IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 5045/2023

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED: ~~YES~~/NO

DATE: 11/09/2025

SIGNATURE:

In the matter between:

THAW CONSTRUCTION (PTY) LTD	**APPLICANT**
(REG. NO: 2016/272328/07)	

AND

LEKOTU ENTERPRISE	**RESPONDENT**
(REG. NO: 2016/530644/07	

JUDGMENT

NGOBENI J

[1] The applicant is Thaw Construction (Pty) Ltd, a company registered and incorporated in terms of the company laws of South Africa, with its registered address at [...] B[...] Street, Rusternburg, North West, 0300.

[2] The respondent is Lekotu Enterprise, a company duly registered and incorporated in terms of the company laws of South Africa, with its registered address situated at 1[...] T[...] Street, Ga-Mampuru, Steelpoort, Limpopo, 1133.

[3] The applicant alleges that this court has jurisdiction to hear this matter because the respondent's registered address is situated within the area of jurisdiction of this court, and that aspect is not in dispute.

[4] This is an application for the winding-up of the respondent based on the reasons that on or about 03 February 2021 the applicant and the respondent entered into a written building contract, where the terms of the contract were that the applicant rendered certain professional building services to the respondent at the request of the respondent. The applicant rendered the building services required in terms of the building contract. In terms of the building contract the total amount payable by the respondent was the sum of R28 404 955-55. The respondent paid only an amount of R25 737 762-27 to the applicant. The balance of the amount owing is R2 669 193-22.

[5] The applicant further alleges that a notice in terms of the provisions of section 345(1)(a)(i) of the old Companies Act 61 of 1973(Act 61 of 1973)[1] was delivered

[1] "345 When company deemed unable to pay its debts
(1) A company or 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-
(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, or

to the respondent and to its directors. On 06 December 2022 the respondent sought clarity regarding the claim after acknowledging receipt of the notice. The attorneys of the respondent responded to the respondent and provided further details of the claim. A period of 21 days has lapsed and the respondent has failed to pay the amount owed.

[6] The applicant further submits that the respondent is commercially and factually insolvent because the respondent is unable to pay its debts, and falls to be wound up by this court, as provided for in section 346(1)(b) of Act 61 of 1973, read with schedule 5 of the Companies Act 71 of 2008 (new Companies Act or Act 71 of 2008), which deals with 'Transitional Arrangements' and section 9 of Act 71 of 2008 which deals with continued application of the previous Act, being Act 61 of 1973, to winding-up and liquidation, and that is despite the repeal of Act 61 of 1973.

[7] The application for the winding-up of the respondent is opposed for the reasons that will follow. The parties entered into a Joint Building Contracts Committee (JBCC or the Principal Building Agreement) on a contract value for the amount of R25 735 762-27. If there were adjustments to be made outside the amount of the contract value, the parties were to follow the terms of clauses 26.5, and this was raised as the third point *in limine* by the respondent.

[8] I will deal with the points *in limine* in the judgment, but it might not be in the order that they were raised. The first and second points *in limine* are related, and I shall therefore deal with them together. The first point *in limine* raised is that the applicant did not comply with the provisions of clause 30.2 of the Joint Building

(ii)…,

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process, or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

Contracts Committee - Principal Agreement (JBCC or Principal Building Agreement) in that the parties did not attempt to resolve the disagreement between them and record a resolution in writing signed by them, and if they could not resolve the issue between themselves, they were supposed to refer the matter for arbitration in terms of clause 30,7 of the Principal Building Agreement (Agreement). The second point *in limine* is that this court lacks jurisdiction to deal with this matter as clause 30.2, 30.3 and 30.7 of the Agreement mandates that arbitration should have been invoked to resolve the dispute between the parties.

[9] In *Crompton Street Motors CC vs Bright Idea Projects*[2] the Constitutional Court confirmed that a party who wished to stop legal proceedings and insists on a dispute being dealt with in terms of an arbitration agreement had two avenues for achieving that:

(i) a substantive application in terms of section 6 of the Act to stay the court proceedings, or

(ii) by way of a special plea in the action requesting a stay of the proceedings pending the determination of the dispute by arbitration.

[10] One of the reasons for refusing to stay the proceedings for referral to arbitration in the *Crompton Street Motors* case, *supra,* was that the relief sought by *Crompton Street Motors* was not capable of being decided by an arbitrator. The proceedings at hand is motion proceedings. Provision is made for motion proceedings in that section 6(1) of the Arbitration Act[3] states that any party to the proceedings may after entering appearance but before delivering any pleadings or taking any further steps in the proceedings, apply to that court for a stay of such proceedings.

[2] 2022 (1) SA 317 (CC) (3 September 2021).
[3] 42 of 1965.

[11] The application that is before this court is for the winding up of the respondent. This is an application which according to provisions of section 345 and 346 of the old Companies Act[4], should be brought before a Court which will then give directives as to what is to happen about the application. It is now well established that an arbitration agreement does not oust the jurisdiction of the courts[5]. The Supreme Court of Appeal made it very clear in *Fleet Africa (Pty) Limited v Polokwane Local Municipality*[6] that it is now established that parties cannot completely exclude a court's jurisdiction through their mutual agreement. Consequently, the high court does not have the authority to refuse to hear cases appropriately brought before them within their jurisdiction[7]. Therefore, the first and second points *in limine* by the respondent to refer the matter for arbitration and lack of jurisdiction are bound to fail.

[12] The fourth and fifth points *in limine* raised is that the applicant failed to join the plant agent who has a direct and substantial interest in any order that this court may make and the funders of the respondent in the project because they are the major creditors and sponsors and have a direct and substantial interest in the outcome of this application. I will deal with the fourth and fifth points *in limine* together on joinder because the principle is the same. Mboweni AJ in his judgment in *Accola v Sboro and Another*[8] dealt with a joinder application and quoted the three cases that I refer to hereunder.

[13] Joinder of parties and causes of action in the high court is governed by provisions of Uniform Rule (Rule/s) 10. The circumstances or test under which a party can be joined or not was clearly explained in *ABSA Bank Limited v Naude N.O.*[9] as follows:

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[4] 61 of 1973.
[5] The Rhodesian Railways Limited v Mackintosh 1932 AD 359 AT 375.
[6] (720/2022) [2023] ZASCA 142 (30 October 2023).
[7] Standard Bank of SA Ltd and Others v Thobejane and Others [2021] 3 All SA 812 (SCA), South Paradigm (Pty) Ltd v Mquqo Attorneys and Another (2732/2021) [2022] ZAECGHC 7 (14 April 2022).
[8] (024263/2022) [2024] ZAGPPHC 379 (17 April 2024).
[9] (20264/14) [2015] ZASCA 97 (1 June 2015); It was held in Judicial Service Commission and Another v Cape Bar Council and Another (Centre for Constitutional Rights as *amicus curiae*) (818/11) [2012]

“The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.

A mere financial interest is an indirect interest and may not require joinder of a person having such an interest.

The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing, that party, unless the court is satisfied that he or she has waived his or her right to be joined”.

[14] In *Bowring N.O. v Vrededorp Properties CC*[10] the Supreme Court of Appeal said that the mere fact that the party may have an interest in the outcome of the litigation does not warrant a joinder plea. The right of a party to validly raise the objection that other parties should be joined to the proceedings, has thus been held to be a limited one.

[15] The proceedings at hand are for the winding up of the respondent for failure to pay an alleged debt. The Funders of the building project might have funded the project, but I fail to see as to how are they directly affected by the agreement between the applicant and the respondent, because there is no role that they directly have to play to the applicant. The circumstances under which the Funders funded the project are between the respondent and the Funders and not the applicant. The terms of the JBCC-Principal Building Agreement is between the applicant and the respondent. The Funders might of course be interested in knowing as to whether the respondent is wound-up or not, but that does not mean that they have direct interest to an extent that they can be joined.

ZASCA 115 (14 September 2012) that it has now become settled law that the joinder of a party is only required as a matter of necessity as opposed to a matter of convenience. If that party has a direct and substantial interest which may be affected prejudicially by the judgment of the Court in the proceedings concerned.

[10] 2007 (5) SA 239 (SCA) et 21.

[16] The applicant as it appears cannot bring any claim against the Funders, but only against the respondent. In the *ABSA Bank* case, *supra*, it was rightly said that a mere financial interest is an indirect interest and may not require joinder of a person having an interest. In my view that can be the only interest of the Funders who are not even contracted to the applicant to these proceedings. When one acts as an agent, the role is exactly that of an agent. The actions of the agent to which the agent is mandated to carry out will then bind the principal. The relationship that is there, if any, is between the respondent, the Funders and the agent. The fourth and fifth points *in limine* are also bound to fail.

[17] I now deal with the third point *in limine* which was raised as follows:

In terms of clause 26.5 of the Building Agreement:

"The contractor shall give notice to the principal agent within twenty (20) working days of becoming aware, or ought to reasonably to have become aware of expense and/or loss for which provision was not required in the contract sum failing such claim shall be forfeited."

[18] It is common cause that the accepted or agreed contract sum was R25 836 827-73, but the final contract amount as certified by the principal agent was R28 404 955-55. The submission by the applicant on this aspect is that the respondent is bound by what the principal agent certified as correct and even signed the final statement of account. On the other hand the respondent argues that the principal agent approved something that was outside his mandate and therefore the respondent cannot be held responsible for that. The reason why I deal with this point *in limine* last is because its discussion will automatically delve into the merits of what this court has to eventually decide, being whether the responded must be liquidated for inability to meet or pay its debt to the applicant.

[19] The principal agent of the respondent in the case at hand issued a final statement of account in which a final contract amount of R28 404 955-55 was accepted by the principal agent of the respondent, despite the fact that the initial contract amount was R25 735 762-27. Clause 26.5 does allow that during the performance of duties pertaining to the contract, there might be adjustments. Those adjustments to the original contract must be brought to the attention of the principal agent within 20 working days of becoming aware of such.

[20] It is common cause that the principal agent in the case at hand eventually issued the final statement of account, which I believe that he issued it because he was satisfied with the work done including the adjustments. The respondent submits that it is not unable to pay the debt, but needed details of the debt, as it differs from the original amount they agreed on.

[21] In my view that is what these proceedings will eventually turn to, being whether the principal agent acted according to the mandate that was given to him. These are application proceedings, which in their nature are decided from the papers and affidavits as filed without the benefit of oral evidence where issues can be interrogated. I'm in no way intending to go that route because I do believe that this matter can be decided on what has been presented before this court.

[22] The view of the court in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another (Namakwaland Diamond Fund Trust-Intervening)*[11] is that the applicant must establish its case on a balance of probabilities, and where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the *Plascon-Evans* rule, and the applicant would then fail, unless if the court is persuaded to hear oral evidence. In the case at hand I have already stated that it does not appear to be the route I intend taking.

[11] (18414/140) [2015] ZAWHC 71; 2015 (4) SA 449 (WCC) (28 May 2015).

[23] The court again in the *Orestisolve* case, *supra*, on the issue of factual disputes went on to say on paragraph 8 of the judgment that even if the applicant establishes its claim on a *prima facie* basis, a court will ordinarily refuse the application if the claim is *bona fide* disputed on reasonable grounds. In the case at hand the respondent was served with a notice in terms of the provisions of section 345(1)(a)(i) of the old Act 61 of 1973 for the payment of the amount of R2 669 192-33. The respondent instead of making a payment as demanded, instead requested through an electronic mail on 06 December 2022 to be provided with detailed information regarding the claim of the applicant so that it could fully understand what the claim was based on.

[24] The applicant responded through an electronic mail as well and replied by stating that the final contract amount payable to the applicant as certified by the principal agent amounted to the sum of R28 404 955-55, and as only R25 736 762-67 was paid, the balance that remained was R2 669 192-33.The amount remain unpaid to date hence the applicant brought this application on the basis that the respondent is unable to pay its debt that is owed to the applicant.

[25] In *Badernhorst v Northern Construction Enterprises (Pty) Ltd*[12], a principle was established in this case which came to be known as the *Badernhorst rule*, which established that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is *bona fide* disputed on reasonable grounds. The respondent in this case submits that it has reasonable grounds to dispute the claim based on the mandate given to the principal agent, because the principal agent approved the final statement of account in contravention of the Agreement.

[12] 1956 (2) SA 346 (T).

[26] It is not strange to raise a defence that the agent did not perform as mandated. An example is in the case of *David Trust v Aegis Insurance Co. Ltd*[13], where the agent deviated from the terms of his mandate of investing the funds of the plaintiffs in certain pre-approved institutions, but the agent instead invested the money in his own name, and he had no license to invest such money, resulting in the plaintiffs losing their investments because of theft by another person. The agent was held liable for the loss because of the breach of his mandate. The court on paragraph 20 of that judgment went on to say that:

"It is one of the naturalia of each such contract, as it is of contracts of mandate in general, that the mandatory is obliged, first, to perform his functions faithfully, honestly, and with care and diligence, and, secondly, to account to his principals for his actions"

[27] The applicant referred the court to the case of *Joob Joob Investments (Pty)Ltd v Stocks Mavundla Joint Venture*[14], where the Supreme Court of Appeal, on appeal upheld the reasoning by Gorven AJ that a final payment certificate is treated as a liquid document since it is issued by the employer's agent, with the consequence that the employer is in the same position it would have been in if it had itself signed the acknowledgement of debt in favour of the contactor. It was further confirmed that the certificate embodies an obligation on the part of the employer to pay the amount contained therein and gives rise to a new cause of action subject to the terms of the contract.

[28] The distinction in the proceedings at hand and the case of *Joob Joob*, *supra,* is that the proceedings at hand are for the winding-up of a company, which if the application for the winding-up the respondent is granted, the respondent will probably cease to exist. In a summary judgment the court proceedings that lead

[13] [2000] 2 All SA 297 (A), 2000 (3) SA 289 (SCA), ABSA Bank Ltd v Arif and Another 2014 (2) SA 466 (SCA), where bank was not held liable for the actions of the bank manager who concluded illegal agreements with clients in order to defraud the fiscus.
[14] 2009 (5) SA 1 (SCA).

to such an order being made against a respondent are proceedings that are just curtailed or shortened for lack of a sustainable defence to the claim that is liquid in form, but that does not affect the existence of an entity. The dire consequences of the winding-up of a company are evident from the fact that section 346(4A)(a) of Act 61 of 1973 requires that an application for the winding-up of a company must be served:

(i) *"to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and*

(ii) *to the employees themselves-*

(aa) *by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or*

(bb) *if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;*

(iii) *the South African Revenue Service, and*

(iv) *to the company, unless the application is made by the company, or court at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it".*

[29] The knowledge about the winding-up by the institutions that are mentioned above is very important because the winding-up of a company would likely affect them negatively. It is therefore important for a court that is called upon to wind up a company to be vigilant in terms of being certain that, winding-up is the only option remaining. A court that is called upon to make such a decision must be certain that indeed the company is unable to meet its obligations and therefore

should be wound-up so that its assets, if any can be liquidated to satisfy its debts as much as possible.

[30] In the case at hand the parties initially entered into an agreement that amounted to a relatively substantial amount of money of R25 735 762-27, which was paid by the respondent without any difficulty as the facts of the case point out. The amount that is the cause of this application is comparatively smaller to the amount that was paid without difficulty. The submission by the respondent is that it is not unable to pay the amount, but that the amount should be clearly accounted for. This court is unfortunately not tasked with that duty of determining the justification of the alleged amount of debt. In my view though, because of the adverse consequences that comes with winding-up of a company, it is not a process that I believe must be resorted to easily, and especially in this case because of some of the reasons that I have already explained.

[31] I am of the view that there are other means in which the amount can be recovered if that amount is indeed owed, in line with the *Badernhorst rule*. I am rather dissuaded not to act in a manner that will negatively impact on many lives if there are other means for recovery if justified. I am therefore inclined to accept that the procedure that was to be followed in terms of clause 26.5 of the Agreement might have been followed, hence the final statement of account was issued, but be that as it may that in my view does not prevent the employer or the respondent to know as to how the adjustments came about. There are no other creditors who came up to claim their dues against the respondent. That is also another reason why this court will not be quick to dismantle the respondent.

[32] In the result the following order is made:

(i) The application for the final winding-up of the respondent is dismissed,

(ii) The applicant is ordered to pay costs on party and party scale B.

J.T. NGOBENI

Judge of the High Court

Appearances

Attorney for the Applicant	: Mr. J. Moolman
Instructed by	: SLH Incorporated
Counsel for the Respondent	: Adv. P.E. Mmutle
Instructed by	: M & M Maiwashe Attorneys

Date of hearing : 31 July 2025

Date of judgment : 11 September 2025

Judgment transmitted electronically