

REPUBLIC OF SOUTH AFRICA



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DELETE WHICHEVER IS NOT APPLICABLE:

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

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

DATE: 04/10/2025 SIGNATURE:

A handwritten signature in blue ink, which appears to be "J. J. J.", is written over a black rectangular redaction box.

CASE NR: 2025-003963

In the matter between:

RUWACON (PTY) LTD

APPLICANT

and

LEAD AND PROJECTS ENGINEERING (PTY) LTD

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected 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 of the judgment is deemed to be 07 October 2025.

JUDGMENT

MARUMOAGAE AJ

1. The Applicant instituted an application for the winding-up of the Respondent. However, before the matter could be heard, the Respondent brought an application to file a further affidavit. On the date of the hearing, an order was made permitting the Respondent to file a further affidavit, with reasons to follow in due course. These are the reasons.
2. The Applicant and the Respondent are private companies incorporated in South Africa in terms of the company laws of this country. The Applicant approached this court in terms of winding-up provisions of the Companies Act 61 of 1973, which continue to apply despite this Act having been repealed.¹
3. According to the Applicant, the Respondent entered an acknowledgment of debt and undertook to pay an amount of R2,300,00.00 in four different payments of R575,000.00 on 19 August 2024. If the Respondent failed to pay any of these amounts on the due date, the total outstanding amount would become immediately due and payable.
4. The Applicant alleged that the Respondent failed to make payment as required by 8 November 2024, and the total outstanding balance became due and payable. A letter of demand was sent to the Respondent. This prompted the Respondent to make a partial payment of the outstanding amount. He further sought an indulgence to settle the balance in two separate payments in February and March 2025, respectively. The Applicant rejected the indulgence sought by the Respondent because this request demonstrated that the Respondent was unable to pay its debts.

¹ *Furniture Bargaining Council v AXZS Industries (Pty) Ltd Trading as Don Elly Enterprises* [2020] 1 All SA 391 (GJ); 2020 (2) SA 215 (GJ) para 32.

5. The Respondent contends that it concluded an agreement with a third party that delayed making payment in terms of the contract, which negatively impacted the Respondent. The Respondent denied being unable to pay its debts. The Respondent sought to file a further affidavit addressing a tender it allegedly made to the Applicant for payment of the full capital amount, interest owed, and liquidation costs, which the Applicant rejected. It was argued that there is money deposited into the Respondent's attorney's trust account for this purpose.
6. During the oral argument, it was argued on behalf of the Applicant that:
 - 6.1. it is not in the interest of justice to allow the Respondent to file its further affidavit because this affidavit is inadmissible;
 - 6.2. the Respondent failed to disclose its financial statements to the court and the Applicant;
 - 6.3. the tender sought to be made does not change the fact that the Respondent, on the papers already before the court, is both factually and commercially insolvent;
 - 6.4. the further affidavit seeks to delay the Respondent's inevitable liquidation, and does not take the matter further;
 - 6.5. the common cause facts demonstrate that the Respondent owes at least one other creditor a substantial amount of money, and other creditors can potentially bring liquidation proceedings against the Respondent, leading to the Respondent's tender to the Applicant being set aside as a voidable preference because it would not have been done in the ordinary course of business; and
 - 6.6. There is no confirmatory affidavit that the amount of the tender is currently deposited into the Respondent's attorneys' trust account.
7. On behalf of the Respondent, it was argued during oral argument that:

- 7.1. the facts sought to be placed before the court came to light after the Answering Affidavit had been filed;
- 7.2. the Respondent employs 1,152 employees and contractors, whose livelihoods may be placed in jeopardy by the Respondent's liquidation;
- 7.3. the fact that the Respondent was initially unable to pay the Applicant and has subsequently acquired money to do so constitutes special circumstances that justify the further affidavit being permitted; and
- 7.4. the further affidavit provides a holistic picture of the dispute, and to arrive at the truth, the court cannot shut its eyes to the facts that may lead to a just decision being made.

8. In *Standard Bank of South Africa Limited v Van Rensburg*, it was held that:

'[t]here are normally three sets of affidavits in motion proceedings, namely a founding affidavit, an answering affidavit, and a replying affidavit. A party who wishes to file any other affidavit may only do so with leave of the court'.²

9. Apart from the three usual affidavits, the parties in this matter have already also submitted a Fourth Affidavit and Supplementary Replying Affidavit, respectively. The Respondent wanted to submit a further affidavit and sought the court's indulgence to do so. In *69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd*, the court held that the relevant considerations in such an application are:

- (i) The reason why the evidence was not led timeously.*
- (ii) The degree of materiality of the evidence.*
- (iii) The possibility that it may have been shaped to "relieve the pinch of the Shoe".*
- (iv) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.*
- (v) The stage which the particular litigation has reached. ...*
- (vi) The "healing balm" of an appropriate order as to costs.*

² (61392/2020) [2024] ZAGPPHC 521 (5 June 2024) para 25.

- (vii) *The general need for finality in judicial proceedings.*
- (viii) *The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client'.³*

10. It was argued that the evidence placed in the further affidavit was not available at the time the Respondent's answering affidavit was commissioned. In other words, the Respondent's financial position improved since it delivered its answering affidavit. The information contained in this affidavit seeks to demonstrate that the Respondent is currently neither factually nor commercially insolvent. It is thus material to the defence that the Respondent wishes to raise.
11. It is not clear what prejudice, if any, the Applicant will suffer if the Respondent is permitted to file its further affidavit. This is because the Applicant can file a further affidavit of its own to respond directly to the allegations made in the Respondent's further affidavit. In fact, when the order permitting the Respondent to file its further affidavit was made, the Applicant was allowed to file its further affidavit, if it so desired. In my view, there is no prejudice that the Applicant will suffer.
12. However, the prejudice that the Respondent will suffer if it is not allowed to place facts before the court that were acquired after it had filed its answering affidavit is apparent. If these facts assist the Respondent to amplify its defence in this liquidation application, it will not be in the interest of justice to prevent the Respondent from having the opportunity to craft its defence in this Application properly.
13. The merits of the application have not yet been argued, and when the matter is heard, the court will benefit from the totality of the facts before it. That will be the appropriate time for the court to determine which evidence is admissible or which is not. The mere fact that a party is allowed to file a particular affidavit does not necessarily mean that what is contained in that affidavit is admissible.
14. The contents thereof remain untested allegations that the opposing party can contradict. I disagree with the Applicant's counsel that the main issue is

³ 2000 (4) SA 598 (C) at 617. The court relied on *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 626A - G and *Western Bank Ltd v Gunas and Another* 1981 (3) SA 91 (D) at 95C - 96E

admissibility and not prejudice. In my view, the test is prejudiced, and the issue of admissibility can be tested when the totality of the facts is evaluated.

15. In terms of Uniform Rule 6(5)(e), the court has discretion to permit the filing of further affidavits. In *Mkhwanazi v Arena Holdings (Pty) Ltd and Others*, the court accepted a view that:

*‘... it is also a question of fairness to both parties as to whether or not a further affidavit be allowed. There should be a proper and satisfactory explanation which negatives mala fides and culpable remissness as to why the facts and information had not been put before the court earlier. Of importance, the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs’.*⁴

16. In my view, fairness dictates that the Respondent should be allowed to place information it believes would assist its case in this litigation before the court, particularly information that materialised after its answering affidavit was filed and served. The Respondent tendered costs for the postponement of the matter on scale C.

17. The Applicant did not dispute the fact that the Respondent was able to secure finances that enabled it to make a tender to the Applicant after it had served and filed its Answering Affidavit. The door is not closed on the Applicant to adequately contradict the Respondent’s Further Affidavit with a Further Affidavit of its own.

18. Counsel for the Respondent referred the court to the case of *Harvey N.O. v Theron and Another*.⁵

18.1. In this case, an executrix of the deceased’s estate applied to sequester the estate of the attorney who was previously appointed as her agent in the administration of the deceased’s estate.

⁴ (065220/2023) [2024] ZAGPPHC 778 (5 August 2024) para 11.

⁵ (8539/2021) [2023] ZAWCHC 157 (29 June 2023).

- 18.2. The attorney made unauthorised cash withdrawals from the deceased estate's bank account. He later tendered a repayment of the amount withdrawn without authorization to the executrix, which was rejected.
- 18.3. The tender was rejected because other creditors wished to pursue the sequestration application. The attorney denied having other creditors.
- 18.4. After the filing of the three usual affidavits, the attorney made an application to be permitted to deliver a supplementary opposing affidavit. He denied being insolvent and having committed any act of insolvency.
- 18.5. The court held that a tender to pay does not constitute performance, and it is not capable of disposing of a sequestration application.⁶
- 18.6. Even though the attorney failed to convince the court why he omitted to include material information in his answering affidavit, the court found that the Applicant did not indicate any prejudice that would arise should the supplementary affidavit be admitted.⁷
19. If the Respondent was allowed to file its further affidavit in *Harvey N.O.*, even though he could not explain why the contents of this affidavit were omitted in his answering affidavit, why should the court in the current matter deny the Respondent the opportunity to place the information that materialised after it served its answering affidavit before the court? The Respondent provided an acceptable explanation for why this information could only be placed before the court through this further affidavit. To refuse the Respondent permission to file its further affidavit would be prejudicial.
20. *Harvey N.O.* demonstrates that even though the party that seeks permission to file a further affidavit must provide an adequate explanation and demonstrate special

⁶ Ibid para 44. The court relied on *Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd* 2019 (1) SA 267 (GJ) para 16, where it was held that '[a] tender to pay is a promise or an undertaking to pay and, accordingly, does not constitute actual payment. The applicant's tender, leaving aside the correctness of the amount tendered, accordingly, did not constitute payment'.

⁷ Ibid para 46.

circumstances that justify such an affidavit being filed, the courts should carefully evaluate the prejudice that is likely to be suffered by all the parties.

21. Where there is no prejudice that the other party would suffer, the court would be more likely to allow the affidavit to be filed. I am not convinced that the court has the discretion to refuse any litigant the opportunity to present relevant facts that materialized after their initial facts and evidence had already been presented to the court.
22. A competent argument was made on behalf of the Applicant that the Applicant could not accept the Respondent's tender because the transaction could potentially be set aside in the future as a voidable preference. I accept that creditors are not obliged to accept payment of their debts by debtors whose assets exceed their liabilities at the time when such offers are made because such transactions are vulnerable to being set aside as voidable transactions at a later stage.⁸
23. However, the issue is not whether the Applicant refused to accept payment or ought to have accepted the Respondent's tender and the reasons for its decision. The issue is whether, in the consideration of the Applicant's case, the Applicant made out a case for the Respondent's liquidation. If yes, whether the Respondent raised a competent defence, even on supplemented facts that are contained in its further affidavit.
24. It may well be that the Applicant, in its own further affidavit, can illustrate that the Respondent failed to raise a defence and that its tender can potentially be impeached should any other creditor successfully apply for the Respondent's liquidation.
25. This is an issue that the court hearing the main liquidation application, upon assessing all the facts and evidence, would be better suited to determine. There is nothing that was submitted on behalf of the Applicant that justifies the Respondent being prevented from filing its further affidavit. It is for these reasons that the order

⁸ *Harvey N.O. v Theron and Another* (8539/2021) [2023] ZAWCHC 157 (29 June 2023) para 32. See also *Salkow v Reeb: Winter Intervening* 1930 WLD 166.

of 1 September 2025 authorising the Respondent to file its further affidavit and the Applicant to do the same was granted.

26. In the premises, the following order is made:

- 26.1. the Respondent is authorised to file its further affidavit;
- 26.2. the Applicant is also authorised to file its further affidavit, if any, within fifteen (15) days of this order;
- 26.3. the Applicant is authorised to approach the Registrar of this court for the earliest available date on the Insolvency Court Roll for the hearing of the main liquidation application.
- 26.4. the Respondent is ordered to pay the costs of the postponement on 1 September 2025 on scale C.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Counsel for the Applicant : Adv LVR van Tonder

Instructed By : SmitSew Attorneys

Counsel for the Respondent : Adv Baxter SC

Instructed By : WJJ Badenhorst Inc

Date of Hearing : 1 September 2025

Date of Judgment : 07 October 2025