IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE	**SIGNATURE**

CASE NO: 31786/2013

DATE: 3/4/2014

IN THE MATTER BETWEEN:

VVM (PTY) LTD APPLICANT

AND

AUTOMAN AUTO TRADING (PTY) LTD RESPONDENT

JUDGMENT

KOLLAPEN J:

1. This is an application brought by the applicant in which it seeks the winding up of the respondent on the basis that it is unable to pay its debts as

contemplated in Section 344, read with Section 345 of the Companies Act 61 of 1973 (read together with the Companies Act 71 of 2008).

2. The respondent opposes the relief sought and beyond opposing the application on its merits, has also raised various points *in limine.*

3. **FACTS UNDERPINNING THE RELIEF SOUGHT**

3.1 During November 2012 an agreement was concluded in terms of which the applicant would send data messages in the form of short messages services ('SMS') to members of the public.

3.2 There is a dispute as to whether this agreement was concluded between the applicant and the respondent, as is contended for by the applicant, or as between the applicant and an entity called Automan Data Solutions (Pty) Ltd (as is contended for by the respondent).

3.3 The applicant rendered services in the form of SMS messages during November and December 2012 and in January 2013 totalling R741 000-46.

3.4 The applicant thereafter issued various invoices to the respondent and in the name of Automan Auto Trading and in response thereto there were various e-mail messages exchanged between the applicant and one Andre van Zyl.

3.5 The designation of Mr van Zyl on the e-mail messages was that of 'CEO – Automan Data Solutions (Pty) Ltd'. It appears that Mr van Zyl is also the CEO of the respondent. In none of the e-mails which were written in response to the invoices generated by the applicant does Mr van Zyl take the stance that the incorrect entity was invoiced, and while he is designated as the CEO of Automan Data Solutions (Pty) Ltd, he responded in those e-mails to invoices directed to the respondent.

3.6 On the 19th of March 2013 an electronic payment of R200 000-00 was made from the bank account of the respondent to the applicant in part-payment of the debt.

3.7 Following various unfulfilled promises of payment made by Mr van Zyl, the applicant, through its attorneys, issued a letter of demand to the respondent on the 19th of March 2013.

3.8 On the 22nd of March 2013, one Andre van Zyl (of Munnik Basson & Associates), presumably the same van Zyl referred to above, responded and stated that 'We act on behalf of Automan.' The reference to 'Automan' could only have been a reference to the respondent as the letter of the 19th of March 2013 was addressed to the respondent alone and to no other entity.

4. In opposing the application, the respondent has raised various defences, including:

4.1 **The incorrect citation of the applicant**:

The applicant is cited as VVM (Pty) Ltd whereas in fact it is 'Van De Venter Mojapelo (Pty) Ltd'. In my view this is not a matter of substance as it appears that the abbreviated from of the plaintiff was used. The resolution authorising the launch of these proceedings contains the full and proper names of the applicant. While the use of the abbreviated name of the applicant may be regarded as shoddy, I am satisfied that there can be no uncertainty as to whom it relates. To dismiss the application on that basis alone would be to elevate form above substance in the most unacceptable fashion.

4.2 **The relief is not competent as the respondent is commercially solvent**

4.3 **On the merits the debt on which the application is based is a debt due by Automan Data Solutions (Pty) Ltd and not by the respondent.**

4.4 The respondent also contends that it is a solvent company and is able to pay its debts. In support of this it annexed its annual financial statement for the year ended June 2012, which demonstrated that its assets exceeded its liabilities and in addition gave notice that it intended prior to the hearing of this application to pay the sum of R541 000-46 into its attorney's trust account. That amount has been paid into the respondent's attorney's trust account as per the affidavit of its attorney, Mr Henry Brooks, dated the 12th of March 2014.

ANALYSIS

5. WAS THE CORRECT PARTY CITED?

5.1 The stance that the contract for services was entered into between the applicant and Automan Data Solutions (Pty) Ltd must be viewed in the context of the evidence in its entirety.

5.2 On what is before me, I have little hesitation in concluding that the respondent was indeed the contracting party. All invoices were directed to it as was the letter of demand, and the payment of R200 000-00 was received from its banking account.

5.3 At no stage whatsoever did the respondent, who had numerous opportunities as well as the duty to do so, point out to the applicant that it was pursuing the wrong party. The fact that Mr van Zyl was designated as CEO of Automan Data Solutions (Pty) Ltd on the e-mails is not determinative of the issue when one has regard to the evidence in its totality and to which reference has already been made.

5.4 On the face of it, what has at first sight complicated the issue is that the directors and key personnel of the respondent are substantially the same as those of Automan Data Solutions (Pty) Ltd. If this is how the respondent has elected to conduct its business, then the applicant cannot be held to the consequences which may arise therefrom.

5.5 I am accordingly satisfied that the contract of services which generated the debt upon which this application is premised, was entered into between the applicant and the respondent, and that the respondent is liable for the payment thereof.

6. THE RELIEF SOUGHT IS NOT COMPETENT AS THE RESPONDENT IS COMMERCIALLY SOLVENT

6.1 At the time of the launching of this application, the applicant was justified in concluding that the applicant was unable to pay its debts as contemplated in Section 344 read with Section 345 of the Companies Act 61 of 1973. The various responses by the respondent to the applicant's demand for payment reflect a consistent thread that the respondent was not in possession of the necessary funds to make payment of the applicant's claim.

6.2 That situation however changed over time and at the date of the hearing of this application, the Court was satisfied, regard being had to the balance sheet of the respondent as well as the payment into trust of the claim of the applicant, that the respondent was indeed able to pay its debts.

6.3 From this I am compelled to conclude that the respondent is neither factually nor commercially insolvent.

6.4 On what is before me the relief sought in respect of the winding up of the respondent is accordingly not competent and should be refused, although my view is that the applicant was entitled to launch the application and seek the relief that it did. The commercial solvency of the respondent was established only in the days preceding the hearing when it paid the amount in dispute into the trust account of its attorneys. This has a bearing on the costs of the application, a matter I will return to later.

7. OTHER COMPETENT RELIEF

7.1 During argument the Court was urged by the applicant to make a money order in respect of the amount in dispute in the event that it refused the main relief sought. Counsel was requested to prepare heads of argument on this aspect and I am grateful to them for their assistance in this regard.

7.2 In **COLLETT v PRIEST 1931 AD 290** at 299, DE VILLIERS CJ explained the nature and purpose of sequestration proceedings as follows:

> *'The order placing a person's estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt before an order so serious in its consequences to the debtor is given the court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment against the debtor upon any such claim.'*

7.3 TRENGOVE AJ referred to this extract in **INVESTEC BANK LTD AND ANOTHER v MUTEMERI AND ANOTHER 2010 (1) SA 265 (GSJ)** at para 29 in considering the purpose and effect of an application for sequestration. At paragraph 30 he said:

> *'The purpose and effect of an application for sequestration are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally. An application for sequestration must have a liquidated claim against the respondent, not because the application is one for the enforcement of the claim, but merely to ensure that applications for sequestration are only brought by creditors with a sufficient interest in the sequestration. Once the sequestration order is granted, the enforcement of the sequestrating creditor's claim is governed by the same rules that apply to claims of all the other creditors in the estate. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim.'*

7.4 In **COMBUSTION TECHNOLOGY (PTY) LTD v TECHNOBURN (PTY) LTD 2003 (1 265 (C)** the Court in dealing with a similar request as the one made to this Court concluded as follows:

> *'Not only is the relief that is now being sought, namely payment (ignoring the frills and furbelows), substantially dissimilar to the relief sought in the notice of motion, but the respondent has not been apprised that such relief would be sought and furthermore has not had an adequate opportunity of considering and dealing with it in the answering affidavit. In the premises I have come to the conclusion that the applicant is not entitled to the order it now seeks under the prayer for other and/or alternative relief.'*

7.5 In my view and on what is before me, it cannot be said that the respondent was appraised that such relief would be sought and was given an adequate opportunity of considering and dealing with it in the answering affidavit.

7.6 I have accordingly come to the conclusion that the relief the applicant seeks by way of payment is not competent for the reasons given.

8. **COSTS**

In considering the matter of costs, it is clear that when proceedings were launched and until the payment into trust of the amount in dispute, the applicants were both entitled to, and justified in bringing these proceedings. The defences raised were raised for the first time in the answering affidavit even though the applicant had ample opportunity to raise some of them at an earlier stage. In addition the 'ability to pay' was only decisively established in the days preceding the hearing of the matter. Under those circumstances I am inclined to exercise the discretion I have with regard to costs in favour of the applicant.

9. **ORDER**

In the circumstances I make the following order:

i. The application is dismissed;
ii. The respondent is ordered to pay the costs of the application.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

31786/2013

HEARD ON: 17 MARCH 2014

FOR THE APPLICANTS: ADV K. D. RAMOLEFE

INSTRUCTED BY: VVM ATTORNEYS (ref: K BOTHA)

FOR THE RESPONDENT: ADV G. D. WICKINS

INSTRUCTED BY: BROOKS & BRAND INC (ref: A BROOKS/1743)