

SOUTH AFRICA / JUDGMENT

Webcon Mini Market (Propriety) Limited v Odoko Construction (Propriety) Limited (39391/2020) [2020] ZAGPPHC 650 (20 November 2020) [2020] ZAGPPHC 650

COURT

North Gauteng High Court, Pretoria

BEFORE

Fabricius

CASE / FILE NUMBER

39391/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

CASE

NO: 39391/2020

In

the matter between:

WEBCON
MINI
MARKET
Applicant
(PROPRIETARY) LIMITED
and
ODOKO
CONSTRUCTION
Respondent
(Registration
Number: 2007/020139/07)

JUDGMENT**FABRICIUS J**

- [1] In these proceedings applicant seeks the winding-up of respondent. The notice of motion does not say which statutory provision is relied upon.
- [2] In the founding affidavit reference is made to the provisions of Chapter 14 of the Companies Act 61 of 1973 as amended which continues to apply to winding-up proceedings despite the “new” Companies Act 71 of 2008. Section 344 (f) of the old Act is relied upon for the submission that the respondent is unable to pay its debts as described in s345 of the 1973 Act.
- [3] Certain statutory and formal provisions apply and must be complied with before a court can grant the order requested. In the founding affidavit applicant refers to most, but not all of them.
- [4] Details of the underlying debt are given, ie the fact that respondent applied for credit in writing for the rental of certain earth moving equipment. It is alleged that applicant complied with its obligation and invoiced respondent from time to time. However, an amount of R 795,287.78 remained unpaid.
- [5] As a result a demand was e-mailed to a number of persons of respondent demanding payment of R632,531.16 within 5 days failing which an application for winding-up would be launched. It is not clear why the said amounts differ.
- [6] In reply, on 21 July 2020 respondent denied owing the first mentioned amount and also requested the relevant invoices. It is also tendered to have discussions.
- [7] This found no favour with applicant and on 3 August 2020 respondent made an offer on a “without prejudice” basis. It stated specifically an amicable settlement should be considered. A comprehensive statement of what was actually due was also requested. Despite the obvious privileged nature of this “without prejudice” letter applicant saw fit to attach it to the founding affidavit.
- [8] In a further communication of 4 August 2020 applicant reverted to the R646, 506,09 amount and stated that R404, 505,76 was then in fact overdue.
- [9] In respondent’s heads of argument the point was taken that the section 345 letter of demand was defective in that it was not sent to respondent’s registered address, nor was the 3 week period referred to in s345(1)A granted.
- [10] Respondent also objected to the fact that “without prejudice” correspondence had been disclosed by applicant. This is not admissible evidence.

See: Venmop 275 (Pty) Ltd V Cleverland Projects 2016 (1) SA 78 (GS) at par 20 and KLD Residential CC v Empire Earth Investments 17 2017 (6) SA 55 (SCA).

Another more recent to the same effect is to be found in Transnet National Ports Authority v Reit Investments (Pty) Ltd [2020] ZASCA 129 (13 October 2020). The said letter was therefore protected from disclosure and cannot be relied upon.

[11] It is also clear that the indebtedness is disputed. Various amounts are relied upon by applicant. Respondent repeatedly requested relevant invoices. It is also clear that winding-up proceedings are not proper where a debt is disputed on bona fide grounds.

See: Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956

(2) SA 346 (T).

[12] It is also noteworthy that applicant has not filed a replying affidavit.

[13] On 14 November 2020 respondent formally sought leave to file a supplementary affidavit relating to the amounts that are disparate as I have pointed out. It is said that a further amount of R50 000 had been paid on 5 June 2020 and attached proof of payment. The amount that applicant ultimately relied on, namely R646, 506.09 had since also been paid, and proof of payment was attached. That left a disputed amount of R98,778,69 which respondent tendered if it were shown to be the correct amount.

[14] Applicant then filed supplementary heads of argument and admitted payment of the major amount, but without provision for certain invoices that had become due since July 2020. It stated that the winding-up would not be persisted in. It submitted however that applicant was entitled to a costs order on a punitive scale.

[15] I do not agree. The initial statutory demand was defective and privileged information was relied upon. It also seems that both parties need to reflect on the importance of proper and correct invoicing.

[16] Under all the circumstances, I deem it fair and appropriate that:

1. I note that the winding-up application is withdrawn, and order that;
2. Each party is to pay its own costs.

H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 20 November 2020.

DATE OF HEARING: NO ORAL HEARING (The judgment was reserved on 16 November 2020)

DATE OF JUDGMENT: 20 NOVEMBER 2020

FOR THE APPLICANT: ADV J VAN ROOYEN

INSTRUCTED BY: DONN E BRUWER ATTORNEY

FOR THE THIRD RESPONDENT: ADV D MOKALE

INSTRUCTED BY: C DE VILLIERS ATTORNEYS

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Prepared on 10 October 2026 · Esheria