

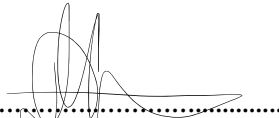
REPUBLIC OF SOUTH AFRICA



**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 1 December 2021

In the matter between:

JL EXCAVATORS (PTY) LTD

Applicant

(Respondent in the Application for Leave to Appeal)

and

C ROCK MINING (PTY) LTD

Respondent

(Applicant in the Application for Leave to Appeal)

JUDGMENT

MAHON AJ

[1] In this judgment, I shall refer to the parties as “*JLE*” and “*C Rock*”, respectively.

- [2] C Rock seeks leave to appeal against the judgment handed down by me on 22 September 2021.
- [3] The first basis upon which the judgment is impugned is the submission that I had insufficient regard for certain facts which appear from the papers which are alleged to have given rise to a triable issue or a factual dispute. On this basis, C Rock submits that I ought to have either dismissed the application as a result of these disputes or, at least, ought to have referred the matter to evidence or to trial.
- [4] The averments to which I have been referred are those which relate to conversations which are said to have taken place between certain individuals, during which JLE is said to have been informed that payments made to it by Paleo Mining (Pty) Ltd ("Paleo") were to be allocated to the debts owed by C Rock and not to the debt owed by Paleo.
- [5] However, these allegations cannot give rise to a material dispute of fact or a triable issue on the papers because, on either party's version, these conversations did not take place at the time of the payments but, indeed, at the earliest, some months thereafter. The application for leave to appeal does not attack the principal findings which I made in my judgment, namely, that:

"[15] 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..."

and

“[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.

[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.”

[6] If these findings are correct, then the subsequent conversations to which I have been referred can have no bearing on the matter. Thus, in the absence of any attack on these findings, there is no reasonable prospect of another court holding that the paragraphs referred to introduce any triable issue or material dispute of fact.

[7] Under the heading “COMPETING CLAIMS”, C Rock submits that I ought to have found that:

“4.1 The competing claims in the action in the North Gauteng under case number 2021/12437 would have the effect that the respective claims by the parties be heard in one action and that one finding would precipitate at the end of such a trial

4.2 *The Court ought to have had cognisance of the aspects of convenience, the calling of witnesses and costs. The Court ought to have found that there was no prejudice to the respondent that the action be heard in the North Gauteng High Court.”*

[8] I regret to say that there is no merit in these submissions.

[9] Firstly, the action in the North Gauteng under case number 2021/12437 was not before me and, secondly, no defence of *lis pendens* was raised on the papers. I was thus precluded from making any finding thereon.

See: Kerbel v Kerbel 1987 (1) SA 562 (W) at 566G

[10] There was also no application for consolidation of the two matters.

[11] I turn now to C Rock’s contention that it was not open to JLE to seek a money judgment as an alternative to a liquidation order as, so the argument goes, to do so constitutes an abuse of process.

[12] In argument, C Rock’s counsel referred me to a number of judgments which deal with the differences between liquidation proceedings and proceedings for the recovery of a debt.

See: Investec Bank LTD v Mutemeri and Another 2010 (1) SA 265 (GSJ); Collett v Priest 1931 AD 290; Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others 1976 (2) SA 856 (W)

[13] This distinction is, of course, well known and long recognised in our law, as these authorities demonstrate. However, none of the judgments to which I was referred dealt with the question under consideration, namely, whether or not it

is permissible to seek a judgment sounding in money as an alternative to a liquidation.

- [14] Suffice it to say that C Rock was unable to point me to any authority which suggests that such an approach is not competent. As pointed out in my judgment, the approach appears to be expressly permitted by 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).

- [15] I am unable to conceive of any reason why such an approach ought not to be permitted.
- [16] C Rock’s submission in its heads of argument that the entire founding affidavit attempts to make out a case *only* for the liquidation of the respondent and that the proceedings are therefore not for the recovery of a debt, is not sustainable.
- [17] In liquidation proceedings, the applicant is required to establish that it is a creditor of the respondent. Proof of this fact, without more, would entitle a litigant to a money judgment. If a respondent has a valid basis for disputing its indebtedness to the applicant then that defence would redound equally to its

benefit whether in answer to a liquidation application or a claim for payment of money.

[18] Moreover, it was at all times abundantly clear to C Rock that a money judgment was being sought in the alternative. Not only was it expressly informed of this fact in JLE's notice of motion, it also specifically prayed that the alternative claim for judgment be dismissed.

[19] Finally, C Rock contended that JLE was non-suited because its founding affidavit did not disclose a complete cause of action for the amount claimed. I do not believe that this submission is borne out by the contents of the founding affidavit but, even if it were correct, that does not assist C Rock.

[20] It is, of course, true, that an applicant must set out sufficient facts to sustain its cause of action in its founding affidavit but when faced with an incomplete cause of action, a respondent is entitled to raise this as a point of law on the applicant's papers in terms of Uniform Rule 6(5)(d)(iii). C Rock did not do so in this case. Instead, it delivered an answering affidavit wherein it stated pertinently that:

"7. The respondent admits that it was indebted to the applicant as in (sic) an amount of R394,052.37, being the amount set out in paragraph 7.15 of the founding affidavit by Diedericks...

...

17. AD PARAGRAPH 7

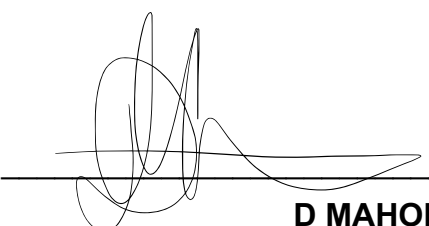
10.1 I refer in this regard to what is set out above, as a more accurate recordal of the salient background facts.

10.2 *While the facts set out in this paragraphs (sic) are in some instances not correct, I do not dispute that an amount of R394,052.37 was due and payable by the respondent to the applicant during the first part of 2018, before the payments to the applicant were effected as set out in paragraph 8 above."*

[21] Therefore, even if JLE's cause of action was incomplete, the existence of the indebtedness (but for the defence of payment) – and, thus, the elements of the cause of action giving rise to such indebtedness – were admitted by C Rock in the answering affidavit. These admissions in the answering affidavit cannot be ignored.

[22] For all of these reasons, I am of the view that there is no reasonable prospect of another court coming to a different conclusion.

[23] In the circumstances, the application for leave to appeal is dismissed with costs.

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D MAHON

Acting Judge of the High Court
Johannesburg

APPEARANCES:

For the applicant (respondent in the Application for Leave to Appeal):

Adv A P J Els

Instructed by: Albert Hibbert Attorneys

For the respondent (applicant in the Application for Leave to Appeal):

Adv C J C Nel

Instructed by: J J Badenhorst & Associated Attorneys Inc.

Date of hearing: 26 November 2021

Date of judgment: 1 December 2021