



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No:40/2024

In the matter between:

VULINDLELA JACOBS SUMMIT (PTY) LTD

First Applicant

SUMMIT CRANE HIRE (PTY) LTD (IN LIQUIDATION)

Second Applicant

and

ALGERINA CORREIA N.O.

First Respondent

ALBERT TAPPENDEN N.O.

Second

Respondent

(in their capacities as co-curators *bonis* and
ad personam to Jose

JOSHKIA (PTY) LTD

Third Respondent

SHORNA LE ROUX-MARX N.O.

Fourth Respondent

ELLIOT NAMASWI MOGALE N.O.

Fifth Respondent

Coram: NUKU J
Heard on: 15 November 2024
Delivered on: 13 January 2025

JUDGMENT

NUKU, J

[1] This is an application to set aside a final order of liquidation granted against the second applicant on 2 April 2024, as well as a provisional order of liquidation granted on 12 February 2024. The orders sought to be set aside were granted at the instance of the first to third respondents who were applicants in the liquidation proceedings.

[2] The application is brought by first applicant in terms of s354 (1) of the Companies Act 61 of 1973 (**Companies Act 1973**) in its capacity as a creditor and shareholder of the second applicant. In the alternative, the application is brought by the second applicant in terms of s149 (2) of the Insolvency Act, 24 of 1936 (**Insolvency Act**) read with s339 of the Companies Act 1973, alternatively in terms of the common law.

[3] The first applicant, Vulindlela Jacobs Summit Proprietary Limited, is a private company duly registered in terms of the laws of the Republic of South Africa with its registered address at 5 Ennisdale Drive, Durban North- KwaZulu-Natal. It is a creditor as well as majority shareholder of the second applicant, Summit Crane Hire Proprietary Limited (in liquidation). The first applicant was not a party to the liquidation proceedings.

[4] The second applicant, Summit Crane Hire Proprietary Limited (in liquidation) is a private company registered in terms of the laws of the Republic of South Africa with its registered address at Mazars House, Railto Road, Grand Moorings Precinct, Century City, Western Cape. It was placed in provisional liquidation by an order of this court

granted on 12 February 2024 and in final liquidation by an order of this court dated 2 April 2024.

[5] The first respondent, Ms Algerina Correia, is cited in her official capacity as the curator ad personam as well as a co-curator *bonis* with the second respondent to the estate of Mr Jose Roque Gonsalves Da Silva (**Mr Da Silva**). The second respondent, Mr Albert Tappenden, is cited in his official capacity as the co-curator *bonis*, with the first respondent, to the estate of Mr Da Silva. The third respondent, Joshkia Proprietary Limited is a private company duly registered in terms of the laws of the Republic of South Africa with its registered address at 10 Akasia Street, Panorama, Cape Town, Western Cape. The third respondent holds ten percent of the shares in the second applicant. The first to third respondents who were applicants in the liquidation proceedings are the only respondents opposing this application and are collectively referred to as the respondents in this judgment.

[6] The fourth and fifth respondents, Shona Le Roux-Marx and Elliot Namiswi, respectively are cited in their capacities as joint provisional liquidators of the second applicant. They do not oppose this application.

[7] This application appears to be driven by Mr Wessel Johannes Jacobs (**Mr Jacobs**) who deposed to both the founding as well as the replying affidavits. He is the director of the first applicant, a company that was established for the purposes of acquiring a seventy per cent shareholding in the second applicant. The records kept by the Company and Intellectual Property Commission (**CIPC**) reflect that Mr Jacobs was appointed as a director of the second applicant on 1 June 2021 and resigned on 1 August 2023. Upon his resignation, he was replaced by Mr Mahomed Farooq Dawood Vawda (**Mr Vawda**) who was appointed on 1 August 2023. Prior to the appointment of Mr Jacobs as a director of the second applicant the following person had been directors of the second applicant, namely (a) Mr Micheal Norman Grant who was appointed on 24 June 2013, (b) Mr Dumisani Blessing Mnganga who was appointed on 31 May 2016, (c)

Mr Clint Correia (**Mr Correia**) who was appointed on 1 December 2016 and (d) Ms Colleen Rabie who was appointed on 1 December 2016.

[8] Prior to his resignation as a director of the second applicant, Mr Corriea had been involved in the running of the day-to-day business of the second applicant from its inception, having been, at different times, its Financial Manager and Managing Director. Mr Corriea is the director of the third respondent.

[9] The second applicant's business included providing mobile cranes, trained operators and related vehicles and rigging services to clients on an ad hoc basis and on short to medium term contracts. At the height of its business, it boasted a fleet of not less than 20 mobile cranes as well as a fleet of trucks, bakkies and forklifts which enabled it to provide a holistic service to its clients.

[10] The lockdowns that were imposed during 2020 in response to the Covid 19 pandemic had a devastating effect on the business of the second applicant. As a result, the second applicant had to wind down its business, retrench its employees and sell its physical assets.

[11] On 22 July 2022, a letter of demand dated 30 June 2022 was served at the second applicant's registered address. The letter of demand referred to loans made by Mr Da Silva to the second applicant between 2011 and 2014 in respect of which an amount of R2 000 000.00 was alleged to be outstanding. The letter concluded by demanding, in terms of s345 of the Companies Act 1973 of the payment of the sum of R2 000 000.00 together with interest thereon at the rate of R20 000.00 per month within 21 (Twenty-One) calendar days from the date of delivery of the aforesaid letter.

[12] The second applicant's attorneys of record responded by way of a letter dated 12 August 2022 disputing the veracity of Mr Da Silva's claim. They also denied that the second applicant was either commercially or factually insolvent. Reference was made to Mr Da Silva's failure to provide the second applicant with proof of the loan agreement as

well as proof of payment of the amount of R2 000 000.00. The letter further recorded that *“After the change of management in our client, the veracity of your client’s claim was accepted as being correct and our client incorrectly continued with the monthly payments to your client without further investigation; and after proper consideration of the financial records our client is constrained to record that your client’s alleged claim has no legal foundation and a high probability exists that the claim was included irregularly in the financial statements of our client.”*

[13] The application for the liquidation of the second applicant was issued on 8 January 2024 and served at the second applicant’s registered office on the same date. The provisional winding up order was granted on 12 February 2024 and same was served at the second applicant’s registered address on 29 February 2024 whereafter a final liquidation order was granted on 2 April 2024.

[14] The first applicant’s case in bringing the application is that the liquidation orders should never have been granted because:

- 14.1 the letter of demand in terms of s345 (1) (a) of the Companies Act 1793 (**s345 letter**) was not authorised in that Mr Da Silva, who was declared as incapable of managing his affairs on 22 July 2022, could not have authorised the s345 letter which is dated 30 June 2022;
- 14.2 the s345 letter was stale by the time when the liquidation application was brought because a period of 17 (Seventeen) months had elapsed after its service on the second applicant;
- 14.3 the first and second respondents had no locus standi to bring the liquidation application; and
- 14.4 the liquidation application, as well as the provisional liquidation order, were not properly served.

[15] The other ground upon which both the first and second applicants brought the application is that in addition to them being unaware of the liquidation proceedings, the claims of the respondents were bona fide disputed by the second respondent.

[16] In support of its claim that the s345 letter was not authorised by Mr Da Silva, the first applicant first highlighted the fact that the respondents, in bringing the liquidation application, relied exclusively on the s345 letter. The first applicant then referred to the fact that Mr Da Silva was declared to be of unsound mind on 22 July 2022, this being the date when the s345 letter was served on the second applicant. Mr Jacobs then surmises that Mr Da Silva could not have authorised the s345 letter which is dated 30 June 2021 because his condition at that stage must have been such that he was unable to do so for the reason that he was ultimately declared to be of unsound mind.

[17] In further substantiation of the claim that the s345 letter was not authorised by Mr Da Silva, the deponent to the founding affidavit went on to state that “To the extent, however, that the relevant attorneys, CK Attorneys, stated that in paragraph 1 of the section 345 (1) (a) letter that they act on behalf of Mr Da Silva, this was clearly impossible. Mr Da Silva was clearly not in a position to furnish them with any instructions to draft the section 345 (1) (a) letter, or to serve it on the Second Applicant on the very day that he was declared to be of unsound mind.

[18] The allegations that the s345 letter was not authorised was denied in general terms with the deponent to the answering affidavit stating that *‘At the time of the section 345 notice was sent, the attorney of record for the first and second respondents acted upon the instructions of the first respondent, who held a General Power of Attorney on behalf of Mr Da Silva’.*

[19] The fact that the s345 letter was not authorised by Mr Da Silva, however, appears from the founding affidavit in the liquidation application wherein Mr Correia, in paragraph 33 thereof states *“No response was received to the letter of May 2022 and*

on 30 June 2022 I instructed CK Attorneys to have the letter in terms of section 345 of the Companies Act 61 of 1973 delivered to the registered address of the Respondent. A copy of the letter is attached hereto marked as "FA21". A copy of the return of service evidencing service thereof is attached hereto as "FA22".

[20] The respondents' denial that the s345 letter was not authorised by Mr Da Silva is at odds with what was stated in the founding affidavit in support of the liquidation application, to the extent that Mr Correia suggests that he is the one who authorised the s345 letter. If indeed it is so that the s345 letter was not authorised by Mr Da Silva but by Mr Correia that is something that may have implications for the liquidation proceedings that were instituted with reliance solely on an unauthorised statutory notice.

[21] The fact that the s345 letter which is foundational to the liquidation application may have been unauthorised may well present a valid defence to the liquidation application. In addition, it is common cause that the liquidation application as well as the provisional liquidation did not come to the attention of the first applicant until Mr Jacobs received a call from the fourth respondent on 20 May 2024. On these facts, I am persuaded that the application for rescission should succeed. Costs, in my view, should stand over for determination in the main liquidation application. This is because these are interlocutory proceedings in respect of which no final finding is made as that is for the court seized with the main application. It is that court, in my view, that is better placed to determine the issue of costs.

[22] In light of this conclusion I deem it unnecessary to deal with the other grounds relied upon by the applicants as they would have no bearing on the outcome. There was also an application that the respondents had brought, in terms of Rule 6 (15) of the Uniform Rules of Court, to strike out some averments in the founding affidavit, an aspect that did not get any mention during the hearing. It appears, however, that the applicants did not persist with the averments that were sought to be struck out and for that reason I make no determination in that regard.

[23] In the result I make the following order:

23.1 The provisional liquidation order under the above case number, granted on 12 February 2024, and the final liquidation order under the above case number, dated 2 April 2024, are set aside at the instance of the first applicant in terms of section 354 (1) of the Companies Act, 61 of 1973.

23.2 The costs are to stand over for determination at the conclusion of the main application.

L.G. Nuku
Judge of the High Court

APPEARANCES

For applicants: R B Engela
Instructed by: VanderSpuy Cape Town Inc, Cape Town

For first to third respondents: P Gabriel
Instructed by: Van Zyl Kruger Inc Attorneys, Cape Town

For fourth and fifth respondents: No appearance