



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 075138-2023

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

DATE 27/02/2025

LENYAI J

KHUMALO ENGINEERING (PTY) LTD
(REG. NO.: 2016/214997/07)

Applicant

And

STEP UP ENGINEERING (PTY) LTD
(REG. NO.: 2010/010996/07)

Respondent

Delivered: This judgment is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading to Caselines. The date and time of hand-down is deemed to be 14:00 on 27 February 2025.

JUDGMENT

LENYAI J

- [1] This is an application for the final, alternatively provisional liquidation of the respondent.
- [2] The applicant avers that the application is launched in terms of the provisions of section 345(1) of the Companies Act, 61 of 1973, read with Item 9 of Schedule 5 to the Companies Act 71 of 2008.
- [3] The applicant submits that on or about 18 July 2017 it entered into a joint venture agreement with the respondent for the purpose of execution of Project No: RTD01-2016/17, 20Km Road and Stormwater and 2,5Km Stormwater Channels – Soshanguve (the project). Subsequent to the joint venture agreement and the awarding of the tender, a dispute arose between the parties regarding the management and control of the administration and execution of the joint venture project and on the 25th January 2021 the parties entered into a settlement agreement.
- [4] The applicant avers that the material terms of the settlement agreement relevant for the purposes of this application are as follows:
- 4.1 With effect from the date of the signature of the agreement, the applicant would give up its interest in and to the project to the respondent so that the respondent becomes the sole interest holder in the project and would be entitled to execute the project for its sole benefit subject to the terms and conditions of the settlement agreement;
- 4.2 In consideration of the interest referred to above, the respondent would pay the applicant an amount of R5 800 000.00 payable as follows:
- 4.2.1 an amount of R1 200 000.00 would be paid on or before 28 February 2021;

- 4.2.2 the balance of R4 600 000.00 would be payable in six equal monthly installments commencing from 31 March 2021 and the last payment being on the 31 August 2021, or alternatively a lump sum would be payable on or before 31 July 2021 provided that the respondent would keep the applicant informed of the status of the project on a monthly basis for as long as the balance remains unpaid;
- 4.2.3 the payments would be effected into applicant's bank account indicated in the settlement agreement and the proof of payment would be emailed to the applicant's legal representative;
- 4.2.4 the parties agreed that the joint venture agreement would be considered to be cancelled on the date of the signing of the settlement agreement, subject to the provisions recorded therein;
- 4.2.5 the agreement would constitute the entire agreement between the parties with regard to the matter dealt with therein and no representations, terms, conditions or warranties not contained therein would be binding on the parties and no agreement varying, adding to, deleting from or cancelling the agreement would be effective unless reduced to writing and signed by or on behalf of the parties.

[5] The applicant submits that the respondent made a series of sporadic payments to the applicant between the period of 30th March 2021 till 24th December 2022 totaling an amount of R3 750 000.00. The respondent is still owing the applicant an amount of R2 050 000.00.

- [6] The applicant avers that the respondent breached the terms of the settlement agreement in having failed to make the payments as agreed to in the settlement agreement. In terms of the agreement, the respondent was obliged to make full payment of the outstanding balance by the 31st August 2021.
- [7] The applicant avers that it is a creditor of the respondent in an amount of not less than R100.00. The applicant further submits that it has served a section 345 notice on the respondent's registered address through the sheriff and despite such notice, the respondent has failed to make payment within 21 days thereafter.
- [8] The applicant avers that the settlement agreement as well as the breach are not denied by the respondents. The respondent is alleging that there is a dispute relating to the joint venture agreement, which dispute has been addressed in the settlement agreement. The applicant further contends that the respondent's answering affidavit is a series of admissions and bare denials of the factual evidence presented in the founding affidavit.
- [9] The respondent contends that the applicant's claim is founded on an alleged breach of the settlement agreement. The respondent avers that since the issuing of the proceedings by the applicant, it had paid a further amount of R350 000.00 which reduced the amount outstanding to R1 700 000.00.
- [10] The respondent further avers that the settlement agreement makes provision amongst other things that:
- 9.1 the settlement agreement be made an order of court;

9.2 in the event of breach, the applicant approaches City of Tshwane and make a claim against any funds due and payable to the respondent in terms of this tender project.

[11] The respondent contends that the applicant did not make the settlement an order of court and neither did it approach the City of Tshwane first as stipulated in the settlement agreement. Despite these omissions the applicant delivered a section 345 notice and instituted liquidation proceedings on allegations of breach of contract. The respondent further contends that the applicant is using the liquidation proceedings as a means to enforce payment.

[12] The respondent further contends that there are disputes of fact which cannot be disposed of in motion proceedings. The respondent submits that the applicant rendered performance impossible by causing construction mafia to disturb the execution of the project's work and this constitutes a breach of contract on the part of the applicant.

[13] The respondent submits that it is not insolvent and is capable of paying its creditors.

[14] Section 345(1)(i) of the Companies Act 61 of 1973 (as amended) provides that:

"A company... 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 of not less than one hundred rand then due –

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due;

... and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;”

[15] It is common cause between the parties that upon the respondent’s breach of the settlement agreement, the applicant caused a section 345 notice to be served on the respondent’s registered address by the sheriff. This notice remained unsatisfied by the respondent more than three weeks after it was served, and this triggered the deeming provision that the respondent is unable to pay its debts. See: **ABSA Bank Limited v Tamsui Empire Park 1 CC (11151/2013 [2013] ZAWCHC 187 at para 13.**

[16] The deeming provision can only be circumvented in the event that the alleged indebtedness of a company is disputed *bona fide* on reasonable grounds. See: **Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 346 – 348.**

[17] In the matter of **Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA)**, the Supreme Court of Appeal confirmed the position in relation to a court’s discretion in liquidation proceedings and held as follows:

“[12] Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, as ex debiti justitiae to a winding up order against the respondent company that has not discharged the debt. Different considerations may apply where business rescue proceedings are being considered in terms of Part A of CH 6 of the New Companies Act 71 of 2008. The court a quo also did not

head the principle that, in practice, the discretion of a court to refuse to grant a winding up order where an unpaid creditor applies therefore is a "very narrow one" that is rarely exercised and then in special or unusual circumstances only.

...

[17] *The question of onus is indeed critically relevant in a case such as this. It bears repeating that once the respondent's indebtedness to the applicant for a winding up order has, prima facie, been established, the onus is on it, the respondent, to show that this indebtedness is indeed disputed on bona fide and reasonable grounds."*

[18] In the matter before me, the respondent in its answering affidavit submits that it is not insolvent and is capable of paying its creditors. The respondent has not furnished the court with its audited financial statements to corroborate its claim that it is solvent. I am reluctant to accept the say so of the respondent as to its financial position without the audited financial statements being shared with the court. I am not satisfied that the respondent has shown the court that its dispute of the indebtedness, is disputed on bona fide reasonable grounds.

[19] The respondent further contends that there are disputes of fact which cannot be disposed of in motion proceedings. The respondent submits that the applicant rendered performance impossible by causing construction mafia to disturb the execution of the project's work and this constitutes a breach of contract on the part of the applicant. Again, here the respondent makes these submissions without placing anything more before the court to corroborate its claims. This in

my view is an unsubstantiated claim, devoid of any explanation or detail to assist the court in the adjudication of this matter. Furthermore the disputes that were there between the parties were addressed in the settlement agreement.

[20] The respondent raises a defense that the settlement agreement relied upon by the applicant was not made an order of court as stipulated by the terms of the agreement. In my view nothing turns on this point. Clause 6 of the settlement agreement makes provision that either party is entitled to approach any competent court to make the agreement an order of court without notice to the other party. The fact that this agreement was not made an order of court does not invalidate the agreement.

[21] The respondent also submits that in terms of the settlement agreement the applicant was supposed to approach the City of Tshwane for the amount owed. Clause 4 of the settlement agreement provides as follows:

“The parties agree that should “SETHEO” fail to honour its payment obligations herein, “KHUMALO” shall in addition to all other remedies available to it in law including, without limitation, to approach any court of competent jurisdiction for any appropriate relief, be entitled forthwith and without any further notice to “SETHEO” to demand payment thereof from the City of Tshwane against the proceeds of “the project”...”

[22] After careful reading of the clause, I am of the view that the operative word here are the words “in addition”. The agreement does not say “prior” to approaching the court, it says in addition to all other remedies available to it in law, the applicant is entitled to approach the City of Tshwane. I am of the view that the respondent misunderstood the settlement agreement.

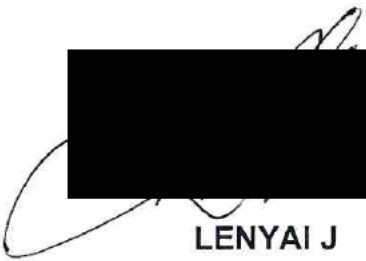
[23] The agreement is valid and binding on the parties and the applicant is correctly within his rights to rely on it to establish its claim. On closer scrutiny of the papers before me and the submissions made in court, the settlement agreement is not disputed, and the debt is also not being disputed by the respondent. In fact, the respondent goes as far as to admit that despite having made a further payment after the liquidation process has been initiated by the applicant, it still owes the applicant an amount of R1 700 000.00.

[24] I am satisfied that the applicant has complied with the provisions of section 345 and the respondent is by operation of law, deemed to be unable to pay its debt.

[25] Under the circumstances I make the following order:

1. The respondent is hereby placed under provisional liquidation;
2. The respondent and any other party who wishes to avoid such an order being made final are called upon to advance reasons, if any, why the court should not grant a final order of liquidation of the respondent on the 26 August 2025 or as soon thereafter as the matter may be heard;
3. The order must be served on the respondent's registered address as well as on its employees and Trade Unions, if any;
4. The order must be served on the Master of the High Court and the South African Revenue Services;
5. This order must be advertised once in the Government Gazette and once in the Citizen and local newspaper

6. Costs of the application to be costs in the liquidation.



LENYAI J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances

Counsel for Applicant	:	Adv M Jacobs
Instructed by	:	Prinsloo Attorneys Inc
Counsel for the Respondents	:	Adv T Munotsiwa
Instructed by	:	Gwanangura Inc Attorneys
Date of hearing	:	28 August 2024
Date of Judgement	:	27 February 2025