REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

22/02/19
Date

ML TWALA

CASE NO: 25483/2018

In the matter between:

INFORMED ACCOUNTING & BROKERAGE SERVICES (PTY) LTD (REGISTRATION NUMBER: 1999/016008/07) **APPLICANT**

AND

TAURUS HOLDINGS CC (REGISTRATION NUMBER: 2005/117846/23 **RESPONDENT**

JUDGMENT

TWALA J

[1] This is an opposed application wherein the applicant seeks an order that the respondent be placed under final winding up with the costs thereof to be costs in the winding up.

[2] It is common cause that in or about 2012 the applicant and the respondent concluded a verbal agreement whereby the applicant would provide accounting and professional services to the respondent on an ongoing basis. It is further not in dispute that the applicant performed in terms of the agreement in providing the accounting services and the respondent paid the applicant therefore. The applicant's attorneys addressed a letter of demand to the respondent on the 22nd of March 2018 demanding payment of the sum of R744 015 for outstanding invoices and to date that amount remained unpaid.

[3] Counsel for the applicant submitted that there is no dispute of fact raised in the papers by the respondent except to say that it has not been provided with itemised accounts. The respondent does not dispute its indebtedness to the applicant. From the papers, it is contended, there is no bona fide dispute raised by the respondent on reasonable grounds to the applicant's claim. The issue of the R500 000 which is said to be a refund from the South African Revenue Service (SARS) is money which is due and owing to the respondent by SARS and not by the applicant. However, so it is contended, there is no confirmatory affidavit from the present accountant of the respondent to the effect that there is R500 000 due to the applicant from SARS. Therefore, as the argument goes, this piece of evidence remains hearsay and should be discarded.

[4] It is further submitted by counsel for the applicant that the issue of prescription should be discarded for it has only been raised by the respondent in its heads of argument. It is contended further that the application for the winding up of the respondent was not served on its employees. However, no prejudice will be meted against the employees of the respondent since the applicant is now seeking a provisional winding up order which has a return date in terms of its draft order handed from the bar.

[5] Counsel for the respondent contended that the indebtedness is disputed. The applicant has failed on numerous requests to furnish the respondent with an itemised account. The quality of services provided by the applicant is questionable since there is an amount R500 000 due to the respondent from SARS which the applicant failed to collect. The respondent has a counter claim against the applicant which is worth more than the claim of the applicant.

[6] It was further submitted by counsel for the respondent that the applicant has failed to serve the application on the employees of the respondent. The applicant now seeks to amend its prayer to that of a provisional winding up without bringing a formal application to amend its notice of motion. It is patently clear, so the argument goes, that the applicant is using the heavy arm tactic of liquidation to force the respondent to pay when there is a dispute of the amount owing. Some of the invoices of the applicant, so it is contended, have become prescribed. It is contended further that nowhere in the founding affidavit has the applicant tender evidence that the winding up of the respondent will be to the advantage of the creditors.

[7] It is trite law that a Court may grant a winding up order if there is reason to believe that it will be to the advantage of creditors of the debtor if its estate is

wound up and placed in the hands of the Master of the High Court. The petitioner or applicant bears the onus to prove that there is a reason to believe that it is to the advantage of the creditors that the debtor be wound up.

[8] Further, it is trite law that when a petition is presented to the Court, the petitioner must furnish a copy of the petition to every registered trade union that, as far as the applicant or petitioner can reasonably ascertain, represents any of the employees of the debtor.

[9] Section 9 (4A) (a) of the Insolvency Act, Act 24 of 1936 provides as follows:

"When a petition is presented to the court, the petitioner must furnish a copy of the petition-

I. To every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

II. To the employees themselves-

(aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

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

III. To the South African Revenue Service; and

IV. To the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditor to dispense with it."

[10] In *Stratford and Others v Investec Bank Limited and Others [2014] ZACC 38* the Constitutional Court stated the following:

"Failure to furnish the employees with the petition may not be relied upon by the debtor for opposing sequestration when the question to be decided is whether sequestration is to the advantage of creditors. In EB Steam Company(Pty) Ltd v Eskom Holdings Soc Ltd [2013] ZASCA 167; 2014 (1) All SA 294 (SCA), the Supreme Court of Appeal stated that the purpose is not to provide a 'technical defence to the employer, invoked to avoid or postpone the evil hour when a winding-up or sequestration order is made.' I agree. There may be instances where a provisional order should be granted to avoid the concealing of assets or for other urgent reasons in circumstances where a delay would substantially prejudice the creditors. Thus, non-compliance will not always render the granting of an order fatal, but this should be only in exceptional circumstances."

[11] Further, the Court noted that:

"the fact that 'furnish' is used in section 9(4A) and the word 'serve' is used in section 11(2A) of the Insolvency Act indicates that the legislation envisaged a lower threshold for notifying the employees than service in respect of section 11(2A). I am of the view that 'furnish' requires that petitions 'must be made available in a manner reasonably likely to make them accessible to the employees".

[12] It is undesirable for a party to use the liquidation process in order to force the other party into submission and pay a debt when it had other options available to it to collect its debt. If a party choses to follow the liquidation process, the issue is not only whether it complies with the provisions of section 344 of the Companies Act in that there is a debt which is due and payable which is not less than R100 and the debtor is unable to pay. It is for

the applicant to establish that the winding up of the debtor will be to the advantage of the creditors.

[13] I agree with the respondent that the applicant has failed to discharge its onus that the winding up of the respondent will be to the advantage of the creditors. Nowhere in the founding papers does applicant address this issue. It is my respectful view therefore that the applicant has failed to comply with the provisions of the Companies Act and its application falls to be dismissed on this ground.

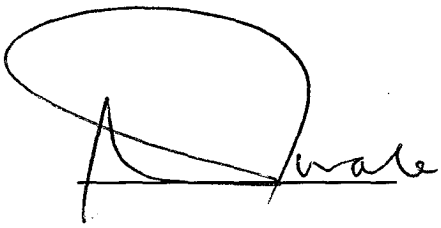
[14] The applicant, as previously employed by the respondent, must have known that there are 29 employees in the employ of the respondent, but failed to serve them with the application for the winding up. The applicant has failed to comply with the provisions of the Insolvency Act and has failed to establish or give any cogent reasons therefore. The applicant only amends its prayer to seek a provisional winding up order without giving reasons for the amendment with the hope that, if granted, it will then serve on the employees of the respondent. I am of the firm view that the applicant's failure to serve the winding up application on the employees in compliance with the Insolvency Act is fatal to its course. The ineluctable conclusion is that the applicant instituted the liquidation proceedings with the hope that the respondent will submit and pay the debt without opposing the matter.

[15] I find myself in agreement with the counsel for the respondent that the applicant abused the process of the Court in bringing this winding up application. The applicant was, in my view, forcing the respondent to pay the debt by bringing this winding up application instead of following the normal litigation route of issuing summons to collect its debt. I am persuaded by the

respondent that the applicant should be mulcted with punitive costs for its conduct in this matter.

[16] In the premises, I make the following order:

The application is dismissed with costs on the scale as between attorney and client.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **4th February 2019**

Date of Judgment: **22nd February 2019**

For the Applicants: **Adv. Y Alli**
Instructed by: **Wadee Attorneys**
Tel: 011 680 1075

For the Respondents: **Adv. C L Markram-Jooste**
Instructed by: **Leon Swanepoel Attorneys**
Tel: 011 864 8593