



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

Case No: **8303/2022**

|                                                                                                 |                    |
|-------------------------------------------------------------------------------------------------|--------------------|
| (1) REPORTABLE: No                                                                              |                    |
| (2) OF INTEREST TO OTHER JUDGES: No                                                             |                    |
| (3) REVISED: /                                                                                  |                    |
| <br>SIGNATURE | 8 May 2025<br>DATE |

In the matter between:

**GUTTER INNOVATIONS CC**  
(Registration No. 1993/07985/23)

Applicant

and

**INNOVATIVE MACHINERY HUB (PTY) LTD**  
(Registration No. 2013/030823/07)

Respondent

*This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 8 May 2025.*

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## JUDGMENT

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### RETIEF J

#### INTRODUCTION

[1] This is an application for the final winding-up of the respondent brought in terms of section 344(f), read with section 345(1)(a) of the Companies Act, 61 of 1973 [Companies Act]. The respondent opposes the relief. The respondent was placed under provisional winding-up on the 4 November 2024 and the applicant's compliance of the provisional order is not in dispute.

[2] The provisional winding-up order has been preceded by a previous liquidation application brought by the applicant in which the respondent was also placed under provisional winding-up based on a unpaid debt claimed in terms of a breach of contract [2019 agreement]. This provisional winding up order was granted on the 25 May 2021 under case number 56032/2020 [first liquidation application].

[3] This application too is brought by the applicant based on an alleged unpaid debt arising from the cancellation of the 2019 agreement as a result of breach. The applicant claimed restitution (restoration of the status quo ante) from the respondent upon cancellation as a result of the breach. Performance failure by the respondent to repay the monies already paid in advance by the applicant for the manufacture of certain machines in terms of the 2019 agreement is common cause. The procedural history giving rise to this application is relevant and the applicant correctly incorporated the pleadings and made reference to the first liquidation in its founding affidavit.

#### BACKGROUND HISTORY

[4] The 2019 agreement was concluded between the applicant and the respondent in January 2019. The terms of the agreement are common cause. In terms of the 2019 agreement, the applicant commissioned the respondent to



manufacture and to deliver certain machines. The respondent undertook to manufacture the machines within an agreed manufacturing period being 12-16 weeks from date of conclusion of the 2019 agreement. Payment terms were agreed and were made up of three payment increments. The total price of R 1 104 000.00 (inclusive of value added tax) [total price] was agreed. The last increment, being a vat inclusive price of 30% of the total price, R 331 200.00, was due and payable on the delivery of the machines. The applicant however paid the total price at once.

[5] The respondent breached the 2019 agreement by its failure to manufacture the machines within the manufacturing period. The applicant waited approximately a year from the date of such breach before it delivered its section 345 demand<sup>1</sup> dated 13 August 2020 [the demand]. In the demand, the applicant, as a result of the breach, demanded specific performance by way of delivery but, also sought the repayment of the R331 200.00 as the same was only due when the respondent performed by delivering the machines. At that stage, breach was common cause. The respondent through its attorney then in writing, undertook to deliver the machines by the end of January 2021. This undertaking was given in August 2020. The respondent reneged on its own written undertaking yet again. Although the respondent's undertaking was made on its own terms during the Covid epidemic it later pegged its own inability to perform on Covid.

[6] Be that as it may, the applicant launched the first liquidation proceedings in October 2020. The respondent opposed the first liquidation application raising, *inter alia*, the ground that the amount claimed R331 200.00, did not constitute a debt in law but an “-untested claim for restitution of an amount allegedly paid sine causa.” The Court having regard to all the facts and defences raised, granted a provisional winding up order and, the respondent before the return date, in a settlement agreement, acknowledged its indebtedness to the applicant in the amount of R 331 200.00 and repaid it. After the repayment, the applicant had still paid a vat inclusive amount of R 772,000.00 (R 1 104 000.00 less R 331 200.00) to the respondent in order to secure their manufacture of the machines. The terms of the settlement was made an order of Court on the return date, the 30 August 2021 [settlement order].

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<sup>1</sup> In terms of section 345 (1)(a)(i) of the Companies Act.

[7] The settlement order effectively reinforced specific performance of delivery in terms of the 2019 agreement and, *inter alia*, set out the applicant's rights, other than in possessed in law, absent the respondent's compliance delivery. According to the settlement order the respondent had to deliver the machines by the 15 November 2021 [delivery date]. The non-compliance of the delivery date, by order, triggered certain procedural options and other remedial rights by consent. In particular clause 7 provided effectively for the extension of the provisional order until the respondent had delivered the machines by the 15 November 2021. Therefore, the delivery date too was intended to trigger the discharge of the provisional order.

[8] The provisional order, contrary to the settlement order, was already discharged on the return date, the 30 August 2021. This may have been because payment of the debt relied on had been paid. However, the respondent failed to deliver the machines in compliance of the Court order. In truth, no evidence before or subsequent to such failure has been tendered by the respondent other than a hollow allegation, that it commenced with the manufacture of the machines, this is since the date of its commission in January 2019 to date (in other words, within the period of approximately 6 years).

[9] The respondent's failure to deliver the machines in terms of the settlement order is common cause. As result of the respondent's continued failure to manufacture the machines, the applicant elected to cancel the 2019 agreement. It expressed this election on the 14 January 2022 . Upon cancellation, it too claimed for the repayment of the R 772,000.00 by demand. Simultaneously with the cancellation and repayment claim, the applicant launched a contempt application in respect of the non-compliance of the settlement order.

[10] Receipt of the demand and its content, in compliance of the Companies Act is not disputed. The respondent failed to respond to such demand. The cancellation of the agreement and non-compliance of the settlement order is common cause. The respondent failed to respond to the obligation to perform by repaying the amount claimed or any part thereof.



[11] On receipt of the demand other than the respondent electing not to pay, it also elected not to exercise any of its rights or defences it deemed it was entitled to as against applicant. Nor, for that matter, did it tender or repay the applicant any amount it deemed appropriate in the circumstances. It simply just waited for the applicant to proceed with the liquidation proceedings, a procedure foretold in the demand and foreseen in the settlement order.

[12] In response to this application, the respondent opposes the relief and raises 3 (three) grounds of defences contending that the same is *bona fide*. Briefly the three grounds are: the settlement order cannot be cancelled and that the respondent's obligation towards the applicant remained delivery of the machines; that the respondent's inability to perform in terms of the settlement order was as a result of the applicant in that, it was partially impossible to perform in that there was a hold on its bank. Such had been frozen as a result of the provisional order in the first liquidation application up and until Friday, the 2 November 2021 and, lastly that the applicant approached the Court with dirty hands, in that it was the party who prevented the respondent from performing in terms of the settlement order and as such, it submits it is not obliged to pay the applicant the amount of R 772,800.00 or any part thereof, but in terms of the settlement it is still liable to deliver the machines. In conclusion of its defence it makes the following statement:

*"5.5 The refusal to make payment is not as a result of an inability on its part to pay debts, but it is a refusal as a result of the claim being disputed."*

[13] The veracity of these defences and too the statement at paragraph 5.5 in the respondent's answering affidavit, must too be considered together with the evidence tendered by way of affidavit, on the return date which was duly filed on the 17 April 2025. The respondent uploaded the affidavit which was deposed to by Mr Matthew Greeff [Mr Greeff], the designer manager of the respondent. Mr Greeff intended to show good cause why the final provisional order should not be made final. Insofar as Mr Greeff in his affidavit refers to the necessity to apply for condonation, no substantive application was brought. Notwithstanding, none was required as evidence was called for by order and in consequence, leave was granted for its contents to be tendered into evidence. In fact the applicant's Counsel referred to its

contents in oral argument. In this way the Court could take cognizance of all the relevant facts in the adjudication of the application and in the exercise of its discretion whether to grant a final winding-up order.

[14] Before dealing with the material allegations pertaining to the merits of any good cause raised by Mr Greeff it is important, as this juncture, to mention that Mr Greeff who was not in Court at the date of the hearing of the provisional order relayed certain utterances in his affidavit made to him by the respondent's attorney, Mr Van Der Berg concerning what transpired in Court. Such utterances he voiced as concerning. The content, as raised, was not confirmed by Mr Van Der Berg under oath. Notwithstanding, the relayed utterances at Mr Greeff's insistence should have been brought to the Court's attention. Mr Van Der Bergh did not raise such utterances or concerns nor did he refer the Court to such utterances in oral argument. For that matter Mr Van Der Berg who argued the matter did not deal with such evidence in written argument either as he did not file nor did he tender any written heads of argument during the proceedings.

[15] In short, such utterances related to certain alleged *ad hominem* attacks against Mr Van Der Berg, before arguments were heard by the Court and, *inter alia*, references were made to remarks of 'shenanigans' and that the applicant had shown the respondent 'grace on grace'. Reference to all the utterances are relayed in paragraph 7 of Mr Greeff's affidavit. Mr Greeff submitted that they tainted the proceeding before the Court and at the provisional stage, which may be cause for a review.

[16] Without dealing with the legal basis for such a review at this time, this Court, absent any argument nor confirmation under oath by Mr Van Der Berg, still deemed it appropriate, before finally dealing with the matter, to ask both the parties, in light of Mr Greeff's concerns whether the parties had any objection to this Court adjudicating the matter to finality. No objections written or otherwise were raised nor received, no application for, nor mention of a recusal was filed. Therefore no party exercised any of its rights afforded to it procedurally or otherwise based on Mr Greeff's submissions. This Court considering all the circumstances and absent



further evidence, is of the opinion that it is capable of applying an objective mind to bear on the material issues before it and apply the evidence.

[17] In so doing, this Court now deals with Mr Greeff's evidence.

### **FURTHER EVIDENCE ON TH RETURN DATE**

*Does Mr Greeff's evidence show good cause in favour of the respondent and tip the balance?*

[18] Mr Greeff deposed to the affidavit pursuant to prayer 3 of the provisional order as an employee of the respondent. From the evidence presented in the first liquidation and in this application, Mr Greeff appears to play an active and pivotal role in the day to day activities of the respondent of which, his daughter is the sole director. Such is enough to draw a reasonable inference from the facts that he, has a legitimate interest, a required enquiry, by order, this is without him alleging the same on the papers. To commence, at this juncture it is important to note that Mr Greeff states that soon after the provisional liquidation was granted, being the 14 November 2024, the respondent provided its attorney with instructions to provide security for the claim against it to bring an end to the liquidation proceedings. This is confirmed by the respondent's director who deposed to a confirmatory affidavit. The intention to pay security did not come to the applicant's attention nor did the payment thereof occur. In fact save for the instructions to their attorney, no further procedural steps were taken by the respondent from the 14 November 2024 until the 17 April 2025 when Mr Greeff's affidavit was filed.

[19] According to Mr Greeff the reason for not paying the security as intended, was that during a consultation with Mr Van Der Bergh, which took place on the 8 April 2025, the respondent had a change of heart in that the respondent did not wish to pay security when it still held the view that quantum was in dispute. In amplification, the respondent on the advice of its attorney in this affidavit holds the view that the applicant's claim is not a claim for a debt but one of damages or one based on enrichment. Furthermore, it was argued that the adjudication of such

claims are not suited on application nor, for that matter, by way of liquidation proceedings. In this way the respondent extended its defence grounds in its answering affidavit and, amplified it by arguing that its opportunity to have the applicant's actual claim in law adjudicated constitutes an infringement of its right to defend its case before a Court as envisaged in terms of section 34 of the Constitution.

[20] The applicant did not raise any argument against the respondent's procedural right nor prejudice it may suffer because the respondent, in this manner, extended its defences not specifically raised in answering affidavit. In consequence, this Court deals with it as raised. In so doing, this Court will reconsider the three distinct defences raised, were applicable too. To commence, the Court agrees that motion proceedings are suited for damages nor enrichment claims. However, the applicant did not claim repayment in the form of damages flowing from cancellation nor on the basis of enrichment but for a debt. Its demand is clear; it requires the repayment of monies paid as a result of a breach of contract. The non-compliance of the settlement order was just another string in its bow to demonstrate yet another non-compliance. The settlement order itself, in any event, attempted to settle the matters arising in the first liquidation application. In other words the payment of an acknowledged debt and a means to enforce performance by delivery. Payment for delivery still owing by the applicant.

[21] The 2019 agreement at the time of the settlement order had not been cancelled. The applicant still required the respondent to manufacture the machines it had already commissioned in January of 2019 for which, it had paid in advance. Failure to manufacture the machines, as stated in the demand as a failure to provide the status of their manufacture constituted a breach upon which, the applicant appearing exasperated with the situation, now wished to cancel the commissioning of the machines all together. No evidence tendered, even after the respondent's bank accounts were unfrozen, that it commenced with the manufacture of the machines. Simply put the applicant did not want the respondent to manufacture the machines anymore. The cancellation valid. This does not translate into what the respondent perceived as a 'cancellation' of the settlement agreement. This argument has never been advanced by the applicant nor could it be sustained.



[22] Furthermore it is trite that a claim for restitution following a breach of contract is a distinct remedy and is a proper measure and a substitute for damages.<sup>2</sup> Upon cancellation of the 2019 agreement and a claim for restitution, an obligation by the respondent to perform was established. Such obligation a debt<sup>3</sup> and, in this case, the obligation to pay money. The claimed amount was set out in the demand wherein restoration and repayment of amounts advanced for the manufacture of the machines was clearly set out. The claimed debt remains unpaid.

[23] Flowing from this finding, the respondent's argument based on any infringement in terms of section 34 of the Constitution based on its ability to ventilate its defence in respect of the claim not constituting a debt and the nature of such claim which follow in a Court of law is not sustainable. Furthermore the respondent has had access to legal representation at all times, it has possessed the liberty of responding to every delivered demand and legal process. Such allegation of infringement at this time and so raised is opportunistic and must fail.

[24] Returning to Mr Greeff's evidence is clear that the respondent was not in a position to pay the security it intended to pay in November 2024. This is because its ability to pay was dependant on future recoverable debts, the payment of which was not secured and would only occur at a future uncertain date. In other words, as argued by the applicant's Counsel and absent evidence to the contrary, the only reasonable inference to be drawn on the undisputed facts by Mr Greeff was that the respondent did not have sufficient funds at its disposal to pay the security it intended to pay. Evidence of the respondent's ability to pay the applicant if and when it was called upon to do so was not only lacking in these papers but also in the papers filed in the first liquidation application.

[25] Over and above the consideration of intent to pay security, Mr Greeff too raised certain factors he wanted this Court to consider when it exercised its

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<sup>2</sup> *Barker v Probert* 1985(3) SA 429 (A); *De Vos, Verrykingsaanspreeklikheid in Suid-Afrikaanse Reg* (2<sup>nd</sup> ed) at 141-143.

<sup>3</sup> See the definition of a "debt" in *Electricity Supply Commission v Stewart and Lloyd of SA (Pty) Ltd* 1981(3) SA 340 and, as applied in *Cook v Morrison and Another* (1319/2017) [2019] ZASCA8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) (8 March 2019).

discretion whether to grant the final relief or not. The weight of such factors was considered and the necessary weight applied. Saliently the following factors:

### 25.1. Factor 1

25.1.1. The applicant is the respondent's only creditor. In support thereof Mr Greeff submits that respondent does not even have to pay for its monthly rent and as such its landlord is not a creditor. In support thereof, Mr Greeff alleges that a company called DKM Machinery (Pty) Ltd [DKM] pays its monthly rent. The only evidence in support of this allegation is an invoice raised by a company called Zanli Engineering Works (Pty) Ltd [Zanli] to DKM. Zanli ostensibly the landlord. The invoice tendered was for the payment of DKM's monthly rent occupied by DKM and payable to Zanli. It is unclear from the invoice and from Mr Greeff's evidence which portion of the leased space the respondent *de facto* occupies, if any. The invoice is silent on the matter. No confirmatory affidavit by a person from Zanli is provided. How this proves that the applicant is DKM's only creditor is unclear.

25.1.2. On the facts both the respondent and DKM carry on business at the same place namely at 8 Mount Joy Road, Wilbart, Germiston. In truth although not much turns on that fact that businesses share the same premises it does require further scrutiny. Why DKM pays the respondents monthly expenses is unexplained as the veracity of the relationship between DKM and the respondent not supported by a confirmatory affidavit by DKM's sole director Deborah Greeff under oath. Without explanation of the *inter partes* arrangement or confirmation thereof, DKM may reasonably too be a creditor on the facts. No further documents other than this invoice was tendered in support of the allegation. Not even a copy or



extract from its creditor control account was supplied. The statement that the applicant is its only creditor rings hollow.

25.1.3. What does not ring hollow is that from the invoice provided, as it demonstrates that the landlord Zanli also carries on its business at the same premises at factory 18, 8 Mount Joy Road, Wilbart, Germiston. In other words, all the parties, the respondent, DKM and Zanli operate business from the same premises. This is not explained. Why then would Zanli raise the invoice for DKM to pay the rent of a premises it too occupies and operates from? What is the nature of the relationship between all the parties?

25.1.4. The assertion that the applicant is the respondent's only creditor is not persuasive and only raises further unanswered questions and doubts as to the respondent's *bona fides*.

## 25.2. Factor 2

25.2.1. The next factor to be considered is of greater concern. This is as a result of Mr Greeff's and the respondent's understanding and appreciation for the effect of a provisional winding up order. He under oath stated that the respondent on the 16 August 2021, sold some of its equipment, movable property, for value, to DKM. On the 16 August 2021 the respondent was factually still under provisional winding up by order as a result of the first liquidation application.

25.2.2. As to the fact that such equipment was sold to DKM, this is factually untrue. The evidence in support of the allegation demonstrates that the respondent sold the equipment to D Greeff. Although D Greeff may very well be Deborah Greeff the only director of DKM, no proof exists that DKM itself bought or paid for the assets on the invoice raised by the respondent.

The evidence shows that D Greeff in her personal capacity acquired and paid for such equipment. The transaction is not confirmed under oath by D Greeff nor is the capacity of D Greeff at the time, explained when such transaction was entered into. The transfer was not only unlawful at the time but, the veracity of the allegations rejected. The weight and circumstances during which such purported transaction took place is a factor for consideration and goes to the heart of the respondent's *bona fides*.

### 25.3. Factor 3

25.3.1. Mr Greeff confirms that a number of the assets attached by the Sheriff on the 5 December 2024 actually belong to DKM. Mr Greeff lists the assets. Any reliance on the transaction of the 16 August 2021 in support of the ownership claim, as discussed is rejected. Even if the Court is to accept the allegations it is counterproductive and only diminishes the respondent's ability to demonstrate that it is in possession of sufficient disposable movable assets on attachment to satisfy the amount claimed by the applicant. Mr Greeff's evidence is not confirmed by DKM. The allegation not persuasive. This too is a factor for consideration.

### 25.4. Factor 4

18.4.1 Mr Greeff states that: *"It is common cause that a payment was made to the respondent for the commissioning of machines and that the contract was cancelled by the applicant as a result of machines not being delivered timeously."* Against the common cause fact, *"-a payment was made to the respondent for the commissioning of machines-"* Against this admission, Mr Greeff attempts to argue that the debt claimed by the applicant



in its demand is not a liquidated debt. This aspect has previously been reasoned and can't stand.

- 18.4.2 The applicant's claim determinable on the common cause facts. The amount claimed exceeds R 100 and it is common cause that the respondent has not paid nor is willing to pay the amount or part thereof nor able to pay the amount as security.

#### Factor 5

Mr Greeff alleges certain dignity violations having occurred involving the applicant's attorney. Mr Greeff is not precluded from pursuing such a claim. The veracity of which is not before this Court to determine but, the allegation has been considered collectively with the other factors in so far as it may advance good cause in favour of the respondent in this application.

#### Factor 6

The contempt application brought by the applicant in respect of the respondent's non-compliance of the settlement order is not a claim for specific performance on any interpretation. Any declarator relief granted in the applicant's favour in the contempt relief will be dealt with on appeal. As raised on the papers by both parties, the appeal in no way effects the basis upon which the applicant launched this application. The contempt proceedings raised in the founding papers and the outcome of such appeal even, if upheld, will not disturb the common cause and admitted facts in this application. This Court has considered this factor as raised.

[26] Considering Mr Greeff's evidence and the factors raised does not tip the balance in the respondent's favour, the reverse is true.

## CONCLUSION

[27] The deeming provisions of section 345(1)(a) of the Companies Act create a rebuttable presumption to the effect that the respondent is unable to pay its debts. The respondent did not admit that the claim constituted a the debt nor was it willing to pay any portion of the amount nor could it, on Mr Greeff's version, pay the security intended. No financial statement or bank accounts are tendered to enable the Court to be satisfied that the respondent can pay and does pay its day to day expenses absent such an allegation. According to Mr Greeff it does not even pay its monthly rent. No unconditional payment was made nor tendered by the respondent to avoid liquidation.

[28] When recalling the respondent's defences raised in its founding papers they too, as reasoned and applied logically, fail to constitute reasonable *bona fide* grounds. Having regard to all the evidence the respondent has failed to rebut the deeming provision of section 345 of the Companies Act and is found to be unable to pay its debts. In consequence, it stands to be wound-up.

[29] In argument the applicant too submitted that it would be just and equitable in terms of section 344(h) of the Companies Act to wind-up. This is often raised by applicants without supporting evidence. However in this matter the applicant's Counsel argued that the Court should consider the affidavit of Mr Greeff and the weight of the respondent's confirmation of such facts to determine whether it is just and equitable. In so doing and having regard to the impact of such evidence as against the respondent itself, the Court finds that it is just and equitable to wind up the respondent. The Court is satisfied that the applicant has complied with all the statutory and procedural requirements. The inevitable flows.

[30] The following order:

1. The Respondent be and is hereby placed under final winding up.
2. Costs of the application are costs in the liquidation, taxed on Scale B.



  
  

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**L.A. RETIEF**

Judge of the High Court  
Gauteng Division

**Appearances:**

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Date of hearing:

23 April 2025

Date of judgment:

8 May 2025