

REPUBLIC OF SOUTH AFRICA



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

Case Number: 9813/2021

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

.....3/7/2022.....

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In the matter between:

SICELO BENARD NGCONGO

First Respondent

IEC CONTRACTORS CC

Second Respondent

INDUSTRIAL ELECTRICAL CONTRACTORS

And,

VOLTEX (PTY) LIMITED

Respondent

In re:

VOLTEX (PTY) LIMITED

Applicant

And,

IEC CONTRACTORS CC

Respondent

INDUSTRIAL ELECTRICAL CONTRACTORS

JUDGMENT

FISHER J

Introduction

[1] The first and second applicants for rescission, Mr Ngcongo and IEC seek to rescind a final liquidation order obtained by the respondent, Voltex by default. Voltex contends that there is an amount of in excess of R 3.8 million owing to it by IEC on account for goods sold and delivered. The defence raised by applicants is one of payment of all sums claimed.

Procedural Background

[2] On 3 June 2021, Voltex obtained the final winding up order of IEC on the basis that IEC is unable to pay its debts, in terms of section 69(1)(a) and 69(1)(c) of the Close Corporations Act (the Act).¹

[3] On 14 June 2021, IEC Mr Ngcongo, as its sole registered member, launched an application in two parts. Under part A an urgent stay of execution of the winding up order was sought. This order was granted urgently on 25 June 2021 subject to arrangements regarding the filing of papers and the expeditious adjudication of the rescission application. Under part B, Mr Ngcongo and IEC seek the rescission of the winding up order before this court. The application is brought under the common law.

[4] Voltex opposes the application. It argues that the applicants have failed to establish any of the essential elements entailed in showing the necessary good cause for rescission: explanation for the default, that the application is bona fide, that IEC has a bona fide defence which prima facie carries some prospect of success.² This latter element entails IEC showing, prima facie, that it is factually and commercially solvent.

¹ Act 69 of 1984.

² See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764 — 7650; *De Wet and others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F — 1043A.

[5] I move to deal with the background to the liquidation with specific reference to IEC's treatment of each of these requirements for showing good cause for the rescission.

Historical Background

[6] The parties have traded with each other in a business relationship which has spanned more than 17 years. Voltex has supplied IEC with electrical components and related goods. The relationship has operated on the basis that the goods are ordered on credit in accordance with overarching credit agreements which have been renewed over the years. The last renewal was in 2019.

[7] It appears that the parties traded without serious dispute until the end of 2019. Voltex alleges that over the period December 2019 to November 2020, IEC purchased goods from the applicant to the total value of in excess of R3. 8 million for which it has not paid. It emerges from correspondence which I will deal with later that over this period IEC began to have cash-flow difficulties.

[8] On 11 January 2021 Voltex caused a demand in terms of section 69 of the Act to be delivered.

[9] This letter was responded to on 2 February 2021 by IEC through its attorney, Mr Erol Goss who delivered a reply in which IEC denied liability and indicated that the threatened application for liquidation would be opposed.

[10] Voltex, then delivered a summons for the debt. The action was opposed, notice of intention to oppose being filed on 02 March 2021. The action is instituted is against IEC as principle debtor and against sureties for the debt in guise of Mr and Mrs Vardopoulos who were the erstwhile registered members and Mr Ngcongco who became the registered member after the resignation of the Vardopouloses.

[11] The plea raised in the action on behalf of IEC is a mixture of allegations that payment has been made in respect of certain amounts, a denial that some goods were delivered; and allegations that credits were due to be passed in respect of certain

amounts, inter alia, for goods returned. In addition the Vardopouloses contend that they have been released from their suretyship obligation.

[12] The application for the winding up was issued on 26 February 2021 and served on IEC's registered and principal addresses on 18 March 2021.

[13] The application was never emailed to IEC's attorney by Voltex's attorney, Mr Orelowitz notwithstanding that Mr Goss had come on record in relation to the section 69 process and agreed to service of process by way of email. This omission is an extraordinary lapse of collegiality and has served no purpose other than the delay caused by this application.

[14] Voltex applied for summary judgment in the action proceedings and IEC and the sureties filed an affidavit resisting summary judgment which set out a defence in similar terms to that raised in this application. In essence it is pleaded that IEC had made payments to Voltex totalling approximately R 3.5 million during the period December 2019 to September 2020 which taken together with credits due totalling an amount of approximately R 1.3 million put IEC into a credit balance. Thus, the defence boils down to an accounting exercise.

Explanation for default

[15] The winding up application was delivered by the sheriff at the offices of IEC which is the principal place of business. Delivery was duly taken by a receptionist employed by IEC, Ms Mashabele. She accepted the papers through a gate at the premises. It is alleged that the documents were then locked in a cupboard by Ms Mashabele who then left that day for Polokwane on compassionate leave and forgot to mention the delivery of the application.

[16] Whilst Voltex says this is improbable, I have no reason to reject the version given under oath by Ms Mashabele and accordingly I accept that the failure to oppose the application was not deliberate.

Bona fide defence

[17] As I have said the defence is, in essence that, on an accounting exercise conducted on the running account, IEC does not owe any amount to Voltex. On the basis that the onus to show payment rests with the person alleging payment, IEC is obliged to show payment. To my mind this would require IEC going further than a mere statement that payment has been made. To show the necessary good cause it must put forward evidence which tends to establish that the payment was indeed made.

[18] I now turn to consider whether IEC has done enough to establish that payment of the indebtedness has been made.

[19] The assertion of payment must be looked at in the context of the dealings between the parties as to the indebtedness. It stands to reason that if the debt claimed had not been paid there would be an engagement between the parties as to such indebtedness. After all, the parties have had a business relationship which spans decades. If nearly R4 million were owed one would expect something to be said about it.

[20] Voltex says that indeed there has been substantial engagement as to this debt. It accuses IEC of being selective in its reference to the correspondence – focussing as it does on the letter of 2 February 2021 which was written in formal response to the section 69 letter and which essentially constitutes a bare denial of liability.

[21] Voltex chronicles the following correspondence as to the debt. On 9 September 2020, Mr Dimitri Vardopoulos addressed an email to Susan Wessels, a legal assistant in Voltex's head office legal department. The letter, on the face of it, seeks to explain the non-payment of amounts due. The introductory paragraph of the letter reads:

"I am writing, as you requested, to further explain IEC's situation. I had given Mr Green [Voltex's Managing Director] a payment plan and we had every Intention to pay Voltex the monies against our account, as proposed.

Unfortunately, for reasons including Covid19, IEC has not been paid the invoices we were relying on to make these payments.' (Emphasis added)

[22] Mr Vardopoulos then sets out, the difficulties IEC has had with several of its own debtors. Towards the end of the email Mr Vardopoulos states as follows:

"We have work to continue with, but without access to our account, carrying on with these projects will prove problematic. Should we not be able to resume working, repaying our account appears unfeasible. We Implore Mr Baig [Mr Ahmed Baig, a Director of Voltex and the Regional Manager of Voltex Gauteng] and Voltex management to lift the hold on our account, as soon as possible, please.

Susan, I would gladly speak directly to Mr Baig in this regard, if he would prefer, and grant me an appointment.' (Emphasis added)

[23] Thus as at September 2020 there is a written acknowledgment from Mr Vardopolous that there was money outstanding that IEC was not able to pay. This is never dealt with by IEC and is a gaping hole in its case.

[24] On 6 October 2020, after further fruitless interaction between the parties, Ms Wessels addressed an email to Mr Vardopoulos in which she made the following request:

"As per discussion with Ahmed, I refer. Please supply us with a payment proposal on the overdue amount of R3,894,106.44 with Atlas Group [a trading division of Voltex]. We need this proposal before any meeting can be scheduled please'.

Mr Vardopoulos response on 7 October 2020 was aggressive and not only for having put most of the email in uppercase. Mr Vardopoulos first laments the fact that he has been unable to meet with Mr Baig. He then makes the following statement:

"VOLTEX OWE ME CREDITS. IT SEEMS TO ME, YOU AND BAIG ARE NOT TAKING ME SERIOUSLY WITH THIS MATTER. He continues in the email listing various aspects on the account which he contends need to be rectified. In the penultimate paragraph he says: "PLEASE UNDERSTAND, I HAVE PROOF AN (sic) BACKING THESE ISSUES.".

[25] Yet, even in the founding papers in this application, none of that 'proof and backing' has surfaced. In any event, Mr Vardopoulos, in the last sentence gives an undertaking:

"I NEED TO SEE HIM [Mr Baig] IN PERSON. UNTIL THEN, I WILL CONTINUE TO MAKE THE PAYMENTS I AM CURRENTLY MAKING."

[26] Voltex alleges that the only amount that was paid towards this debt over the period September 2019 to November 2020, was an amount of R20 000,00 which was paid on 6 January 2021.

[27] Mr Vardopoulos wrote a further letter on 8 October 2020. Apparently somewhat chastened, he commences with an apology and then states as follows:

"I'd like to offer, if it might help, me signing personal surety against the outstanding IEC account. I am pledging to make every effort to reduce the amount as quickly as possible (as done previously). It will be my personal undertaking. (Emphasis added)

[28] Thus, as at late 2020, it was clear that Mr Vardopolous acknowledged that there was a substantial amount owing and offered to give a personal undertaking that he would reduce the indebtedness.

[29] The correspondence and negotiations of time for payment is all conducted by Mr Vardopolous – who seems heavily invested in the matter of payment. Mr Ngcongco is heard from only as a deponent to the litigation.

[30] The deponent to the affidavits filed on behalf of Voltex, Ms Stacey Duncan is the Legal General Manager of Voltex. She makes a supplementary affidavit to deal with Mr Ngcongco's protestations that there is nothing owing to Voltex and that all has been paid. She is assisted in this by Ms Lilashine Moonsamy, who is a senior debtors' administrator employed by Voltex. Ms Moonsamy's testimony reflects an accounting exercise undertaken by her. She is able to confirm that she has undertaken an accounting – which is attached to her affidavit which shows that whilst payments have been made on account over time, an amount of in excess of R 4 million (which probably impermissibly includes legal costs) remains outstanding. Importantly this

accounting exercise puts paid to the vague assertions of payment which Mr Ngcongo has been put to. Why a senior accounts employee would lie under oath as to such a substantial amount outstanding is not explained on behalf of IEC. Neither is an attempt made to give Mr Vardopolous' version as to what appear to be his desperate attempts to seek the indulgence of senior management of Voltex in order to put in place a payment plan in respect of admitted arrear amounts.

[31] The spread sheet accounting which is put forward by Ms Moonsamy appears cogent. It takes account of payments made on the account and shows that there is a balance due in accordance with the amount claimed by Voltex.

[32] Rather than properly to join issue with the accounting and the correspondence, IEC ostensibly led by Mr Ngcongo attempts to obfuscate as to the payments due. This is unfortunate.

[33] Section 58 of the Act stipulates that the members of a corporation shall within six months after the end of every financial year of the corporation cause annual financial statements in respect of that financial year to be produced. The section sets the minimum content of the annual financial statements, and stipulates that it must be approved and signed by or on behalf of members holding at least 51% of the member's interest.

[34] Mr Ngcongo's failure to present any annual financial statements, invites the inference that such financial statements would not support the contention that IEC is solvent.

[35] Reliance by courts on proper financial disclosure by corporation is a hallmark of the type of inquiry which is to be undertaken here. In *Storti v Nugent*³ the Court stated as follows:

'It is difficult to see how one can show a Court with any degree of confidence that a company is solvent, without the audited financial statements. Although I look at this stage only at the allegations in the founding affidavit, and treat them as being correct for the purposes of deciding whether the founding affidavit discloses a cause of action, I consider that a Court

³ 2001 (3) SA 783 (W).

would be very reluctant to accept the say-so of a director as to the financial position of a company In the absence of audited financial statements, particularly where there has been criticism since 1994 of the failure to produce same, and the solvency or insolvency of the company depends entirely on whether one takes into account the action for damages'.⁴

[36] Having not shown payment, IEC takes the route of attempting to explain with reference to internal accounting records that it is not factually insolvent and is able to meet its debts as they fall due. Again, this does not explain the correspondence by Mr Vardopolous seeking indulgence and to be allowed a 'payment plan'. These lacunas persist notwithstanding that the parties have adopted a somewhat free approach to the filing backwards and forwards of supplementary affidavits. I have allowed the affidavits as it is the interests of the applicants that they be given a full opportunity to make their case and thus that the respondent be allowed to counter the attempts at showing payment.

[37] The form taken in purported substantiation of the alleged solvency is reference to rudimentary documents which are alleged to be trial balances for the years ending 2020 and 2021. Why trial balances are relied on instead of financial statements is not explained. In any event reference to these trial balances reveals the following:

- According to the 2020 trial balance IEC had R474.70 in its bank account at the end of that financial year, and an additional R630 000.00 which is called "POS cash control".
- The balance of the debit value of IEC's business for that year was reflected in "shareholders/directors/members loans".
- According to the trial balance for the period ending 2021, the members loans had increased from approximately 12.4 million in 2020 to approximately R21.3 million.

[38] Voltex makes the point that the extent and increase in these members loans suggest that large sums are being taken out of IEC. Mr Ngcongco is reflected as having taken more money out of the entity on loans than reflected profits allow for. There are

⁴ Id at 808 H-J.

also no trade debtors reflected – which suggests that there is no cash-flow. The trial balances reflect that, on paper, IEC has a single asset, namely a loan account in terms of which Mr Ngcongo owes it approximately R22 million. The business is evidently cash starved, and there has been no return of monies to IEC by Mr Ngcongo, or even an undertaking to do so and this notwithstanding that the correspondence between the parties shows that IEC has not been able to pay its debts.

[39] The business is reflected as having generated a profit over these periods (more than R 7 million for the year ended 2020 and more than R 5 million for the year 2021). But there is no indication of where these profits were applied. Mr Ngcongo is reflected as having a loan which has grown by nearly nine million year on year. This suggests alarming movement in member's loans which is not explained.

[40] In its supplementary answering affidavit, Voltex sought to present the evidence of Mr Ivor Davkin, a chartered accountant, as an expert to give testimony as to the poor financial position which the trial balances show. Advocate Shepstone for IEC correctly makes the point that Mr Davkin is in no better position than this court to make these observations. I have thus not given regard to this evidence in my determination of this matter.

[41] I find that IEC has not established that it is solvent.

[42] Ms Duncan raises a troubling aspect as to the position of Mr Vardopoulos at IEC. She says that Mr Ngcongo is known to Voltex as a driver employed by IEC. From the correspondence referred there can be no doubt that Mr Vardopoulous has retained a central role in IEC. Mr Ngcongo explains that Mr Vardopoulos is a salaried employee of IEC and assists him as a 'technical advisor'. He says the driver referred to is his brother. This is not verified by way of an affidavit. Voltex alleges that this is a case of fronting and that Mr Ngcongo is not the real member. In Voltex's answering affidavit, it was explained that Mr and Mrs Vardopoulos were the members of IEC until 2016 when they resigned and Mr Ngcongo became the sole member. Mr Vardopolous appears in the correspondence above to exhibit an interest in the business which is more than that of salaried employee.

[43] The limitations of IEC's case obviously being apparent to IEC it has sought resort to a technical defence as to service. It is alleged that there was no proper service on the employees of IEC and that, on this basis, the application for liquidation should have succeeded.

I move now to deal with this defence.

No proper service on the employees

[44] IEC takes issue with the manner of service on the employees. The complaint is that the sheriff did not enter the property and look for a notice board. It is alleged that only gave one copy to Ms Mashabela through the gate.

[45] The sheriff, Mr Johan Lessing in an affidavit which was filed to explain more fully his method of service states the following:

'On 18 March 2021, I attended, to serve the Notice of Motion and Founding Affidavit on IEC Contractors CC (IEC) as well as the Employees of IEC, at IEC registered address, situated at 12 Van der Merwe Street, Brenthurst Brakpan and its principal place of business situated at 27 Boyd Street, Brenthurst, Brakpan.

IEC's registered address was locked and used only for parking. The offices of IEC are located at its principal place of business which is situated across the road from its registered address.

The premises did not have a notice board. Therefore, 'I gave one copy to Phindile and I also left a copy of the Application at the front gate.

I informed Mrs Phindile Mashabela that one copy of the Application was for the employees and the other copy was for IEC. I explained to Mrs Phindile Mashabela the nature of the contents and she accepted service of the Application on behalf (sic) of IEC as well as the employees.'

[46] It is obligatory for the applicant for a winding-up order to furnish a copy of the application papers to the persons mentioned in s 346(4A) of the previous Companies Act. When dealing with employees the section refers to three possible ways of doing this. The first is by placing the papers on a notice board at the premises where they

work and to which they have access. The second and third are by affixing a copy of the application papers to the front gate of the premises where the employees work, if access to the premises cannot be obtained, or to the front door of the premises from which the business was conducted at the time of the application.

[47] I am satisfied that the method of service on the employees adopted by the sheriff – i.e. the service of the application on an employee and the leaving of a copy of the application at the gate of the property with the express explanation to the employee served that the copy at the gate is for the employees' attention is satisfactory and reasonably likely to make them accessible to the employees. This is all that is required for compliance with the section.⁵

Conclusion

[48] IEC has not made out a case which goes any way to showing that payment has been made in millions of rands for the relevant period such that these payments have extinguished the indebtedness which was admitted in writing during late 2020.

[49] The rudimentary 'trial balances' which are attached to the founding affidavit in a purported attempt to show solvency emerge as no more than an attempt at obfuscation.

Order

[50] In the circumstances I make the following order:

The application for rescission is dismissed with costs which includes the costs of Part A of the application.

⁵ *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* (979/2012) [2013] ZASCA 167; [2014] 1 All SA 294 (SCA) (27 November 2013) at para 19.


FISHER J

HIGH COURT JUDGE
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 20 January 2022.

Judgment Delivered: March 2022

APPEARANCES:

For the Applicant : Adv RS Shepstone.

Instructed by : Errol Goss Attorneys.

For the Respondent : Adv A Bester SC.

Instructed by : Orelowitz Incorporated.