

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

CASE NO: 15169/2021

REPORTABLE: ~~YES~~ / NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED.
27.09.2021

In the matter between:

SUMENTHREN POOBALAN PILLAY

Applicant

and

MACSILLA HOLDINGS

(Registration No: 2012/145671/07)

First Respondent

McDONALD KUDZAI IMANI

(Identity No: [...])

Second Respondent

RUTENDO PRISCILLA IMANI (born DOKWANI)

(Identity No: [...])

Third Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] The applicant sought the winding up of the first respondent, Macsilla Holdings, (referred to herein as the ‘respondent’), in terms of sections 344(f) and 345(1)(c) of

the Companies Act, 61 of 1973, read together with item 9 of schedule 5 of the Companies Act, 71 of 2008.

[2] The applicant did not proceed with the sequestration applications against the second and third respondents given that insolvency proceedings may not be brought against multiple debtors under a single application.

[3] The applicant is Sumenthren Poobalan Pillay ('Pillay'), the deponent to the founding and replying affidavits. Pillay is an attorney practising under the name and style of SP Attorneys Incorporated, an incorporated private company conducting an attorneys' practice. Pillay is a Director of SP Attorneys Incorporated.

[4] The respondent did not dispute that the applicant was a creditor of the respondent in respect of a debt of R4 million, payment of which was due, owing and payable to the applicant. Demands for payment were not met, the respondent having sought an opportunity to make arrangements for such payment.

[5] The applicant held no security for his claim.

[6] At the outset, the respondent's counsel raised a point *in limine*, the outcome of which was envisaged as dispositive of the matter in its entirety.

[7] The point was that the underlying loan transaction, the applicant's cause of action, was unlawful in that the loan was implemented in a manner that contravened s 86 of the Legal Practice Act 28 of 2014 ('LPA') ('s 86'). This because the loan was funded allegedly by way of trust funds paid from SP Attorney's Incorporated's Trust account to the first respondent.

[8] The respondent contended that a transfer occurred from the applicant's trust account in the second respondent's presence on each occasion that Pillay advanced monies to the respondent's account. Furthermore, that the relevant trust account from which the funds were paid to the respondent was that of SP Attorneys Incorporated and not Pillay's personal bank account. The respondent argued that the allegations *prima facie* stood uncontroverted by the applicant.

[9] The respondent's argument was that in the event that the source of the funds was trust funds in contravention of s 86 as alleged, then the loan itself was void

pursuant to the maxim *ex turpi causa non oritur actio*. The respondent proffered an opportunity to the applicant to procure proof of the source of the funds in order to demonstrate that they were not trust funds.

[10] The respondent did not make the point in greater detail in the papers. The applicant denied that the funds transferred in terms of the loan agreement to the respondent were anything other than his personal funds paid from his trust account and declined the opportunity to source proof of the source of the funds.

[11] Section 86 deals with the opening and operating of trust accounts by attorneys referred to in s 84(1) of the LPA. Section 86 prohibits the opening of such accounts in circumstances other than those envisaged in s 86. The provision does not serve to prohibit an attorney transferring his personal funds from his trust account to another bank account as transpired herein. Nor does s 86 prohibit the investment of funds absent an underlying transaction in terms of Rule 55 of the LPA Rules.

[12] Nothing alleged by the respondent demonstrated that the funds loaned to the respondent were anything other than a transfer from Pillay's trust account to a potential creditor for the purposes of an outside transaction that was not prohibited under section 86.

[13] Accordingly, the respondent's point *in limine* did not hold merit and did not justify a referral to oral evidence on the point as sought by the respondent.

[14] In respect of the merits of the winding-up application against the respondent, the respondent argued that it was uncertain on the applicant's papers whether the true creditor under the loan was the applicant or SP Attorneys Incorporated.

[15] Thus, the respondent asserted that the identity of the true creditor on the applicant's founding papers was uncertain.

[16] However, the pleadings themselves did not demonstrate the alleged uncertainty. The applicant stated in the founding papers *inter alia* that:

16.1 He was the applicant in his personal capacity; and

16.2 He was the creditor in terms of the loan transaction.

[17] The respondent made common cause that the applicant in his personal capacity was the true creditor under the loan transaction. Furthermore, that the applicant was a creditor of Macsilla Holdings. The respondent admitted that the applicant and the respondent entered into an oral agreement pursuant to which the applicant would lend and advance funds to the respondent as subsequently occurred.

[18] In the circumstances, the pleadings did not reflect any debate or uncertainty as to the identity of the true creditor under the loan transaction. The pleadings demonstrated unequivocally that the applicant in his personal capacity was the true creditor of the respondent in terms of the loan transaction.

[19] Some attempt was made on the papers to allege that the respondent was solvent. The respondent bore a duty to adduce evidence¹ in respect of the respondent's alleged solvency.

[20] However, the documents provided by the respondent were unaudited and unreviewed management statements for the year ended 31 December 2020, unsigned and unconfirmed by the respondent's director and unaudited by the respondent's auditors ('statements').

[21] The statements reflected current liabilities as at 31 December 2020 of R25 503.00 and non-current liabilities, being a loan from the respondent's shareholder, of R981 513.00. The statements showed total assets of R1 435 106.00. Critically, the statements did not reflect the respondent's undisputed liability to the applicant of R4 000 000.00. In the event that the latter liability was added to those reflected in the statements, the respondent was self-evidently insolvent, both factually and commercially.

[22] Suffice it to state that the respondent did not meet its obligation² to adduce relevant admissible evidence of the respondent's solvency. No weight can be attributed to the statements for the reasons already stated.

¹ *Standard Bank of South Africa v R-Bay Logistics CC* 2013 (2) SA 295 (KZD).

[23] In the circumstances, no cogent argument was raised as to why this Court should not order the final winding-up of the respondent and I intend to make such an order accordingly.

[24] As regards the applications against the second and third respondents, the applicant requested that those be adjourned *sine die* with the Taxing Master to make the appropriate allocation in respect of the costs incurred by the respondent in dealing with those applications.

[25] By reason of the aforementioned, I grant the following order:

1. The first respondent is placed under final winding-up.
2. The costs of the winding-up application, including the costs of two counsel, are costs in the liquidation of the first respondent.
3. The applications against the second and third respondents are postponed sine die, the applicant to pay the wasted costs of the applications in respect of the second and third respondents.

A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

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 27 September 2021.

² *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited* 2014 (2) SA 518 (SCA); *Firststrand Bank v Lodhi 5 Properties Investment CC* 2013 (3) SA 212 (GNP) para 30.

COUNSEL FOR THE APPLICANT: Mr L Pillay SC & Mr R Kisten.

INSTRUCTED BY: SP Attorneys Incorporated.

COUNSEL FOR RESPONDENTS: Mr J G Smit.

INSTRUCTED BY: Mashabane & Associates Inc Attorneys.

DATE OF THE HEARING: 27 July 2021.

DATE OF JUDGMENT: 27 September 2021.