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

REPUBLIC OF SOUTH AFRICA

Case Number: 4712/2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
	DATE: 12 MARCH 2021
	SIGNATURE: ....

In the matter between

PREMIER FMCG (PTY) LTD Applicant

And

ABC FIRE PROJECTS PROPRIETARY LIMITED Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] I heard this matter in the urgent court last week and issued an order for the provisional liquidation of the respondent. I indicated that the reasons for the order would follow. The reasons appear *infra* and due to the urgency of the matter, a short summary of the facts and law will suffice.

Reasons

[2] The applicant prayed for the provisional liquidation of the respondent on the basis that the respondent is factually insolvent.

[3] In a separate application under case number 4709/2021, the applicant also prayed for the provisional sequestration of the estate of Barbara van Zyl, the sole director and shareholder of the respondent, on the basis that she is factually insolvent.

Facts common cause

[4] The respondent was appointed as a senior credit controller by the applicant on or about 1 April 2002. Specific customer accounts were allocated to the respondent to manage, which management included obtaining proof of payments (remittances) made by the customers, allocating each payment/remittance to that customer's account and ensuring that agreed discounts, rebates, returns or other credit transactions are accurately recorded on each customer's account.

[5] Naturally, the credit control duties performed by the respondent played an important role in the applicant's business operations and enabled the applicant to have an accurate record of the liabilities of each of its customers towards it.

[6] The applicant alleges that the respondent had, as a result of her position, become acquainted with all the applicant's internal financial processes including the applicant's internal checks and balances.

[7] One of the customer's allocated to the respondent was a certain Farhaad Distributors ("FD"), which customer forms the subject matter of the alleged fraud/theft perpetrated by the respondent.

[8] According to the applicant's accounting records, the account of FD seemed up to date. Some suspicious behaviour of the respondent, however, prompted the applicant to appoint forensic investigators to investigate the accounts managed by the respondent. The results of the forensic investigation were, as will appear more fully *infra,* astounding.

[9] In conducting the investigation, an analysis of the bank accounts of the respondent and ABC for the period 2017 to date were compiled.

[10] The analysis revealed the following:

10.1 during the period 2017 to date, FD made payments to ABC's bank account referenced either by the customer account number allocated by the applicant to it or by the name of Mr Aboo Baker, the proprietor and director of FD, in an aggregate amount of R 74 137 004, 57;

10.2 the aforesaid amount was disbursed by the respondent by *inter alia* paying an amount of R 39 899 654, 57, directly into her bank account, which amount was disbursed by the respondent.

[11] The financial statements of ABC for 2019 reflects total equity and liabilities of R 301 519, 00 and a nett profit of R 19 863. Sales for the year amounted to only R 976 286, 00.

Points *in limine*

[12] Prior to considering the merits of the applicant's application it is necessary to deal with the points *in limine* raised by the respondent.

First point *in limine*

[13] The respondent alleges that the applicant's notice of motion is defective because it does not reflect a date for hearing if the matter is opposed.

[14] The point is ill-fated. A mere reading of the notice of motion makes short shrift of the point, to wit:

"TAKE NOTICE FURTHER that, in the event that a notice of an intention on the part of the respondent to oppose this application is received as aforesaid, the application will be made at 10h00 on Tuesday 23 February 2021 or as soon thereafter as counsel for the applicant may be heard."

[15] The point is dismissed.

Second point *in limine*

[16] The respondent contends that a supplementary affidavit filed by the applicant on 8 February 2021, should be disregarded because no basis or exceptional circumstances for the filing of the supplementary affidavit exists.

[17] It is trite that an applicant who wishes to file further affidavits may only do so with permission of the court. The supplementary affidavit contains facts that came to the knowledge of the applicant subsequent to the filing of the founding affidavit.

[18] I am of the view that the facts contained in the supplementary affidavit do not take the matter any further. The respondent has, however, responded to the contents of the supplementary affidavit in her answering affidavit and as a result, did not suffer any prejudice by the filing thereof.

[19] In the exercise of my discretion, the supplementary affidavit is admitted into evidence.

Third point *in limine*

[20] The respondent alleges that the applicant's claim underlying the application is one for damages and as such does not fall within the definition of a *"liquidated claim"* as envisaged in section 9 of the Insolvency Act, 24 of 1936 ("the Act").

[21] The point pertains to the merits of the application and will be dealt with *infra*.

Fourth point *in limine*

[22] The respondent contends that the allegations in the supplementary affidavit dispel any notion that she is a debtor of the applicant.

[23] The point, once again, pertains to the merits of the matter and will be dealt with *infra*.

Applicant's case

[24] The applicant reconstructed the account of FD and established that an amount of R 124 941 177, 90 is outstanding on the account. From the aforesaid facts, the applicant contends that the respondent clearly misappropriated the money paid by FD to the benefit of the applicant into ABC's account.

Respondent's case

[25] The respondent explained that FD made payments to ABC for services rendered. In support of the aforesaid, the respondent attached four invoices issued by ABC to FD in respect of the services rendered to her answering affidavit. The toral amount of the invoices is approximately R 45 000, 00.

[26] Having regard to the amount paid by FD to ABC, the explanation is untenable, to say the least.

Legal principles and discussion

[27] The respondent does not dispute that the applicant has complied with all the formal requirements pertaining to the application for liquidation. The issues in dispute are whether the applicant has a claim against the respondent and if so, whether the claim is liquidated.

[28] The sections pertaining to the liquidation of a company in the previous Companies Act, 61 of 1973 ("the Act"), has been retained in the present Companies Act, 71 of 2008. Section 344 of the Act lists the circumstances in which a company may be wound up and subsection (f) read with section 345(2) provides that a company may be wound up if it is proved to the satisfaction of the court that the company is unable to pay its debts.

[29] In terms of section 346(1)(b) an application for the winding-up of a company may be brought by one or more creditors, including contingent or prospective creditors.

[30] The applicant's claim against the respondent is based on a debt arising from theft perpetrated by the respondent. The claim is for the repayment of stolen monies, which claim is recognised in our law as a liquidated claim. [See: *Kleynhans v Van der Westhuizen N.O.* 1970 (2) SA 742 AD] This dispose of the liquidity point.

[31] Insofar as the *locus standi* of the applicant is concerned, the respondent does not deny that R 74 137 004, 57 was paid into its bank account by FD referenced by the

customer account number allocated by the applicant to FD or by the name Aboo Baker, the director and proprietor of FD.

[32] In is manifestly clear from the respondent's bank statements that the payments made by FD into the account of FD was in respect of the debt it owes to the applicant. Instead of paying the money to the applicant, ABC appropriated the monies to itself and thereafter utilised the money for its own benefit

[33] The respondent did not provide any facts to dispel the applicant's allegation that FD, after a reconstruction of its account, owes the applicant R 129 million.

[34] On the face of the applicant's claim for repayment of the stolen R 74 137 004, 57, ABC's current financial position according to its financial statements referred to *supra* proves that it is unable to pay its debts and is hopelessly insolvent.

[35] In the result, the applicant has established facts entitling it to an order for the provisional liquidation of ABC and such order was granted.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

<u>DATE HEARD PER COVID19 DIRECTIVES:</u>	3 March 2021
(Virtual hearing.)	
<u>DATE DELIVERED PER COVID19 DIRECTIVES:</u>	12 March 2021

<u>APPEARANCES</u>

Counsel for the Applicant:	Advocate N.G.D. Maritz SC and Advocate P. Lourens
Instructed by:	Adams and Adams Attorneys
Counsel for the Respondent:	Advocate A.J. Swanepoel
Instructed by:	Jay Inc.