THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 3998 / 2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

28 July 2022 ....
DATE SIGNATURE

In the matter between:

BUBA ATTORNEYS INCORPORATED **APPLICANT**

Registration no. 2013/21822013/21824/21

And

BONGIVELI RAIL **RESPONDENT**

Registration no. 1996/051691/23

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 28 July 2022.

[1] The Applicant in this case seeks an order for provisional winding up of the Respondent following its failure to pay a debt of R80 500.00. The application is premised on the provisions of sections 345(1)(a)(i) and 346(1)(b) of the Companies Act, 2008 (I suppose the Applicant meant Act 61 of 1973). In terms of this provision, a company or body corporate shall be deemed to be unable to pay its debts if a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due. Furthermore, an application to the Court for the winding-up of a company may be made by one or more of its creditors. *In casu*, the alleged debt is for legal services rendered by the Applicant to the Respondent. The Respondent opposes the application in that it disputes having received such a service from the Applicant.

[2] In the answering affidavit, the Respondent raised a point *in limine* over not properly cited. Instead of Bongiveli CC, the Applicant cited the Respondent as Bongiveli Rail CC. The Respondent claims that since the names cited in the Notice of Motion do not belong to it, it is therefore not the party referred to in the application. It argues that the party cited in the papers does not exist. This is denied by the Applicant who filed a replying affidavit with a request to amend the Notice of Motion so it can reflect the correct name of the Respondent. This point *in limine* does not take the Respondent's argument far

as the registration number that was cited next to the name is that of the Respondent. Furthermore, the Notice of Motion was served at the Respondent's place of business. This is a clear indication that adding the word "Rail" to the name of the Respondent, was an error on the part of the Applicant. The error may be indicative of how well the Respondent is known to the Applicant, but not a bar to have the Notice of Motion amended. The amendment of the Notice of Motion is therefore allowed.

[3] As for the legal services rendered, the Applicant alleges that during November 2017, the Respondent, represented by Mr. Vusimuzi Willem Magagula (Magagula) entered into an agreement for rendering of legal services. To this extent, a document marked "ZB5" was attached which was referred to as the mandate.[1] However Annexure ZB5 referred to is not a mandate but a letter titled, "Demand in terms of section 345 of the Companies Act 61 of 1973."[2] The Applicant further avers that the mandate related to legal proceedings brought by Loudtrack[3] (Pty) Ltd against XDSL Trading Proprietary Limited (in business rescue), a company in which Magagula was a shareholder. The Applicant claims to have provided legal opinion and facilitated settlement negotiations on behalf of the Respondent.[4]

[4] How all of a sudden, the settlement is said to have been negotiated on behalf of the Respondent, while all along the Applicant appears to have been acting for Magagula is not explained. The deponent to the affidavit on behalf of the Respondent avers that Magagula was not its employee and was never authorised to enter into such an agreement on its behalf. This was also confirmed by Magagula in an affidavit. It is however common cause that

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[1] See p. 9 of the paginated bundle, para 9.1
[2] See p. 24 of the paginated bundle.
[3] Correspondence elsewhere suggests this may have been Loutrack as opposed to Loudtrack – see p. 117 of the paginated bundle.
[4] See p. 9 of the paginated bundle, para 9.4

Magagula is one of the members of the Respondent. This however does not clear the picture as to how the Respondent gets drawn into this while the Applicant was dealing with Magagula all along. The absence of a written contract, mandate or any correspondence between the parties regarding the alleged legal service complicates the issues especially when the Respondent claims to have never needed nor acquired such services.

[5] As proof of the legal services rendered, the Applicant attached a two paged document titled, "Settlement proposal regarding XDSL 504 Trading Proprietary Limited (in business rescue)."[5] The contents of this letter though do not confirm the Applicant's version. The opening paragraph thereof says, "…we confirm that we are acting on behalf of Mr. Willem Magagula, a shareholder of XDSL 504 Trading Proprietary Limited (in business rescue) …" The Respondent was not mentioned anywhere in it. This could perhaps explain why the Applicant used wrong names to cite the Respondent in this application. It could be indicative of the two having not interacted in the past. One more hurdle for the Applicant is that Magagula was not cited as one of the respondents in this application.

[6] While it appears from the papers that the Applicant and Magagula had some interaction, the court does not get the link between services rendered to him and them being imputed to the Respondent. As a result, there appears to be a dispute of fact on whether legal services were rendered for the Respondent by the Applicant and if so, what the terms and conditions thereof were. In *National Director of Public Prosecution v Zuma*[6] the Supreme Court of Appeal emphasised the Plascon-Evans rule when it held,

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances

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[5] See p. 114 of the paginated bundle.
[6] 2009 (2) SA 277 (SCA) at para 26.

are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[7] The dispute raised by the Respondent *in casu* cannot be categorised as bald or implausible denials, raised fictitious disputes of fact, or was palpably implausible, far-fetched or so clearly untenable that the court was justified in rejecting it merely on the papers. The supporting documents filed by the Applicant do not support his case. It is my respectful view therefore that for this reason, this application cannot succeed.

[8] For those reasons, I make the following order.

The application is dismissed with costs.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

MBOMBELA

FOR THE APPLICANT : ADV. T SNYDERS

INSTRUCTED BY	**: BUBA ATTORNEYS**
	PRETORIA
	C/O: SEYMORE DU TOIT & BASSON ATTORNEYS MBOMBELA
FOR THE RESPONDENT	**: ADV. J DE NECKER**
INSTRUCTED BY	**: WDT ATTORNEYS INC**
	: MBOMBELA
DATE HEARD	**: 19 JULY 2022**
JUDGMENT DELIVERED	**: 28 JULY 2022**