

REPUBLIC OF SOUTH AFRICA



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

30/11/12
Case No.: 15636/2012

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

2012-11-29
DATE


SIGNATURE

In the matter between:

EPITAPH PRODUCTIONS

t/a LEGEND PRODUCTIONS

APPLICANT

and

LEGEND GOLF & SAFARI RESORT (PTY) LTD

RESPONDENT

J U D G M E N T

HIEMSTRA AJ

[1] The applicant applies for the provisional winding-up of the respondent on the ground of the deeming provision in s345 of the Companies Act, 61 of 1973 (the Act) that it is unable to pay its debts. On 17 January 2011 the applicant caused a letter in terms of s345 of the Act

to be served on the respondent, claiming that the respondent is indebted to the applicant in the sum of R690 000 in respect of damages suffered by the applicant as a result of the respondent's alleged breach of a contract between them. The respondent failed to respond within the three weeks as stipulated in subsection (1)(a)(ii). The respondent denies knowledge of the letter. In view of my findings on other aspects of the applicant's claims, it is not necessary to resolve this issue.

[2] The applicant alleges that the parties entered into a contract in terms of which the applicant would for a period of five years arrange and produce an annual weekend golf day and music festival, styled the "Bosveld Makiti", to be held at the Legend Golf and Safari Resort, owned by the respondent. The applicant claims that it had contracted with several well-known performing artists to perform at the first event which was to be held on the weekend of 30 September to 1 October 2011. It had paid several of these artists in advance in terms of the agreements with them and had incurred other costs in relation to the event. On or about 14 September 2011, the respondent cancelled the event, leaving the applicant with financial obligations and wasted expenditure to the tune of R690 000.

[3] The respondent vigorously denies that it is indebted to the applicant in any amount and claims that no contract had come into existence between the parties that it could have breached, causing the applicant to suffer damages. Apart from the respondent's denials in its answering affidavit, the respondent's defence to the claims is succinctly set out in an e-mail, dated 16 September 2011, addressed to a certain Elmien Fitchet, representing the applicant. It is significant that this e-mail is dated one day prior to the date of the letter in terms of s345. It reads as follows:

"Dear Elmien

Your e-mail dated 13 September 2011 refers.

Please take note that Legend is not in breach of contract, as no contract is in place for the Bosveld Makiti nor for the Golf Day. We have not received any contract from you for the Bosveld Makiti, despite your undertaking some time ago to furnish us with a contract for our consideration. You also failed to furnish us with your company registration number and VAT number. We have sent the contract for the Golf Day to you, but have not received the signed copy from you. As we are still in the negotiation stage of both agreements, no formal contracts were concluded. Only once the required contracts are signed by all relevant parties can there be a breach of contract.

You have unilaterally cancelled the media launch, without any reasonable explanation, it is our opinion that you do not have sufficient time left to reschedule a media launch and to timeously prepare for the Makiti and Golf Day for the proposed date of 30 September 2011. It is a well-known fact that timeous marketing and preparation for both events are a prerequisite for a successful event.

Concerning information was brought to our attention about the way you (Elmien) conduct business. In the light of the allegations we need time to investigate the correctness thereof prior to entering into any formal relationship with you.

Regards"

[4] As to the amounts allegedly paid to the performing artists, it is apparent from the applicant's own Founding Affidavit that the artists were paid after the respondent had withdrawn from the events. It may be that the applicant had been contractually bound to pay the artists regardless of the cancellation of the event. However, the applicant states in its Replying Affidavit that the venue of the Bosveld Makiti had at the last minute been moved to another venue where it duly took place. Not all, if any, of the alleged expenditure was therefore wasted.

[5] Counsel for the applicant argued that the allegations disclosed in the respondent's answering affidavit do not constitute a *bona fide* defence to the alleged indebtedness. It is, however, impossible to evaluate the merits of the claims and counterclaims on the papers. There are numerous factual disputes. I cannot on any ground find that the respondent's defence is bogus or not in good faith. Without deciding the issues, the respondent's allegations and submissions appear on the face of the papers before me persuasive.

[6] S 345 of the Act provides a company or a body corporate shall be deemed to be unable to pay its debts if—

"(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—

... " [my emphasis]

It has been held in many judgments referred to in Henochsberg on the Companies Act, 1973, at 707, that the underlined words mean "then due and payable" and that the debt must therefore be a liquid or a liquidated claim.

[7] The alleged debt is in respect of damages and it is not liquidated. On the applicant's own Founding Affidavit the debt, if it existed at all, was not due and payable at the time of the s345 letter. The amount of the alleged debt is far from clear or easily determinable. The Makiti in fact took place at a different venue with the result that much, if not all, the expenditure had not in fact been wasted.

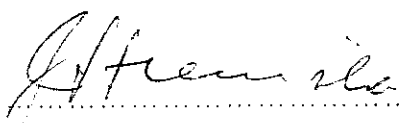
[8] It is further noted that the applicant has failed to furnish an affidavit by the person who had furnished a copy of the application to the employees of the respondent and to the South African Revenue Service as required by s 346(4)(b) of the Act. It has been held that this is a peremptory requirement.

[9] It was held in a long line of cases, starting with *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 at 347 – 348 that winding-up proceedings ought not to be resorted to in order to enforce a debt, the existence of which is *bona fide* disputed by the company on reasonable grounds. This is exactly what the applicant did. The applicant could not have believed that the alleged debt would not be disputed by the respondent, especially in view of the e-mail of 16 September 2011 in which the respondent's defence is set out on grounds that are uncontested. It is common cause that no written contracts had been concluded between the parties and that there were still a number of issues outstanding before such contracts could be concluded.

[10] I find that this application is entirely misconceived and a clear abuse of the process of court. This is a ground for making a punitive cost order against the applicant.

I make the following order:

The application is dismissed with costs on an attorney and client scale



J. HIEMSTRA

ACTING JUDGE OF THE HIGH COURT

Date heard:	22 November 2012
Date of judgment:	30 November 2012
Counsel for the applicant:	Adv J. Hershensohn
Attorney for the applicant:	Smit & Vosloo Attorneys 1213 Cobham Road Queenswood, Pretoria
Counsel for the respondent:	Adv L.W. De Koning SC Adv W.J. Botha Adv. J. Van der Merwe
Attorney for the respondent:	Nel. van der Merwe & Smallman Attorneys Ref: CVDM/KG/CM 0067 c/o Ross & Jacobsz 457 Rodericks Road Lynnwood, Pretoria