

**THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA**

Case No: 054604/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE **23 NOVEMBER 2023**

SIGNATURE

In the matter between:

UNIFIED PAYROLL LIMITED (in liquidation)

Applicant

And

JUST PATIENCE (PTY) LTD

Respondent

J U D G M E N T

MAKHOB A, J

[1] This is an application for an order placing the respondent in liquidation on the basis that the respondent is commercially insolvent and unable to pay its debts.

[2] The applicant is Unified Payroll Limited (in liquidation), a company incorporated in the UK with company registration number 09692858. I shall hereinafter refer to the applicant as 'UPL'.

- [3] The respondent is Just Patience (Pty) Limited, a company duly incorporated in accordance with the company laws of South Africa with its registered address at 6[...] V[...] M[...], D[...], 8[...] G[...] Drive. Wood Hill Golf Estate, Pretoria Gauteng, 0081. The respondent is a haulage business which primarily transports grain.
- [4] Patience Mwakurudza (hereinafter referred to as 'Mwakurudza') is the respondent's sole director and shareholder.
- [5] The applicant submits that UPL perpetrated a fraudulent tax scheme in the United Kingdom. UPL then made payment totaling R 34 705 935.40 to Mwakurudza. Mwakurudza in turn made payments totaling R 4 484 982 to the respondent. These payments to the respondent are the basis of UPL's claim against the respondent.
- [6] UPL has also applied for the provisional sequestration of Mwakurudza's estate. Zwelithini Ncube (hereinafter referred to as Ncube) is the sole director and shareholder of UPL.
- [7] Ncube and Mwakurudza were in a romantic relationship. UPL was incorporated in July 2015 in the United Kingdom and it traded mainly in the field of healthcare.
- [8] In December 2021 UPL's liquidators obtained orders in the Western Cape High Court recognising their appointment within South Africa.
- [9] It is further submitted by the applicant that the respondent does not have cash resources to settle the claim and it is commercially insolvent. UPL seeks a provisional order against the respondent.
- [10] It is argued on behalf of the applicant that UPL's claim against the respondent to recover the funds paid to it (or the fruits of those funds, or damages

equivalent to those fund) is based on the Aquilian action for patrimonial loss based on dolus and on the specific delictual action, the *condictio furtiva*.

- [11] The *condictio furtiva* is a delictual action which is available as a remedy to an owner of a thing against a thief for patrimonial loss. It is further argued that the remedy is available to recover the money from the respondent.
- [12] Based on the *condictio furtiva*, the applicant submits that the respondent is a joint wrongdoer or co-conspirator in relation to the fraudulent scheme and is therefore liable to compensate the applicant for the losses it sustained as a result of a fraudulent scheme.
- [13] The applicant contend that Mwakurudza knew, or must be taken to have known, about the UPL's fraudulent scheme and she participated in the fraudulent scheme. Her knowledge must be attributed to the respondent,
- [14] Counsel for the respondent submitted that the applicant never paid any monies to the respondent, consequently the applicant lacks *locus standi* to bring this application.
- [15] Counsel for the respondent submitted that the applicant's claim against respondent is based on Aquilian action which is a delict. A delict cannot be proven in an action proceeding.
- [16] It is contended by the respondent that *conditio furtiva* is not applicable in the present case. Mwakurudza denies that she was part of any scheme to defraud the applicant.
- [17] It is contended further that the applicant violated the provisions of section 344 and 345 of the Companies Act by failing to put a demand to the respondent before lodging this application.

[18] Counsel for the respondent is of the view that since from the papers, it is clear that the existence of a debt is in dispute and that the present application proceedings are misplaced.

[19] In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA168 (24 November 2016) the respondent disputed the debt on *bona fide* and reasonable grounds. The court *a quo* referred the matter to oral evidence the court of appeal held that winding up proceedings are not designed for the enforcement of disputed debts.

[20] In paragraph 8 of the judgment the court said the following:

“[8] The consequences of this referral were unfortunate. As recorded earlier, there was no need in these proceedings for a finding whether or not the respondent is indebted to the appellant, as the respondent does not have to prove its defence. All that was required of the respondent, was to show that the appellant’s claims were disputed on bona fide and reasonable grounds.”

[21] A plethora of decided cases referred to in *Fresh Investment (Pty) Ltd* requires a party challenging an application for a winding-up of a company to show that the claim is in dispute.

[22] Mwakurudza denies that she was part of any scheme to defraud anyone. She denies that neither herself nor the respondent received any tainted or stolen money. In my view this needs to be proven by the applicant.

[23] I am of the view that the respondent succeeded in showing that the applicant’s claim is disputed on *bona fide* and reasonable grounds.

ORDER

[24] The application is dismissed with cost.

MAKHOB A J
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED JUDGMENT: 17 OCTOBER 2023

JUDGMENT HANDED DOWN ON: 23 NOVEMBER 2023

Appearances:

For the Applicant: Adv G Woodland SC (instructed by) Edward Nathan Sonnenbergs Attorneys.

For the Respondent: Mr T Mukwani from T Mukwani Attorneys.