IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 3133/2019

In the matter between:

TRADE FIRST 2124 CC Applicant

and

ENM TRADING CC Respondent

HEARD ON: **17 OCTOBER 2019**

JUDGMENT BY: **LOUBSER, J**

DELIVERED ON: **31 OCTOBER 2019**

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[1] This is an application for the provisional liquidation of the Respondent close corporation. The application is made in terms of Section 345 (1)(a)(i) and (ii) of the Companies Act 61 of 1973,

read with Schedule 5, Item 9 of the new Companies Act 71 of 2008. The Respondent strongly opposes the application.

[2] Section 345 provides that a company or a body corporate shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted, has served on the company a demand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum to the creditor. Section 344 of the Act provides that a company may be wound up by the court if, *inter alia*, the company is unable to pay its debts as described in Section 345, or it appears to the court that it is just and equitable that the company should be wound up. Section 345(2) provides that, where the Court has determined the inability to pay the debts on the basis of a demand for payment and the neglect to pay for three weeks, the Court shall also take into account the contingent and prospective liabilities of the company.

[3] The Applicant relies solely on the fact that he has made more than one demand for payment in terms of Section 345, and that the Respondent has neglected to pay for a period of three weeks after each of the demands. No information requiring the contingent and prospective liabilities of the Respondent has been placed before the Court by any of the parties, with the result that the Court is unable to comply with the provisions of Section 345(2).

[4] The background facts of the matter are as follows: The Respondent was a partner in the Siyathunya Joint Venture, which Joint Venture was appointed by the Ngwathe Local Municipality to design and implement a new stormwater system. Subsequent to this appointment, the Applicant was appointed by either the

Respondent or the Joint Venture to build the stormwater system as a sub-contractor. The Respondent admits that the project was completed, but asserts that the Applicant was paid for its services and that it owes the Applicant nothing more.

[5] It is common cause between the parties that the Applicant was relying on the non-payment by the Respondent of three different amounts at the time of the filing of the application. These amounts were the following: R 192 193-00 for the Z414 Road project, R 212 409-62 for the Jouberton/NWPL Project, and then an amount of R 1 098 765-00 for the stormwater system of the Ngwathe Local Municipality. It is common cause that the first two amounts have been paid by the Respondent since, and the non-payment thereof is no longer relevant to the application. It is only the last amount that remains relevant.

[6] It is also common cause between the parties that the amount remaining relates to additional work done by the Applicant by way of variation orders. It is the case for the Applicant that the instructions to do the additional work, came directly from the Respondent, and therefore the Respondent is liable for the payment thereof. The Respondent, on the other hand, denies that it ever issued instructions for such additional works, and that it was the Municipality who itself had given the Applicant the instructions directly. The Respondent therefore maintains that the Municipality is liable for the payment to the Applicant.

[7] In an attempt to resolve the dispute, the Applicant and the Respondent held talks on 9 April 2019, which talks culminated in a written Settlement Agreement concluded by them on the same day. Pertaining to the claim of R 1 098 765-00 for the Ngwathe

Local Municipality project, the parties recorded the agreement in the following words:

> *"Resubmitting to Ngwathe Municipality with all the VO and extra cost for the payment by both ENM and Trade First 2124."*

The "VO" that had to be resubmitted, obviously refers to "variation orders". According to the Applicant, he was not in possession of the variation orders and invoices for the extra costs, as he was only a sub-contractor of the Respondent. In his Founding Affidavit, the only member of the Applicant referred to the Settlement Agreement and explained that, in terms thereof, the payment (by the Respondent) "was subject to the" resubmitting of the documents to the Municipality.

[8] In its opposing papers the Respondent gives a different explanation. It says that it only undertook to assist the Applicant to progress its claim against the Municipality, insofar as certain municipal officials had improperly given instructions to Applicant in the absence of the Respondent's knowledge or approval. Despite this dispute in the interpretation of the agreement, it is evident, however, that both parties were looking at the Municipality for payment of the R 1 098 765-00, be it directly to the Applicant or be it to the Applicant via the Respondent. What is also evident, is that the Respondent has nowhere admitted that it was owing that amount to the Applicant. If it had indeed given the instruction for additional work, it was obviously waiting for the Municipality to pay before it could be in a position to pay the Applicant. The question therefore still remains whether the Municipality had given direct

instructions to the Applicant, or whether the instructions went to the Respondent, who in turn instructed the Applicant.

[9] The Municipality is not a party to these proceedings, and there is no affidavit by the Municipality in the papers before me to clarify this question. Despite the silence on the part of the Municipality, I am nevertheless of the view that the balance of probabilities and the evidence favour the Applicant. I can think of no reason why the Municipality would instruct the Applicant directly while it has no contract with the Applicant at all. In its Replying papers, the Applicant has also attached an affidavit by the Senior Quantity Surveyor of the Respondent at the time, confirming that he had forwarded the new scope of work to the Applicant for pricing. On receipt of the new pricing, the Respondent approved same, and a new order was then issued by the Respondent to the Applicant, he says. He further states that all the certificates for the additional work done, was issued by himself according to the now approved budget and scope of the additional work. The work was given by the Respondent to the Applicant, he declares.

[10] In addition, the Applicant has also submitted a number of emails showing that the above-mentioned quantity surveyor had requested quotations from the Applicant for certain additional works in order for the Respondent to do a formal variation order to proceed with such additional work. Also included in the papers is a Contractors Claim sent by the Respondent to the Municipality after the work was done for payment of R 1 098 765-00 to the Respondent. That is the amount now claimed by the Applicant from the Respondent.

[11] Another document needs mentioning. It is a letter from the Respondent to the Municipal Manager of Ngwathe, dated 3

December 2018. It bears the heading Final Payment Certificate Koppies Stormwater Drainage and is signed by a Mr. Lionel Naude of the Respondent. The letter reads as follows:

> *"Herewith ENM Trading Siyathunya JV's payment certificate for your approval and action. Amount now claimed R 1 098 765-00."*

In the application papers Applicant admits having drafted this letter itself, and that it submitted the draft to Mr. Naude for his signature. The Respondent, however, denies that Mr. Naude had any authority to sign the letter on behalf of the Respondent. Be it as it may, the question remains why Mr. Naude would have signed the letter if the contents thereof were not reflecting the correct position.

[12] In the premises, I find that the Applicant performed the additional work in the amount mentioned on the instructions of the Respondent, and not on the direct instructions of the Municipality. The evidence on the papers is overwhelming to this effect. It is also clear, on the other hand, that the Applicant was aware all along that the funds for the payment in this amount had to come from the Municipality. That is the reason why the Applicant was assisting the Respondent in obtaining the payment from the Municipality, so that he could be paid in turn by the Respondent. The question then arising is whether it would be prudent to place the Respondent in provisional liquidation only because the Municipality is dragging its feet in paying for the additional work, or even refusing to make any payment.

[13] In this respect I need to mention that there is no information before me pertaining to the assets, liabilities or the general financial

position of the Respondent. What appears from the Answering Affidavit filed by the Respondent, is that the Respondent is one of the subsidiaries of a holding company by the name of ENM Holdings (Pty) Limited. No further information about the Respondent has been disclosed in the papers.

[14] In applications for provisional liquidation the Court has a discretion to grant the relief or not. One of the grounds on which the Court may exercise its discretion in favour of an Applicant for liquidation in terms of Section 344, is when it appears to the Court that it is just and equitable that the company should be wound up. Although the Applicant has met all the requirements of a demand in terms of Section 345, and although the Respondent has failed to pay, I hold the view that it would not be just and equitable to wound up the Respondent in the overall circumstances of this case. There can be little doubt that it is in fact the Municipality which is not honouring its obligations to pay for the additional works. If the Respondent is now placed in provisional liquidation as a result thereof, such a step could have dire consequences for the Respondent, it’s staff and it’s business in general. The interests of justice therefore demand that the Respondent not be placed in provisional liquidation in the special circumstances of this case.

[15] The following order is made:

1. The Application for provisional liquidation of the Respondent is dismissed with costs.

P.J. LOUBSER, J

For the Plaintiff:	Adv. C. Hendriks
Instructed by:	Noordmans Attorneys Bloemfontein
For the Defendant:	Adv. A.E Ayayee & Adv. R.Peterson
Instructed by:	Majavu Attorneys, Johannesburg c/o Rampai Attorneys Bloemfontein