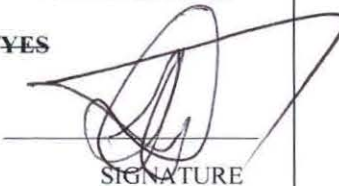




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case no:36816/2021

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED. NO/YES
<u>21/09/2022</u> DATE	
 SIGNATURE	

In the matter between:

VALERIO ENGINEERING CC

APPLICANT

And

DESIGNATECH (PTY) Ltd

RESPONDENT

(Reg nr:2018/602676/07)

JUDGMENT

MAKHOB A J

Introduction

1. The applicant initially sought an order seeking final winding-up of the respondent in terms of Section 344 read with Section 345 (1) (9) of the Companies Act, 61 of 1973. However, on the 3rd August 2022 counsel for the applicant when he addressed the court asked on behalf of the applicant a provisional winding-up order.
2. The applicant is Valerio Engineering CC. The applicant sold and delivered goods as well as services to the respondent.
3. The application is opposed by the respondent who filed an answering affidavit which was responded to by way of a replying affidavit.

Point in *limine*

4. At the commencement of the proceedings counsel for the respondent raised a point in *limine* which had not been raised in the heads of argument.
5. Counsel for the respondent submits that on the 28th July 2022, the applicant filed a bond of security which is dated and issued on the same day. However, the applicants notice of motion is dated 26 July 2021.
6. The respondent raised a point in *limine* founded on non-compliance with section 346(3) of the Companies Act, 1973 (as amended) and section 9(3) of the Insolvency Act (as amended). In a nutshell the respondents' contention is that the bond of security did not accompany the application

and or served on the respondent, but rather that at the time the application was signed and served, security had not been given and a certificate had not been obtained.

7. The counsel for the respondent relied on the decision *De Wet NO v Mandelie*¹ where the point in *limine* was raised on similar grounds and the court upheld the point in *limine* after considering a number of authorities².
8. On behalf of the applicant counsel asked the court to dismiss the point in *limine* and to follow the decision in *Standard Bank of South Africa v Bester NO and others*³.
9. In *Nedbank Ltd v Nzeba Tshibumbu Katompa and Mwamba Bernard Katompa* delivered on 12 May 2021, a similar point in *limine* was raised before Baqwa J. In paragraphs 9 and 10 of the judgment Baqwa J referred to numerous court decisions including Mars: The law of insolvency in South Africa tenth edition, Bertelsman et al, at paragraph 5.4 on page 127 and came to the conclusion that the point in *limine* is found wanting both in fact and law and he dismissed the application.
10. In *Nedbank case*⁴ the court said the following-: “*I am accordingly of the view that s 9(3)(b) of the Act does not require the security certificate to accompany the application either when it is filed with the Registrar or when it is served on the respondent and that the practice in the Court a quo, followed in the present case, does not conflict with the provisions of the subsection. The point taken by*

¹ 1983 (1) SA 544 (T)

² *Franks and Another v Hairdressers' Supplies (Pty) Ltd* 1932 CPD 92, *Rennies consolidated (Transavaal) (Pty) Ltd v Cooper* 1975 (1) SA 165 (T) *Mafeking Creamy Bpk v Van Jaarsveld* 1980 (2) SA 776 (NC) at 780 and the decision on by Bokako AJ in *Thusanyo Investments (Pty) Ltd v Maduo Supply and Projects CC* (39913/20) [2022] ZAGPHC 95 24 February 2022)

³ 1995 (3) SA 123 (A)

⁴ *Supra* at page 131

the appellant that the application was fatally defective for want of compliance with the subsection cannot therefore succeed.”

11. In my view this point *in limine* cannot succeed and it is dismissed.

Background

12. The applicant is a close corporation and Antonio Rodrigues is its sole member. The respondent is Designation (Pty) Ltd a duly incorporated company.

Issues

13. The applicant's case is that the respondent is indebted to the applicant in the amount of R440 458.27 for goods sold and delivered and services rendered which amount was due and payable November 2020. Applicant served its notice in terms of section 345 of the Companies Act on the respondent on 18 February 2021.

14. The respondent's defence to the relief sought is as follows: -

14.1 The respondent denies being indebted to the applicant and it is alleged that the applicant raised invoices for work that had not been agreed upon for which the applicant had not been entitled by the respondent.

14.2 Solvency of the respondent.

15. The applicant submits that respondent during the year 2020 admitted liability on the invoices.⁵ The applicant demonstrated this by referring to the messages sent to applicant by the respondent⁶.
16. The respondent contends further that the applicant failed to account for cash payment made by the respondent. The invoices are also in dispute between the parties. Moreover it is argued that the interest charged is incorrect.
17. The court is referred to the respondent's auditors letter confirming the respondent's solvency. In conclusion counsel for the respondent submits that the applicant has not provided evidence, other than the disputed indebtedness, to show that the respondent is actually or commercially insolvent.
18. In *Kali v Decotex (Pty) Ltd and Another*⁷ the court held that if the applicant establishes a *prima facie* case on affidavit then, a provisional order of winding up should be granted.
19. I am of the view the applicant in the founding affidavit and by way of demonstrating to this court by his counsel succeeded to show that the respondent is indeed indebted to the applicant in the amount of R 440 458.27.
20. Moreover the messages sent to the applicant also proves that the respondent was aware of the debts owing to the applicant⁸

⁵ Caselines 004-89

⁶ Vide caselines 004-90

⁷ 1988 (1) SA 943 (A) at 979

⁸ Vide Caselines 004-89

21. The respondents' letter by the auditor is very sketchy and does not show why it is said that the respondent is solvent.
22. The bank details provided on caselines⁹ does not prove the solvency of the respondent. The respondent must show unambiguously its healthy state of solvency¹⁰.
23. It is trite that in order to successfully defend an application for sequestration the respondents have to show on a balance of probability that their indebtedness to the applicant is disputed on *bona fide* and reasonable grounds. See Kalil v Decotex (Pty) Ltd¹¹
24. The respondent is deemed to be unable to pay its debts and is factually and commercially insolvent.

Order

25. In the result, I make the following order:

- 25.1 The respondent is placed under provisional liquidation in the hands of the master return date 14 November 2022 to the unopposed motion court roll.
- 25.2 The respondents and all other parties, are called upon to show cause why the respondent should not be placed under a final winding-up order.
- 25.3 The order be served upon the respondent's registered address.

⁹ Vide Caselines 003-50 and 003-52

¹⁰ Vide Caselines answering affidavit, annexures "DG- 9.1.2, pg 003-39 to 003- 50

¹¹ Rosenbach and Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597 G

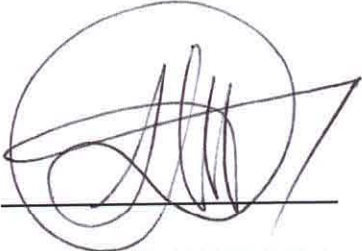
25.4 This order be served upon the Master of the High Court and the South Africa Revenue Services by way of filling notice, by hand;

25.5 The Sheriff serving this order upon the respondent's is to enquire if the respondent's have any employees of the respondent.

25.6 This order is to be published as follows:

- a) By publication in the Citizen Newspaper;
- b) By publication in the Government Gazette.

26. Costs to be costs in the liquidation.

A handwritten signature in black ink, consisting of a large, stylized 'M' and 'A' followed by a series of vertical strokes, all contained within a circular loop. The signature is written over a horizontal line.

D MAKHOB

**JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the applicant: Advocate Welgemoed

Instructed by: Strauss Daily Attorneys

For the respondent: Advocate J Scallan

Instructed by: Strydom M and Associates

Date heard: 03 August 2022

Date of Judgment: 21 September 2022