REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 11490/2017

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

SIGNATURE .... DATE 10/4/2017

10/4/2017

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA
(Registration Number: 1962/000738/06) Applicant

and

ZWELOTHANDO MINERALS AND RESOURCES (PTY) LTD
(Registration Number: 2009/023158/07) Respondent

JUDGMENT

KUBUSHI J

[1] The applicant has launched, on an urgent basis, an application seeking an order that the respondent be placed under final winding-up in the hands of the Master of the High Court. The application is in terms of section 344 *(f)* of the Companies Act 61 of 1973 read with section 345 (1) *(c)* thereof and item 9 (1) of schedule 5 of the Companies Act 2008. At the commencement of the hearing of this application, the applicant's counsel applied for a provisional order returnable on 24 May 2017.

[2] It is not in dispute that in terms of agreements entered into between the applicant and the respondent, the applicant granted the respondent various credit facilities. It is also not in dispute that the respondent breached such agreements and that the full amounts due and owing in respect of such agreements became owing and payable. A further settlement agreement was entered into by the parties but was not honoured by the respondent. At the time of launching the application it is alleged that the amount due and owing by the respondent was in the region of approximately R14 million.

[3] The respondent is opposing the application and has raised numerous defences in its papers including lack of urgency. I deal first with the issue of urgency.

[4] In paragraph 35 of its founding papers the applicant raises the following grounds for launching the application on an urgent basis:

"35.1 the applicant having perfected its cession of debtors and contracts the respondent is in no position to make payment of any of its costs, security, security over the vehicles, insurance or salaries and wages;

35.2 notwithstanding numerous demands the respondent has failed to provide the applicant with proof that the insurance policy which it managed to obtain had come into effect as such prescribes that the insurance will only be in effect if the premium has been paid and the applicant has failed to provide proof of payment of such premium;

35.3 if a premium has been paid, it has not been paid from the overdraft account and it would seem that payments from debtors are being directed to a different account at another institution in contravention of the undertaking in the agreement of settlement;

35.4 two of the vehicles of the respondent have already been stripped of parts, apparently cannibalising them in order to keep other vehicles on the road, the applicant verily fears that unless this matter is heard as a matter of urgency under the circumstances employees may cannibalise the vehicles further in *lieu* of wages, may take out their frustrations on such vehicles by causing damage to such vehicles and that the vehicles will be uninsured and unsecured under the circumstances;

35.5 the vehicles are stored on an open piece of ground and there is an extreme danger of damage being caused by the employees and/or disgruntled creditors;

35.6 in the event of an urgent order being granted and liquidators being appointed they may be in a position to carry on the business of the respondent it is deemed to be in the interest of the respondent and its creditors and to this end obtain such powers from the Court. They will, however, in doing so be able to ensure that the proceeds thereof are distributed *pro rata* and according to law between the respondent's creditors. It is, however, essential

> that this be done as soon as possible as the respondent will not be in possession of funds with which to carry on its own business."

[5] When it comes to urgency, uniform rule 6 (12) *(b)* requires the applicant, in her/his founding affidavit to set out explicitly the circumstances on which she/he relies to render the matter urgent and the reason why she/he claims that she/he cannot be afforded substantial relief at the hearing in due course.

[6] Urgency is a reason that may justify deviation from the times and forms the rules prescribes. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief.[1]

[7] I am inclined to agree with the argument by the respondent's counsel that the applicant has not in its founding papers established the need for this application to be heard on urgency. There are no reasons set out in its founding papers why it is necessary that this matter be heard now and why it cannot be afforded substantial relief at the hearing in due course.

[8] The submission by the respondent's counsel that the first three reasons, stated in paragraph 35.1, 35.2 and 35.3 of the founding affidavit, provided by the applicant for urgency, speaks to the merits of the application and that the application

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[1] See Commissioner for the South African Revenue Service v Hawker Air Services (Pty) Ltd [2006] SCA 55 (RSA) para 9

can, therefore, not be entertained on urgency, is correct, in my view. Besides, in respect of the reason in paragraph 35.2 the respondent has in the meanwhile provided proof that the insurance premium has been paid.

[9] I would accept the remaining reasons as sufficient to establish urgency except that the reasons as stated in the founding affidavit are unsubstantiated. For instance, the applicant's allegation that two of its motor vehicles have already been stripped of parts, and cannibalised in order to keep other motor vehicles on the road, is unsubstantiated. The evidence in support of this allegation is only provided for in the applicant's replying affidavit by means of a valuation report of Pieter Havenga Valuations. It appears that this valuation report was compiled on 10 February 2017 and attested to on 15 February 2017, whilst the application was filed and served on 16 February 2017. There is no explanation, either in the founding affidavit or the replying affidavit, why the report was not referred to in the founding affidavit and/or attached at the time the application was launched. I would have, therefore, to disregard the report as not forming part of the papers before me.

[10] The applicant's fears that the employees may cannibalise the motor vehicles further in *lieu* of wages, may take out their frustrations on such motor vehicles by causing damage to the motor vehicles and that the motor vehicles will be uninsured and unsecured under the circumstances is unfounded and at best speculative. Besides, the respondent in its answering affidavit concedes that the two motor vehicles were at some point stripped but provides plausible reasons that the motor vehicles were stripped for mechanical repairs.

[11] The uncontested evidence of the respondent in its answering affidavit has shown that the motor vehicles are not stored on an open piece of ground but in a Kendel Accommodation which is fully secured and a 24 hour security mans the gate. I would have to assume, therefore, that there is no basis for the applicant to allege in its founding affidavit that, there is an extreme danger of damage being caused to the motor vehicles by the employees and/or disgruntled creditors.

[12] I am, as such, constrained to strike the application from the urgent court roll for lack of urgency.

[13] I make the following order

1. The application is struck from the roll with costs.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Counsel for Applicant:	Adv J E Smith
Instructed by:	Jason Michael Smith Inc
Counsel for Respondents:	Adv T Ngcukaitobi
Instructed by:	Ndumiso Voyi Incorporated
Date heard:	02 March 2017
Date of judgment:	10 April 2017