) at para 14

[5] SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A); Brisley v Drotsky 2002

(4) SA 1 (SCA).

- [6] Note 5 above.
- [7] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956
- (2) SA 346 (T) at 347–8.
- [8] [2023] ZAGPJHC 441.
- [9] 1998
- (4) SA 1240 (D) at 1249.
- [10] 1961
- (4) SA 119 (T) at 121.
- [11] 1985
- (1) SA 312 (W) at 316.
- [12] [2022] ZAMPMBHC 59.
- [13] [1992] ZASCA 2; 1992
- (2) SA 489 (A) at 507C.
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