

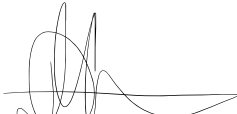
REPUBLIC OF SOUTH AFRICA



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

CASE NO: 9347/2020

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


.....
SIGNATURE

DATE 22 September 2021

In the matter between:

JL EXCAVATORS (PTY) LTD

Applicant

and

C ROCK MINING (PTY) LTD

Respondent

JUDGMENT

MAHON AJ

[1] In its notice of motion, the applicant sought a winding-up of the respondent, *alternatively*, judgment for payment of an amount of R394,052.37 together with interest at a rate of 10% *per annum a tempore morae*.

- [2] At the hearing of the matter, the applicant indicated that it would not be persisting with its prayer for a winding-up order and would only be seeking judgment as prayed for in the alternative.
- [3] The respondent argued, as a preliminary point, however, that it was not open to an applicant to seek judgment as an alternative to a winding-up order and that, for this reason, the application ought to be dismissed. The respondent was, however, unable to point me to any authority in support of these submissions and, understandably, did not press the issue.
- [4] I can see no difficulty in an applicant seeking judgment as an alternative to a winding-up, as long as the case for judgment is sustained on the papers and the respondent has had an opportunity to deal with the claim for such relief. Indeed, it seems to me that the court, when faced with a winding-up application, if it were not satisfied that the requirements for a winding up had been met but was nonetheless satisfied that the debt relied upon was indeed due, owing and payable, could nonetheless grant judgment in the applicant's favour if it considered it just to do so.
- [5] I find support for this conclusion in the wording of section 347(1) of the Companies Act 61 of 1973 (which remains of application by virtue of item 9, schedule 5 of the Companies Act 71 of 2008). The section provides that:
- "The Court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been*

mortgaged to an amount equal to or in excess of those assets or that the company has no assets” (my emphasis).

[6] I turn now to the merits of the application for payment.

[7] the applicant leased an excavator and two articulated dump trucks to the respondent for the period 15 March 2018 to 16 May 2018 in terms of an oral agreement. It complains that amounts owed by the respondent in terms of this agreement remain unpaid.

[8] The defence raised by the respondent is one of payment. But for such payment, the respondent accepts that an amount of R394,052.37 would otherwise be due and payable by the respondent to the applicant.

[9] The respondent contends that the aforesaid amount was paid on its behalf by a third party, Palaeo Mining (Pty) Ltd (“Palaeo”) out of funds of the respondent held by Palaeo on the respondent’s behalf. This was apparently done for practical reasons to expedite the payment to the respondent, rather than transferring the amount from Palaeo first and then making payments from the respondent's own accounts.

[10] In paragraph 8 of the answering affidavit, the respondent states as follows:

“The respondent settled this indebtedness by arranging for Palaeo Mining to make 3 (three) payments to the applicant, on the following dates and in the following amounts:

8.1 On 26 March 2018, an amount of R1,000,000;

8.2 On 2 May 2018, an amount of R250,000;

8.3 On 10 May 2018, an amount of R130,000."

- [11] At the time of the payments, however, Palaeo was also indebted to the applicant and the payments which were made were attributed by the applicant to the debt of Palaeo in reduction of its indebtedness to the applicant.
- [12] The respondent states that "*on the respondent's* [presumably intended to be a reference to the applicant's] *own version, the fact that these payments were to be allocated to the indebtedness of the respondent, was communicated to the applicant...*". However, the applicant's version is that this was communicated to it sometime after the payments were made and only once the applicant had followed up with the respondent in regard to the outstanding amounts.
- [13] It is not suggested by the respondent that, at the time that the payments were made, it was communicated to the applicant that such payments were being made by Palaeo on the respondent's behalf in reduction, not of the indebtedness of Palaeo, but in reduction of the indebtedness of the respondent.
- [14] On the basis of the aforesaid facts, the respondent contends that there is a *bona fide* and material dispute of fact which cannot be resolved on the papers and that I should accordingly dismiss the application.
- [15] It seems to me, however, that the dispute is not factual in nature as the underlying facts appear, largely, to be common cause. Even if it is accepted that Palaeo's subjective intention in making the payments was to do so, not on its own behalf but on behalf of the respondent, the real question is whether, in the light of Palaeo's silence, the applicant was entitled to attribute such payments

to Palaeo's debt rather than to the respondent's debt. This is a legal question and can be disposed of with reference to legal authorities on the point.

[16] In the absence of *delectus personae*, a debtor may validly perform through an agent,¹ and a third party may intervene and validly perform with or without the knowledge of the debtor and even against the debtor's will, provided the third party makes clear that it is performing in the name and on behalf of the debtor.²

[17] The proviso emphasised above is not without significance, for the creditor is entitled to reject performance by a third party if it is not made in the name and on behalf of the debtor.³

[18] As it is put by Pothier, *Obligations*, 111.1.1. (*Evans'* trans. at p. 330) -

"It is not essential to the validity of the payment that it be made by the debtor, or any person authorised by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will."

[19] The payment must accordingly have been made in the respondent's name and in its discharge, whatever the transactor's subjective intention may have been. From this it appears that the transactor's subjective intention must give way to the outward manifestation of what his intention may be.

¹ Voet 46 3 1.

² *Union Bank v Beyers* (1884) 3 SC 89 102; *Commissioner for Inland Revenue v Visser* [1959] 2 All SA 19, 1959 (1) SA 452 (A) 457–8; *Froman v Robertson* 1971 (1) SA 115 (A)

³ *Blake v Wickham and Hattingh* 1952 1 PH A14 (O)

[20] In the present matter, not only did Palaeo not communicate any intention to have made the payment on the respondent's behalf, it clearly indicated on each proof of payment that the payment was being made by Palaeo when it could, quite easily, have given some indication in the payment reference that it was to be attributed to the debt of the respondent.

[21] Thus, if one accepts that Palaeo's intention can only be deduced from the outward manifestation of its intention, then it seems that the applicant was justified in attributing the payments to the debt owed by Palaeo to the applicant.

[22] That being the case, the payments which were made by Palaeo cannot legally be concluded to have been made on the respondent's behalf. The defence of payment must accordingly fail.


[23] Although the notice of motion prays for interest at a rate of 10%, no submissions were advanced in support of this and the rate of interest was not dealt with in any of the affidavits before court. I therefore merely intend to grant interest *a tempore morae*.

[24] Judgment is accordingly granted against the respondent for:

[24.1] payment of the amount of R394,052.37;

[24.2] interest on the aforesaid amount *a tempore morae* until date of payment;

[24.3] the applicant's costs of the application.



D MAHON

Acting Judge of the High Court
Johannesburg

APPEARANCES:

For the applicant: Adv A P J Els

Instructed by: Albert Hibbert Attorneys

For the respondent: Adv C J C Nel

Instructed by: J J Badenhorst & Associated Attorneys Inc.

Date of hearing: 7 September 2021

Date of judgment: 22 September 2021