

SOUTH AFRICA / JUDGMENT

Ameropa Commodities (Pty) Ltd v Salvage and Stockfeed Parcels CC (7882/2016)

[2017] ZAKZDHC 23 (15 June 2017)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

Madondo DJP

CASE / FILE NUMBER

7882/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, DURBAN

Case

no: 7882/2016

In

the matter between:

AMEROPA
COMMODITIES (PTY)
LTD APPLICANT
versus
SALVAGE
AND STOCKFEED PARCELS
CC RESPONDENT

JUDGMENT

MADONDO DJP:

Introduction

- [1] The applicant seeks an order provisionally winding up the respondent on the ground that it is unable to pay its debts to the applicant, as envisaged in sections 66(1) and 69(1)(c) of the Close Corporation Act 69 of 1984, read with section 344(f) of the Companies Act 61 of 1973 (the 1973 Companies Act), together with section 9 of Schedule 5 of the Companies Act 71 of

2008 (the 2008 Companies Act). On 8 July 2016 the sole member of the respondent, George Charalambus, signed a certificate of balance in terms of which he admitted the respondent's indebtedness to the applicant and confirmed that the amount of R26 405 500.99 contained therein was an outstanding balance, which was due and payable on that account by the respondent to the applicant, as at 31 May 2016, for the wheat the applicant sold and delivered to the respondent.

- [2] The respondent opposes the liquidation application on the basis that it is not indebted to the applicant in any amount claimed. While the respondent admits signing the certificate of balance in question it avers that it signed such certificate of balance in error, believing that it was correct. As a counter application to the liquidation application, the respondent seeks a stay of the proceedings pending the finalisation of the dispute resolution procedures by way of arbitration.

Parties

- [3] The applicant is Ameropa Commodities (Pty) Ltd, a private company with limited liability, duly incorporated in terms of the laws of the Republic of South Africa, with its principal place of business at Unit 4, Rydal Vale Crescent, La Lucia, Durban. The applicant is an international company based in Switzerland and primarily a supplier of wheat maize.
- [4] The respondent is Salvage and Stockfeed Parcels CC, Close Corporation duly incorporated in terms of the laws of the Republic of South Africa, with its registered office at Unit 1, Broadmill Park, 6 Mountview Close, Broadlands. The respondent sells and supplies its wheat to its associate companies, namely Prograin (Pty) Ltd (Prograin) which are millers that mill the wheat and pre-pack the finished product, namely flour, for sale and distributes it to their various customers.

Factual

Background

- [5] Most of the facts in this matter are common cause with an exception of a few facts and that will become more apparent later in the judgment. During the period between 5 October 2015 and 3 February 2016 the parties entered into three agreements of sale in terms of which the applicant sold wheat to the respondent on credit in terms of a running account payable sixty days after invoice. The purchases were made on a running account which had commenced in 2014.
- [6] The wheat sold in terms of such sale agreements was delivered to silos at a mill (storage facility) owned and operated by a company related to the respondent, Prograin. The respondent then on-sold all wheat purchased from the applicant to Prograin: (George Charalambus is the sole member of the respondent as well as the sole director and principal shareholder of Prograin).

[7] All risk in respect of damage or loss to the wheat transferred to the respondent on delivery to the storage facility, while ownership and title in and to the goods remained with the applicant until payment was made.

[8] The wheat was held under the custody of Drum Commodities Limited (Drum) in terms of a collateral management agreement (the CMA)

entered into between the applicant and Drum. Drum is a company duly incorporated under the laws of England and Wales and having its registered office at Comewell House, North Street, Horsham, West Sussex, RH12 1 Rd, England and place of business at 18 Vallis Way, Frome, Somerset BA 11 3BJ, England.

[9] The applicant appointed Drum on 26 June 2014 as a collateral manager because the respondent was ordering more stock than its credit limit would allow. The CMA allows for wheat to be taken to the mill and stored on-site, but only released to the respondent when its credit limit allows. According to the applicant the invoices were only issued once release was authorised, not when wheat was ordered. Drum would not release or allow the release of any goods from the storage facilities unless it had received written instruction from the applicant, stating the person or parts to whom the goods should be released and the date and the manner of such release.

[10] Payment in respect of the wheat by the respondent was due within sixty days of the respondent receiving an invoice from the applicant, and interest would accrue on any overdue amounts at a rate of the Standard Bank's prime overdraft rate plus two percent per annum.

[11] Between 5 October 2015 and 30 April 2016 the applicant duly released portions of the wheat sold in terms of the sale agreements and held under the CMA on the applicant's instruction, and invoiced the respondent. The respondent was invoiced for the wheat released to it. This was done in this fashion in order to ensure that the respondent's outstanding balance remained within its credit limit.

[12] At the end of each month the respondent received a statement from the applicant, showing each invoice the date of issue, the amount and the due date, the quantity of wheat sold, the price and the agreement reference number. Although the respondent made various payments towards some of the invoices issued, the last payment the applicant received from the respondent was made on 8 April 2016. However, according to the respondent all the invoiced amounts have been paid in full.

[13] The amount invoiced for the quantity of wheat released as at 31 May 2016 was R26 405 500.99. On 8 July 2016 the respondent,

through its sole member, duly acknowledged its liability and confirmed that the balance then owed for the wheat, sold and delivered by the applicant to the respondent, was due and payable by the respondent to the applicant by signing a certificate of balance annexure “NH5” to the applicant’s founding affidavit. As per the terms of payment, the balanced owed from the wheat sold became due and payable on 31 July 2016, being sixty days from 31 May 2016.

[14] On 5 July 2016 George Charalambus, the sole member of the respondent, replied to an email from Janet Chattiar, one of the applicant’s

debtors clerks, requesting payment of the admitted balance, stating that the respondent was responsible for the payment of the account. He went on to state that the respondent would make payment on receipt of funds to be allocated to it by Prograin. The reply by the respondent is annexure “NH6” to the applicant’s founding affidavit. He also stated that the company would also use the money, it expected to receive from the then pending BEE pay-out of sixty percent shares, to liquidate all this account.

[15] Subsequently, the applicant discovered that the quantity of 4287.64 metric tons of wheat to the value of R17 862 228.85, which the applicant had sold to the respondent but not yet released it to the respondent, had been misappropriated or disposed of. Such wheat had according to the applicant been released by either the respondent or Drum or Prograin without its instruction for such release. This was over and above the wheat the applicant invoiced and released. The applicant has since instituted action proceedings for the recovery of such wheat against Prograin. In any event, according to the applicant, at that stage all the risk in and to all the wheat had already passed on to the respondent.

[16] Several meetings were held between the applicant’s representatives and the respondent during July and August 2016 in

order to discuss payment of the admitted balance and the provision of security by the respondent for the debt. During such discussions

between the parties, the respondent provided its draft financial statements and management accounts to the applicant allegedly on a without prejudice basis.

[17] In July 2016 the parties orally agreed on a payment plan which was later to be reduced to writing and signed. In the agreement the respondent undertook to pay the appellant the amount of R26 714 740.99 which was then owing as at 30 June 2016, as

follows:

- (a) the sum of R22 000 000 on 17 August 2016;
- (b) the collateral management charges for July 2016 on the date of signature of the agreement.
- (c) twenty three monthly instalments of R236 348.32 commencing on 1 September 2016, and
- (d) the outstanding balance remaining as at 1 August 2016, on or before 1 August 2018.

- [18] The applicant's attorneys of record drafted a written agreement confirming these terms, for signature by the respondent. When the applicant requested the respondent for signature of the payment plan and security to be forwarded by the related companies, in an email dated 25 July 2016 ("NH20") the respondent's attorneys of record stated that the applicant's request was being attended to but they were still waiting for the respondent's annual financial statements and reports from the respondent's auditors. The respondent never disputed the debt and its quantum.
- [19] The respondent admits signing the certificate of balance on 8 July 2016 and avers that its sole member, George Charalambus, unwittingly signed the certificate of balance believing it to be correct, without checking its correctness due to work pressure and that the applicant's members of staff were also putting pressure on him to sign. In the premises, the respondent denies being indebted to the applicant in any amount claimed.
- [20] The respondent alleges that it only became aware of the overcharging errors, carrying cost, interest, CMA cost and storage costs on 5 August 2016 alternatively when the applicant instituted the liquidation application proceedings on 13 August 2016. On 30 August 2016 the respondent declared a dispute to the debt.
- [21] The respondent claims to have as from 7 September 2015 to 10 August 2016, paid a total sum of R24 770 432.38 to the applicant for the amount of wheat released to the respondent in terms of the release instructions supplied by the applicant. In actual fact, according to the respondent, it has overpaid the applicant by an amount of R20 414 263.90.
- [22] The respondent seeks to stay the liquidation application proceedings on the grounds that it disputes the debt and seeks to refer it for arbitration. The respondent contends that it was, therefore, not open for the applicant to launch the liquidation application proceedings. The respondent avers that the dispute between the parties has to be dealt with following the arbitration procedures.
- [23] The respondent states that for its claim the applicant relies on three agreements ("NH3.1", "NH3.2" and "NH3.3") and claims an amount collectively against the respondent. According to the respondent agreements, "NH3.1 and NH3.2 incorporate the provisions of SAGOS and the agreement "NH3.3" incorporates the provisions of the Grain and Feed Trade Association (GAFTA) agreements. In terms of both SAGOS and GAFTA agreements any dispute between the parties shall first be resolved by way of a dispute resolution procedure and arbitration (clause 15.1 of SAGOS and 21 (b) of SAFTA).
- [24] The respondent contends that the applicant has failed to comply with the peremptory provisions of s 346(4A) of the 1973 Companies Act which require an applicant for a winding-up order to furnish a copy of the application to certain parties, including the company's

employees and the South African Revenue Services. As a consequence, the respondent calls for the dismissal of the liquidation application with costs on the ground of non-compliance with the peremptory provisions of s 346(4A)(a) of the 1973 Companies Act read with the provisions of s 25

of the Close Corporations Act 69 of 1984. The applicant in its submission argues that there has been compliance with the provisions of s 346(4A) of the 1973 Companies Act. The returns of service are attached to s 346(4A) affidavits by Damian Bond of Straus Daly Attorneys and Hugo van Heerden of Hayes Incorporated, the applicant's attorneys of record.

[25] The respondent, further, asks that the three following procedural issues be determined at the outset:

- (a) A ruling that the supplementary founding affidavit by the applicant is regarded as pro non scripto;
- (b) The striking out of various paragraphs in the applicant's replying affidavit read with the supplementary founding affidavit;
- (c) Leave should be granted to the respondent to file a supplementary affidavit pursuant to the respondent receiving confirmation that the issues should be arbitrated.

[26] I propose to first deal with the preliminary issues relating to the counter application (referral of the matter for arbitration),

non-compliance with peremptory provisions, and procedural issues relating to the filing of more than three sets of affidavits.

- (a) Preliminary Issues
- (i) Arbitration

[27] The respondent contends that the dispute between the parties has to be dealt with following the arbitration procedures. For this contention, the respondent relies on the provisions of SAGOS and GAFTA agreements. Both clauses 15.1 of SAGOS agreement and 21(b) of GAFTA agreement provide that neither party to these agreements or any person claiming under either of them shall bring any action or other legal proceedings against the other in respect of such dispute, or claim until such dispute or claim has first been heard and determined by the arbitrators. In the light of the foregoing, the respondent argues that it is not open for the applicant to launch these proceedings without exhausting the remedy of arbitration first. The respondent therefore contends that the applicant is not properly before court.

[28] It is common cause that the applicant never disputed its indebtedness to the applicant before the institution of the liquidation

application proceedings. Instead, the respondent admitted its liability to the applicant and confirmed that the balance owed, as at 31 May 2016, was due and payable by it to the applicant by signing the certificate of balance ("NH5"). Also the respondent admitted its liability in a letter ("NH6") it addressed to Janet Chattiari, an employee of the applicant, in response to her request for payment of the admitted balance. In an effort to reach agreement on how the payment for the admitted balance would be made and to secure the respondent's indebtedness to the applicant, the parties held several meetings during July and August 2016.

- [29] With the exception of claims, “NH3.1” and NH3.2” a dispute with regard to contract AM 16-5-0035, concluded on 3 February 2016 between the parties, was declared and referred for arbitration on 28 October 2016. Under this agreement the applicant never released any wheat to the respondent and as a result no invoices were issued to the respondent in this regard. The liability of the respondent in this regard arises from the risk it had with regard to the loss or theft of wheat transferred to Prograin Company. However, in respect of the other two contracts, “NH3.1” and “NH3.2”, the debt had been established and admitted by the respondent, and therefore, there was no dispute to refer for arbitration. Inevitably, the respondent’s counter application falls to be dismissed with costs.
- [30] However, the respondent contends that the applicant cannot deal with the matter in a piecemeal fashion. On one hand, instituting liquidation proceedings and on the other hand, it is required to arbitrate on one particular contract. According to the respondent the applicant’s acceptance that the contract “NH3.3” be referred to arbitration supports the respondent’s counter application that the matter be stayed pending the finalisation of the arbitration procedure in respect of all contracts contended for by the applicant. According to the respondent liquidation proceedings have a negative effect on the respondent’s business. In my view the contention by the respondent in this regard does not hold any water since the contract referred to arbitration does not form part of the subject matter of liquidation application, and in respect of the other two contracts the applicant’s claim is undisputed and therefore, there is nothing further arbitration to decide. See also *Altech Data (Pty) Ltd v MB Technologies (Pty) Ltd* 1998 (3) SA 748 (W) at 754.

(ii) Non-Compliance with Peremptory Provisions

- [31] The respondent alleges that the applicant in serving the notice of its intention to institute liquidation proceedings it did not comply with the peremptory provisions of s 346(4A) read with s 25 of the Close Corporation Act 69 of 1984 and Rule 6(5)(a) of the Uniform Rules of Court in that, in particular, it failed to serve the notice on the respondent’s employees. For that reason, it has been argued on behalf of the respondent that the liquidation application be dismissed on that ground alone. However, it does not advance reasons for such allegation. On the other hand, according to the applicant, procedurally, all the requirements have been satisfied. In support of its contention the applicant relies on the affidavits by Damian Bond and Hugo van Heerden.
- [32] In his affidavit, Bond states that in compliance with s 346(4A)(a)(i) and (ii) the applicant caused a copy of the application to be served on any trade union representing the employees of the respondent. The respondent’s employees, in turn, advised the sheriff that there was no trade union representing them. Bond personally served a copy of the application on the South African Revenue Service. The Master of the High Court and the respondent were also duly served.

[33] Van Heerden in his further affidavit in terms of s 346(4A) of the 1973 Companies Act, regarding service of the application on the employees and trade union, states that the application was served on the respondent's employees at Broad Mill Park, 6 Mountain Close, Broadlands, Durban, KwaZulu-Natal. When the respondent in its opposing affidavit denied that such service had taken place, the sheriff served a copy of the Notice of Motion on the respondent's employees at 110 South Coast Road, being the respondent's physical address. On enquiring whether such employees were members of a trade union, the sheriff established that they were members of AMCU and he served a copy of the notice on the representative of the said trade union, one Mr Sanjay. Copies of the returns of service on the respondent's employees and the representative of the trade union are annexed to the affidavit, marked "HVV1" and "HVV2" respectively.

[34] In *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2013

(2) SA 526 (SCA) para 17 – 19 the Supreme Court of Appeal was called upon to decide whether s 346(4A)(a) was peremptory and it held that the requirement to furnish the application to the person specified in s 346(4A) was peremptory, but the methods stipulated in s 346(4A)(a)(ii) for furnishing the application to employees were merely directory, alternative effective means may be adopted were those stipulated in the section would be impossible. In other words, the methods for furnishing employees with the application papers as set out in s 346(4A)(a)(ii) are no more than guides. If other more effective means are adopted and reflected in the affidavit filed in terms of s 346(4A)(b) then, provided the court is satisfied that the method adopted was reasonable likely to make the application paper accessible to the employees, there has been compliance with the section. To 'furnish' the application means to make it available in a manner that is reasonably likely to have it accessible to the named persons. It is not a requirement that the papers, as a

matter of fact, came to the knowledge of those persons. It follows that when the court is satisfied that the method adopted by the applicant to furnish the application paper to the employees, there is no reason to refuse a winding-up order, whether provisional or final, merely because they were not furnished to the employees in one of the ways indicated in s 346(4A)(a)(ii). Nor should the court refuse an order merely because it is not satisfied that the application papers have come to the attention of all employees. That is not what the section requires.

[35] In the circumstances the means employed in the present case as set out in the affidavits of Bond to furnish the notice of motion to the named person, more particularly, the respondent's employees and the trade union, were in, my view, satisfactory. Accordingly, I find that there was compliance with the provisions of s 346(4A)(a)(ii).

(iii) Filing more than three sets of Affidavits

[36] In the present case, seven sets of affidavits have been filed. With regard to the number of affidavits that may be filed in an opposed application the court in *Standard Bank of SA Ltd v Sewpersadh* and another 2005 (4) SA 148 (C) at 149 held:

‘The ordinary rule is that three sets of affidavits are allowed, i.e. supporting affidavits, answering affidavits and replying affidavits. The court may in its discretion permit the filing of further affidavits:’

[37] The court will exercise its discretion to admit further affidavits only if there are special circumstances which warrant it or if the court considers such a cause advisable. There must furthermore be proper and satisfactory explanation as to why the information

contained in the affidavit was not put up earlier and what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs. See also *Dickinson v South African General Electric Co. (Pty) Ltd* 1973

(2) SA 620 (A); Rule 6 (5)(e) of the Uniform Rules of Court.

[38] The court’s discretion to admit further affidavits must be exercised judicially upon a consideration of the facts of each case and basically it is a question of fairness to both sides. See *Milne, NO v Fabric House (Pty) Ltd* 1957

(3) SA 63 (N). However, a court will only exercise its discretion in this regard when there is good reason for so doing. See *Hano Trading CC v J R 209 Investments (Pty) Ltd* and another 2013

(1) SA 161 (SCA). The lack of prejudice has been identified as one of the prime considerations in the exercise of the court’s discretion in favour of the applicant. See *Business Partners Ltd v World Focus* 754 CC 2015

(5) SA 525 (KZP) at 528.

[39] As indicated above, in this case the parties have filed more than permissible affidavits. After the respondent had filed the answering affidavit, the applicant without the leave of court filed a supplementary founding affidavit together with its replying

affidavit. The respondent contends that the applicant’s supplementary founding affidavit ought to have been regarded as pro non scripto. The applicant avers that by its supplementary founding affidavit it intended to correct errors in its founding affidavit. In its replying affidavit, according to respondent, the applicant has simply incorporated the allegations made in the supplementary affidavit and relied on the same to cure defects in its founding papers.

[40] In *Transvaal Racing Club v Jockey Club of South Africa* 1958

(3) SA 599 (W) at 602A-B William J said:

‘If a party to an application files and serves certain affidavits and before the other party has replied thereto he files additional

affidavits, either because he had not had time to complete the whole of his affidavits before a fixed time or because new matter has been discovered or for any other good reason, I do not think a Court would reject such affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits.'

- [41] On conclusion of the replying address, at the opposed application hearing on 17 February 2017, the applicant's counsel handed up a copy of another of applicant's further affidavits. The respondent argued that such an affidavit should not be allowed and if it would be allowed the respondent should also be offered an opportunity to respond thereto. With the leave of court, it is open for the applicant to correct or amend its founding affidavit, if it so desires, by means of a supplementary affidavit. However, if the applicant files such supplementary affidavit without having obtained the leave of court, it must ask the court for authorisation. In the present case, before filing a supplementary affidavit the applicant did not obtain the leave of the court to do so. Nor did it ask for condonation. There is nothing to suggest that the respondent was prejudiced by the applicant's filing of a supplementary founding affidavit. If there was any prejudice caused to the respondent, it was caused by allowing the respondent to respond to the applicant's supplementary affidavit, dated 15 February 2017.
- [42] The consideration of justice and equity have in the present case dictated that the respondent should be given an opportunity to respond to the applicant's recent further affidavit, and the respondent availed itself of such opportunity on 27 March
2017. The circumstances of this case are such that the need exists to ensure that parties are afforded an ample and equal opportunity to adequately present their cases so that both will have proper ventilation of their cases and which will enable this court to decide the real issues between the parties. See also *Bader and another v Weston and another* 1967 (1) SA 134 (C) at 138. However, certain allegations that do not support the applicant's case should be disregarded.

(b)

Issues

- [43] The facts of this case raise the following issues:
- (i) whether the applicant has established that it is the creditor of the respondent;
 - (ii) whether the respondent bona fide disputes the debt on reasonable grounds; and
 - (iii) whether the respondent is commercially insolvent.

The onus is on the applicant to establish that it is a creditor with locus standi to bring the application. See *Common Wealth Shippers Ltd v Myland Properties (Pty) Ltd* 1978 (1) SA 70 (D) at 71 – 72. The creditor must show that the unsatisfied demand against the respondent is for payment of a due debt of at least R100. The amount ‘due’ means that it must be due and payable. See *Barclays Bank (DCO & O) v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C) at 948.

(i) Is the Applicant the Creditor for the Respondent

[44] A bald allegation that the applicant is a creditor for a particular amount, without a description of the cause of the indebtedness, is insufficient. See *Du Preez v Boetsap Stores (Pty) Ltd* 1978

(3) SA 560 (NC). For its liquidation application the applicant relies on the certificate of balance the sole member of the respondent signed on 8 July 2016 and in terms of which the respondent admitted its liability to the applicant and affirmed that the amount of R26 405 500.99, stated therein as the balance owing as at 31 May 2016, was due and payable by the respondent to the applicant. The respondent denies that the applicant is a creditor in the amount of R27 043 190.75, which the applicant claims, being the balance of the purchase price, plus interest and charges for wheat the applicant sold and delivered to the respondent, and avers that it signed the certificate of balance in error.

[45] For the respondent to succeed on a defence of a mistaken belief, such mistake must be iustus. The respondent must prove that its mistake was due to a misrepresentation, whether innocently or fraudulently, by the applicant. See *George v Fairmed (Pty) Ltd* 1958

(2) SA 465 (A) at 471A – D.

[47] On 6 July 2016 Janet Chattiar, an employee of the applicant, forwarded an email (“NH13”) to the respondent’s

sole member, and to which a statement (spread sheet), showing all transactions from the commencement of trade between the applicant and the respondent and listing all payments received and invoices up to 31 May 2016 (“NH15”), were also attached. This spread sheet was forwarded to the respondent together with statement showing the computation of the balance owing, and giving the details of the invoices making the sum owing. In the email Janet had invited Mr Charalambus to check the attached statement and confirm that he agreed with the outstanding balance reflected thereon. The certificate of balance itself had an inscription on it that both parties had audited it, meaning that they had checked it against their own records and the calculations and satisfied themselves that all was correct. Mr Charalambus took time to consider those documents and he only returned the signed confirmation of balance (“NH5”) to the applicant after two days, on 8 July 2016.

[48] Mr Charalambus claims that at the time he signed the certificate of balance he was under immense pressure in various work commitments and the applicant's member of staff were also putting pressure on him to sign the document. As a consequence, he unwittingly and in trust of Mr Hannan, the applicant's financial officer, signed the document on 8 July 2016 without verifying the correctness

thereof. He then emailed it back to the applicant. Mr Charalambus goes on to allege that "NH5" is a fallacy since no audit had been done by either party. The parties did not compare the alleged audits at all. The respondent misrepresented to the

respondent as to the amount owed.

[49] It is highly improbable that Mr Charalambus an experienced and astute businessman would simply sign the document, confirming the correctness of the balance then owing, without having satisfied himself that it was correct. The respondent had twenty two staff members and two of whom (Prishani and Tashni) in Charalambus version were dealing with this account. In addition, the respondent had auditors and attorneys attending to its financial affairs and who were aware of this debt. If Mr Charalambus was as busy as he claims, he could reasonably have delegated this task to any of them. The respondent was in receipt of monthly statements by the applicant setting out the details of purchases and, payments made as well as the balance due. Apart from that, the respondent was in possession of the records in terms of sale agreements as to the existence of such debt including delivery notes and invoices of wheat released. In the circumstances, a mistaken belief and trust that what Mr Hannan (the applicant's financial officer) was saying was correct could not have arisen at all. The applicant specifically asked the respondent to look into its own records and verify whether the amount stated on the certificate of balance was correct and due. The evidence, therefore, shows that the applicant in this regard did not make any misrepresentation to the respondent whether innocently or fraudulently, by which a reasonable man in the position of Mr Charalambus (the sole respondent's member) would have been misled and acted upon it. Nor has the respondent's sole member demonstrated as to how the applicant's members of staff pressurised him to sign the certificate of balance. The certificate itself stated that the parties had both audited it. This also makes it difficult for me to believe Mr Charalambus allegation that in the circumstances he simply signed the certificate without satisfying himself of the correctness of the contents thereof, and his version in this regard is not only implausible but also improbable. Accordingly, it falls to be rejected as such. Each party had been afforded an opportunity to go through all of the invoices, released instructions and the monthly statements in order to verify the amount due.

[50] According to the applicant Mr Charalambus asked for a split of the accounts, not because he disputed the amount owing, as he wanted to see how much of the accounts related to wheat only and how much related to ancillary charges i.e. interest, carrying cost; storage, CMA charges and penalties, which the applicant was entitled to charge in terms of each of the sale agreements. The applicant denies that the respondent had at any stage asked for the provision of invoices or proof of delivery as the amount and existence of the debt had been

agreed between the parties. The only reason for the meetings was to discuss how and when the respondent would make payment of its indebtedness, which was then long overdue.

[51] The respondent never disputed the debt and the quantum thereof. This is also evident from the conduct of the respondent's sole member before and after the signing of the certificate of balance. In response to the demand for payment addressed to the respondent by Janet, the applicant's debtors clerk, Charalambus in an email dated 5 July 2016 ("NH6") admitted liability and committed the respondent to paying the admitted balance, once it had received its funds from Prograin. However, the respondent denies the correctness and validity of "NH6" notwithstanding the fact that the respondent had drafted such document. After the signing of the certificate of balance several meetings were held between the parties in an effort to make arrangements for a payment plan and provision of security of the debt. In settlement of its indebtedness to the applicant, the respondent in July 2016 orally offered to pay to the applicant an amount of R22 000 000 and to liquidate the balance in twenty three months. All this, militates against the respondent's allegation that based on the misrepresentation by Mr Hannam of the applicant, it sought to settle the purported indebtedness in good faith.

[52] Nor had the respondent signed the certificate of balance under protest, without admitting liability on the grounds that due to the work pressure and the pressure the applicant's members of staff exerted on its sole member to sign the certificate of balance coupled with the applicant's alleged failure to make all the necessary accounting information available to it, its sole member had been unable to verify the correctness of the amount specified in the certificate of balance as owing, due and payable by the respondent to the applicant before signing the certificate. See also *Helderberg Laboratories CC and others v Sola Technologies (Pty) Ltd* 2008

(2) SA 627 (C).

[53] The debt upon which the applicant's locus standi to seek liquidation is founded, is the payment of the sum of R27 043 190.76 by the respondent. The computation of that

sum is reflected in annexure "NH4" to the applicant's founding affidavit and annexure "NH21" to the applicant's supplementary founding affidavit. According to the applicant the sum of R27 043 190.76 relates only to the wheat it supplied to the respondent. The applicant avers that the last payment it received from the respondent was made on 8 April 2016.

[54] Up until the institution of the liquidation application proceedings the existence of the debt and the quantum thereof were common cause between the parties. During all the correspondence and meetings between the parties in July and August

2016, the respondent accepted that it owed the plaintiff the sum of R26 405 500.99 and it never questioned this. Respondent

conceded that the amount the applicant was then claiming, was due and sought time to pay it. The respondent claims to have only become aware of the overcharging errors, carrying costs, interest, CMA cost and storage costs on 5 August 2016 alternatively when the applicant instituted the liquidation application on 13 August 2016. On the same day, the respondent alleges that it requested the applicant to provide invoices and proof of delivery so that the debt could be established. It also asked the applicant to split the account into wheat price and costs. The respondent further contends that the applicant does not have supporting documents to the tune of R27 043 190.76. The applicant denies that the respondent had ever asked it for the invoices and proof of delivery and states that it was only the respondent's attorneys who, after the applicant had given notice of its intention to bring a liquidation application, in the letter dated 5 August 2016 the respondent alleged that there were errors and overcharges on the account and that the claim was not properly quantified. They then asked for the documentation including invoices and delivery notes so that their accountants could conduct an audit.

- [55] It is not in dispute that on 8 July 2016 the respondent signed a certificate of balance in terms of which it admitted liability to the applicant in respect of the balance stated therein and accepted that it was correct, owing, due and payable by it to the applicant. Also, the computation of the applicant's liquidated claim against the respondent is reflected in annexures "NH4" and "NH21" respectively to the applicant's papers. Therefore, it could not be true that the applicant has not produced any supporting document for its claim. Further, on the respondent's version the applicant furnished it with all the relevant release instructions pertinent to the agreements on which the applicant relies to prove its claim (respondent's answering affidavit para 38.4). In addition, the respondent's attorneys in the letter, they addressed to the applicant on 25 July 2016, did not dispute the existence of the debt and its quantum. Instead, they undertook to pay the amount then due on receipt of certain documentation from the respondent's auditors.
- [56] The respondent denies that it owes the applicant the amount of R27 043 190.76 and avers that it has overpaid the applicant by an amount of R20 414 263.90. The respondent alleges that in the period between 7 September 2015 and 10 August 2016 it paid the applicant the total sum of R24 770 432.38 for the amount of wheat the applicant released to it. According to the respondent the total quantity of wheat the applicant sold and delivered to it, is 1263.795 metric tons, with a total purchase price of R4 355 808.00. However, the respondent falls short of explaining how it happened that it paid the applicant the amount which exceeded the amount it owed to the applicant by such a far amount.
- [57] Notwithstanding all this, the respondent on 8 July 2016 signed a certificate of balance confirming that outstanding amount stated therein was then owing, due and payable by it to the applicant, after having been afforded an opportunity to verify such amount. On 20 July 2016 the respondent once again offered to make a down payment of R22 000 000 and settle the balance by twenty three monthly instalments. Respondent's attorneys on 25 July 2016 never brought to the attention of the applicant that instead of owing the applicant the respondent had in fact overpaid the applicant by R20 414 263.90. If it is true that this was the

position the respondent's attorneys would reasonably be expected to have raised it with the applicant. At some stage, in its papers the respondent alleges that the applicant overcharged it by more than R46 000 000 but it did not realise this, and inexplicably signed the document confirming that the balance was correct. This, in my view, is in sharp contrast with the claim that the respondent has overpaid the applicant by R20 414 263.90.

[58] However, four payments, dated 7 September 2015, 18 September 2015 and 17 October 2015 respectively, totalling R4 550 000.00 fall outside the ambit of the applicant's claim, as they fall outside the period of the three agreements upon which the applicant's

claim is based. The amount should therefore, be subtracted from the amount the respondent allegedly paid. If the amount the respondent

allegedly paid is deducted from the amount, R26 405 500.99, which was as at 31 May 2016 outstanding, this leaves the balance of R6 185 068.61, after deduction of the amount of R4 550 000.00, falling outside the ambit of the applicant's claim. Even if such amount is added back, on the respondents version, it has paid the amount of R24 770 432.38 which still falls short of the amount claimed R27 043 190.76, by R2 272 758.38.

[59] In addition, the respondent contends that the applicant should have invoiced it for 12,706.867 tons as opposed to 19,690,896 metric tons as reflected in annexure "NH21". If that is multiplied by R3 773, it give the total of R74 293 750.60. The respondent claims to have paid its total amount of R60 751 905.91, leaving the balance of R13 541 844.69 which is according to the respondent could have been more than sufficient to cover any other incidental costs levied by the applicants regarding storage costs, interest etc. However, the respondent does not give the amount of incidental costs and it is not clear in respondent's version whether such costs were indeed settled.

[60] The quantity of 7078.530 metric tons at R3 611.55 per metric tons which equals to R25 564 465.02 was according to the respondent never received by Prograin Mill, but the applicant invoiced the respondent for it. In addition, the applicant alleges that an amount of 4287.643 tons of wheat was stolen from Prograin silo, which according to the respondent could only hold 1,960 tons. In the respondent's version, the amount of the purported debt in respect of misappropriated wheat is R27 043 190.76.

[61] However, it is common cause that the applicant instituted an action against Prograin for theft of wheat. It could not therefore claim the misappropriated wheat from the respondent. The applicant's version, in this regard, is that the amount for the misappropriated wheat was not taken into account when computing the amount owing, due and payable by the respondent to the applicant. This finds support in the fact that the applicant had instituted an action against Prograin for the recovery of the amount for the misappropriated wheat.

[62] At this junction what is essential to determine, is whether or not the respondent is indebted to the applicant. If it is indebted,

whether the amount owed is at least R100, and the payment of which is due. See *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) at 428B – C. If the amount owed is at least R100, that is sufficient to establish that the applicant is a creditor to the respondent. The respondent claims to have paid the total sum of R24 770 432.38 and this amount still falls short of the amount claimed. According to above calculations the difference between the amount claimed and the amount the respondent has allegedly paid, exceeds R100 by far. For now, it is not necessary for this court to adjudicate the amount on each and every claim. The debts will later be referred to the liquidators who will, in turn, determine the existence of such debts and actual quantum thereof. In my judgment, the applicant has *prima facie* established that it is a creditor to the respondent in an amount in excess of R100.

(ii) Bona fide Dispute of Debt on Reasonable Grounds

[63] The respondent disputes its indebtedness to the applicant in any amount claimed. The respondent may only avoid liquidation on this basis if it can show that it disputes the debt both bona fide and on reasonable grounds. See *Hülse – Reuter and another v HEG Consulting Engineers (Pty) Ltd (Lame and Fey NNO Intervening)* 1998

(2) SA 208 (C). Winding up proceedings ought not to be resorted to in order, by means thereof, to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds. The procedure for the winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt. See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956

(2) SA 346 (T) at 347 – 348; *Kalil v Decotex (Pty) Ltd and another* 1988

(1) SA 943 (A) at 980.

[64] The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. The rule is generally known as the “Badenhorst rule”, after one of the leading cases on the subject. See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* see at 347H – 348C.

[65] In order to succeed on the ground that it disputes the applicant's debt bona fide and on reasonable grounds, the respondent must genuinely wish to contest the claim and genuinely believe that it has reasonable prospects of success. According to the applicant the respondent's dispute is a fictitious one, manufactured in order to avoid liquidation.

[66] I propose to start by first defining the meaning of, ‘bona fide disputed on reasonable grounds’. ‘Bona fide’ relates to the respondent's subjective state of mind – that it believes its factual statement to be true, while ‘disputed on reasonable grounds’ requires that objectively the defence raised be supported by the facts alleged. Bald allegations lacking in particularity would not satisfy the requirement, and might even indicate that the respondent is not bona fide. See *GAP Merchant Recycling CC v Goal Reach Trading* 55 CC 2016

(1) SA 261 (WCC) at 268I/J – 269C and 269G – I. Bona fide actually means to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the respondent close corporation.

[67] Bona fides have to do with the belief on the part of the litigant as to the truth or falsity of his factual statements. It is related to the

state of the defendant's mind. See *Standard Bank of SA Ltd v EL-Nadaa F and another* 1999

(4) SA 779 (W) at 784G – 785B. In *Breitenbach v Fiat SA (Edms) Bpk* 1976

(2) SA 226 (T), Colman J stated that the requirement of bona fides is separate from the requirement that the defendant 'discloses fully the nature and grounds of the defence and the material

facts

relied therefor.'

[68] The GAP Merchant case at 269 para 26 Rogers J said the following:

"Bona fides relates to the respondent's subjective state of mind, while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless interrelated because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts."

[69] The respondent has to satisfy me that the grounds which it advances for disputing the applicant's claims are not unreasonable. To do that it is not necessary for it to adduce on affidavit, or otherwise, the actual evidence on which it would rely, it is not

required to establish on the balance of probabilities that it will succeed on the action the applicant might bring to enforce a claim as in the summary judgment proceedings, where a defendant who resists such an application is required by an affidavit to satisfy the court that he has a bona fide defence to the action and to disclose fully in his affidavit or affidavits the material facts upon which he relies for such defence.

Where such facts are not within its personal knowledge, it is enough for it, to set out in the affidavit the basis on which it makes such allegations of fact, provided it does not do so badly, but with adequate particularity. See *Hulse-Reuter* case at 219F – 220C. But, it is only sufficient for it to allege facts which if proved at a trial, would constitute a good defence to the applicant's claim.

[70] The statement of material facts should simply be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. See *Breitenbach* case at 228B – E; *GAP Merchant* case para 24. Bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is bona fide.

[71] The requirement of bona fides is satisfied if the company genuinely wishes to contest the claim and believes it has reasonable prospects of success. Lack of bona fide will usually go hand-in-hand with an intention to delay, which would in turn indicate that the company is unable to pay its debts and militate with the exercise of the discretion in its favour. See Orestisolve (Pty) Ltd t/a Essa Investment Holdings (Pty) Ltd and another 2015

(4) SA 449 (WCC) at 450.

[72] The Badenhorst rule states that a court will refuse an application for the liquidation of the company where the company bona fide disputes the applicant's claim on reasonable grounds. The first ground on which the respondent disputes its indebtedness to the applicant is that it signed the certificate of balance in error. I have adequately dealt with this part above, and I propose to reserve my pronouncement on it until later in the judgment.

[73] The second ground is that the applicant seeks to introduce three additional agreements of sale in the supplementary founding affidavit with reference numbers AM15-5-0089, AM15-5-0104 and AM15-5-0121, marked "NH10", "NH11" and "NH12"

respectively. According to the respondent such averments by the applicant should be regarded as pro non scripto or be struck out. The applicant states that while it is true and correct that since 2014 various agreements have been concluded

between the parties in terms of which the applicant sold and delivered wheat to the respondent on credit in accordance with a running account payable sixty days after invoicing. For its claim the applicant relies on the three agreements, namely "NH3.1",

"NH3.2" and "NH3.3", respectively, which are the subject of the liquidation application. According to the

applicant the sum of R27 043 190.76 relates only to wheat supplied and invoices issued in respect of the agreements in issue. It does not relate to the sale contracts which were concluded between 2014 and September 2015 as they are not relevant to this application since the purchase prices of sales related thereto have been paid in full.

[74] The agreements in issue are those concluded on 5 October 2015, bearing reference number AM016-5-0124 ("NH3.1"), on 29 January 2016, AM16-5-0034 (NH3.2) and on 3 February 2016, AM-05-0035 ("NH3.3") respectively. In terms of the first agreement 3000 metric tons of Russian milling wheat was purchased and sold at the contract price of R3 776.50 per metric tons. In terms of the second agreement 200 metric tons of Russian milling wheat was purchased and sold at US\$ 217 (United States dollars) per metric ton plus R180 port charge and R911.17 duty. In terms of the third agreement 300 metric tons of Argentinian milling wheat was purchased and sold at a contract price of US\$ 192 per metric ton plus R180 port charge and R911.17 duty.

[75] The respondent admits the conclusion of the agreements in question between the parties in the period between 5 October 2015 and 3 February 2016, save the part performance by the applicant that it would deliver by way of substitution 723.698 tons. However, the respondent denies the sale of 3000 tons of Russian wheat took place between it and the applicant, but the applicant sold such quantity of wheat to a third party, Sesifikile. Such third party substituted the respondent as the purchaser. The respondent had, therefore, no obligation in terms of this agreement. According to the respondent an amount of R11 329 500.00 must be deducted from the purported claim by the applicant.

[76] The respondent avers that in respect of the wheat transferred into the silos at Prograin premises in respect of “NH3.2”

under the control of Drum Commodities Ltd (Drum) in terms of Collateral Management Agreement (CMA) Drum is liable to the applicant

in respect of any loss. However, in respect of other two agreements the risk passed onto the respondent on receipt of the stock.

Respondent would receive stock once Drum had given a release instruction.

[77] The third ground on which the respondent disputes its debt to the applicant is that the applicant's invoices do not correspond

with the release instructions the applicant gave to Drum. Therefore, the respondent avers that the applicant relies on a debt which is not due and payable.

[78] The fourth ground is that on 1 July 2016 the applicant represented to the respondent that the total amount of wheat held by Drum in Prograin's silo was 4501.438 metric tons. According to the respondent that was a fraudulent misrepresentation since the silos at Prograin could only hold a maximum capacity of 1,960 metric tons. The respondent further avers that Russian wheat in the tonnage of 3707.700 was never released to it but the applicant claimed interest thereon, which is not entitled to.

[79] In the fifth ground, the respondent contends that annexure “NH21” reveals that the applicant has overcharged it because the total tonnage invoiced is greater than the total tonnage released out by Vallis Drum out in terms of the CMA. According to the respondent it was overcharged for 573.08. The respondent bases such allegation on the fact that the tons were taken back to the CMA after having been released and invoiced. The respondent states that the tons should have gone to Prograin instead. In the version of the applicant the respondent was correctly invoiced for the amount of wheat released, as is reflected in annexure “NH24”.

[80] Also, the respondent alleges that the applicant had in certain instances double charged it. Annexure “NH25” indicates

that as early as February 2015 the applicant was overcharging it for wheat and had received payment in the sum of R2 966 006.40 for wheat it could not possibly have delivered.

[81] On the whole the respondent's sole member alleges that he signed the certificate of balance in error without having verified

and confirmed the correctness of the contents thereof. This creates a dispute of fact and so as to the appropriateness of the invoicing and charging of the respondent for the wheat the applicant sold and delivered to the respondent as well as the quantity of wheat released and delivered to the respondent on the instruction of the applicant.

[82] When the application is opposed and factual disputes are raised, the question is whether on the evidence contained in all the affidavits a prima facie case for the grant of such order has been established on a balance of probabilities. See *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 AD at 976 – 979; *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA). In this event, Corbett JA in *Kalil* case at 979 said:

‘save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence. This does no lasting injustice to the respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues.’

[83] In *Ter Beek v United Resources CC* 1997 (3) SA 315 (C) at 336 the court decided that an application might be decided on the affidavits if it is satisfied that there is no real and genuine dispute of fact; that the respondent's allegations are so far-fetched and untenable that they warrant rejection merely on the papers or that viva voce evidence will not disturb the probabilities appearing from the affidavits. In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.

[84] In an opposed application for provisional liquidation in order to succeed in its claim the applicant must establish its entitlement to an order on a prima facie basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour. See *Kalil* case at 975J – 979F. Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is bona fide dispute on reasonable grounds. See *Badenhorst* case at 347H – 348C. The onus is on the respondent to show that it bona fide disputes the debt on reasonable grounds. See *Hülse – Reuter and another* at 218D – 219 C.

[85] However, the test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities.

Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits and must instead apply the Plascon-Evans rule. See *Paarwater* case, para 4.

[86] If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavit favours the applicant. At the final

stage, therefore, the Badenhorst rule is likely to find its main field of operation where the applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is bona fide disputed on reasonable grounds and should not be determined in liquidation proceedings.

[87] In the present case, the application before court is for a provisional liquidation and this court must, therefore, confine

itself to it. In my judgment none of the issues in this matter cannot be resolved on paper. This will become more evident in my dealing with such issues below. It is common cause that the respondent signed a certificate of balance and in terms of which the respondent admitted its indebtedness to the applicant and confirmed that the balance stated therein was then owing, due and payable by the respondent to the applicant. It is not in dispute that when Janet Chattiar gave the certificate of balance to the respondent's

sole member for signature, she requested such member to audit and verify the correctness of the certificate of balance. Further, the respondent's sole member was in possession of the records relating to the release instructions and invoices issued by the applicant to it. In determining whether the applicant is the creditor to the respondent above, it has been adequately demonstrated that the respondent's allegation that it signed the certificate of balance in error is so far-fetched that it warrants to be rejected out rightly on the papers.

[88] While it is true that the applicant has made reference to certain agreements, it relies on three agreements for its claim, not on such additional agreements as the respondent claims. In its further affidavit the applicant has referred to the following agreements: AM15-5-0089, AM15-5-0121 and AM15-5-0124 which do not relate to the amount claimed, R27 043 190.76. Therefore, reference to such agreements in the papers is regarded pro non scripto, as having no bearing on the amount claimed. That the applicant only relies on the three agreements, outlined above, is quite evident from the fact, which is common cause, that the settlement negotiations were only in respect of annexure "NH3.1", "NH3.2"

and "NH3.3". However, agreement "NH3.3" was referred to arbitration by the parties for determination on 28 October 2016.

[89] On that the invoices do not correspond with the release instructions, the applicant states that it never released any wheat under contract AM16-5-0035 and accordingly no invoices were issued to the respondent under such contracts. In any event, the respondent is expected to pay on the invoices issued, and such invoices must tally with the released instructions. Both parties are in possession of such records "NH16" and "NH21". Reconciliation showing

both direct deliveries to the respondent and the CMA releases is contained in annexure “NH24”. The actual amount owed will any way be determined by the liquidators. It is also common cause between the parties that under AM16-5-0035 relating to 3000 metric tons of Argentinian milling wheat, concluded on 3 February 2016, the applicant did not deliver any wheat to the respondent in this regard.

[90] According to the applicant the debt of R27 043 190.76 does not, therefore, relate to the sale contract AM16-5-0035. This sale contract is only relevant to the issue of the misappropriated wheat, in respect of which the respondent bore the risk of loss. The value of the misappropriated wheat in the amount of R17 862 228.85 does not form part of the amount claimed, which according to the applicant has been due, owing and payable since 31 July 2016 and which the respondent’s is unable to pay. On 8 August 2016 the applicant instituted an action against the respondent for the recovery of the value of the misappropriated wheat. The content was by consent between the parties referred to arbitration on 28 October 2016, as indicated above.

[91] With regard to the quantity of 4501.438 which Mr Hamman purported to have been stored in Prograin’s silos, the applicant states that the wheat sold was not released in one tranche but bit by bit to the respondent in accordance with the balance outstanding on the respondent’s credit limit with the applicant. The respondent denies that the quantity of wheat as contended for by the applicant could possibly have been stored at Prograin’s silos since the holding capacity of the silos was 1960 metric tons. According to the applicant the wheat was not stored at once in the silos. It was continuously released from silos at Prograin to the respondent and milled and then on sold.

[92] It is quite strange and improbable too that Mr Charalambus being the sole director and principal shareholder of Prograin, presumably

well-knowing the maximum holding capacity of grain, would not investigate the matter and simply accept the ipse dixit (say so) of Mr Hamman, the applicant’s representative, regarding the quantity of wheat which was allegedly in the silo. Such

allegation by Hamman would reasonably be expected to have soon alerted the respondent to the fact that the applicant’s claim

was somehow bogus. In the premises, a reasonable man in the position of Mr Charalambus, the respondent’s sole member, would not have been misled by such purported misrepresentation.

[93] With regard to the wheat allegedly sold to a third party the applicant states that reference to a third party was a typographical

error. The wheat was sold to the respondent and that finds support in the contracts itself. The addendum to “NH3.1” the respondent refers to was according to the applicant merely concluded in order to fix the wheat price in South African currency. It also appears in “NH3.2” that the respondent was the buyer. In fact, the respondent was the purchaser in all three agreements. The applicant’s version is more plausible and probable. Accordingly, the respondent’s version in this

regard falls to be rejected as not only being improbable but also false, on the balance of probabilities.

[94] The respondent argues that the financial records it tendered at the settlement negotiations, at the instance of Mr Hamman and Mrs Suna de DeBruyn representing the applicant, held on a without prejudice basis with a view to resolving the disputes before any threat of litigation or liquidation application, are accordingly information that falls under the ambit of the privilege and do not fall within the exception as determined by one court. As a result, the respondent requests this court to strike out paragraphs 31 to 41 of the Notice of Motion including the supplementary affidavit in its entirety. In *Lynn & Main Inc v Naidoo and another* 2006

(1) SA 59 (N) at 65D – E the court held that in insolvency proceedings where an offer is made without prejudice during settlement negotiations, such offer is nevertheless admissible in evidence as an act of insolvency.

[95] This principle was affirmed in *Absa Bank Ltd v Hamerle Group* 2015

(5) SA 215 (SCA) para 13 and the Supreme Court of Appeal went on to hold that:

“Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion.”

[96] In the present matter the existence and quantum of the debt were common cause between the parties at the settlement meetings. As it was the fact, it was then due and payable, there was no privilege attached to these meetings or communications. The only reason for the meeting was to discuss how and when the respondent would make payment of its debt, which was long overdue, or secure its payment.

[97] It is trite that where prima facie the indebtedness exists the onus is on the respondent's company to show that it is bona fide disputing the debt on reasonable grounds. As a rule, the respondent has set out in its affidavits the basis on which it makes such allegations. Though it can be said that the respondent has done so not baldly but with particularity, its version is improbable and implausible as compared to that of the applicant. The version of the applicant finds support in the parties' papers and supporting documents thereto. As a consequence, contentions by the respondent do not hold any water. In the circumstances, the respondent has failed to discharge the onus resting on it to prove on the balance of probabilities that it bona fide disputes the debt on reasonable grounds.

(iii) Commercial Insolvency

[98] The company is commercially insolvent if it is unable to pay its debts as they fall due, this situation may prevail even though the value of the company's assets exceeds its liabilities. However, the fact that a company which is commercially insolvent has assets which in value exceed its liabilities may be a relevant circumstance in the exercise of the court's residual discretion to refuse a winding-up order. See *Johnson v Hirotec (Pty) Ltd* [2000] ZASCA 131; 2000

(4) SA 930 (SCA) para 6.

[99] Section 344(f), states that a company may be wound up by the court if 'the company if unable to pay its debts as described in section 345 of the 1973 Companies Act.' As the statutory demand, a company is not deemed to be unable to pay its debts merely because an established claim has not been paid or secured. What must be shown is that the company has 'neglected' to pay or secure the claim.

[100] A company's inability to pay its debts may be proved in any manner. Evidence that a company has failed on demand to pay a debt payment of which is due, is cogent prima facie proof of inability to pay its debts. In *Kalk Bay Fisheries Ltd v United Restaurants Ltd* 1905 TH 22 it was held that the court might properly find that the company was unable to pay its debts where it had admitted to its creditors

that it could not pay or had failed to adhere to an agreement in monthly instalments. The mere fact that the value of a company's

assets may exceed the amount of its liabilities does not preclude a finding that the company has any funds with which to meet current

demands, the company is 'commercially insolvent'.

[101] In determining whether a company is unable to pay its debts, the court shall also take into account the contingent and prospective

liabilities. To date, according to the applicant, the respondent has failed to make payment of the balance due in terms of the certificate of balance, it signed on 8 July 2016, when it fell due on 31 July 2016 in the ordinary course of its business. The respondent denies that it is unable to pay its debts and claims to have to date paid the applicant a total sum of R24 770 432.38.

[102] The applicant does not simply claim payment for 8000 tons of wheat delivered in terms of the three agreements in question. Its claim pertains to wheat released as well as interest and ancillary expenses. The applicant goes on to state that the payment the respondent allegedly made related to deliveries and invoices which are not part of the claim upon which it (the applicant) relies in this application. In the light of its failure to pay such balance the applicant argues that the respondent is unable to pay its debts.

[103] The respondent's indebtedness to the applicant in the amount claimed was not disputed. This was a clear admission of both the respondent's liability and its inability to pay its debts. See *Absa Bank Ltd v Hamerle Group* case para 8. In addition, the respondent's sole

member sent an email to the applicant on 5 July 2016, “NH6”, stating that the respondent would pay the debt once a related company, Prograin (Pty) Ltd, allocated funds to it based on its purported indebtedness to the respondent. This, once again constitutes an admission on the part of the respondent of its inability to pay its debt.

- [104] Further, the respondent stated that Hakan Agro SA (Pty) Ltd (Hakan) was in the process of purchasing the assets of Prograin and Proflour and that the proceeds would then be paid to the respondent in settlement of its loan account and the respondent would, in turn, use the proceeds to liquidate its debt to the applicant. The respondent also stated that there was a pending BEE buyout of shares which would assist to liquidate its account. Over and above all this, the respondent undertook to pay to the applicant the amount of R22 000 000 and to settle the balance by twenty three monthly instalments.
- [105] The respondent contends that its assets exceed its liabilities. The application for a winding-up order can be refused if the facts show that there are liquid assets or readily realisable assets available out of which the company is in fact able to pay its debts. See *Rosenbach & Co. (Pty) Ltd v Singh's Bazaars* 1962
- (4) SA 593 (D) at 597. According to the applicant the Prograin mill does not hold any raw materials for milling purposes due to the misappropriation of wheat as set out in paragraph 21 of the applicant's founding affidavit. The respondent's total assets is reflected in “NH8”, as being R42 612 896, is R12 823 274 less than the respondent's liabilities.
- [106] The final statements of Prograin, from which the respondent needs to obtain the funds with which to pay its debt, show that it is hopelessly insolvent and its assets, if released, are nowhere near sufficient to pay the respondent's debt due and payable to the applicant. According to the applicant Prograin will never be in a position to repay this loan.
- [107] In the premises, I am satisfied that the applicant has succeeded to establish that the respondent is unable to pay its debts in that it is unable to meet, current demands upon it, its day to day liabilities in the ordinary course of its business, and that its liabilities exceed the value of its assets. The *ex debito justitiae* maxim conveys that once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order.

Order

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

- (a) The counter application by the respondent is dismissed with costs;
- (b) The respondent is placed under a provisional liquidation order in the hands of the Master of the High Court;
- (c) A rule nisi is issued calling upon the respondent and all interested parties to show cause, if any, on 16 August 2017 at 9.30 am, why the provisional

liquidation order should not be made final;

(d) The cost of this application are costs in the liquidation;

(e) The provisional liquidation order shall be served by the sheriff on:

(i) The respondent;

(ii) Any employee of the respondent at the principal place of business of the respondent by affixing a copy of the provisional order to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the respondent's principal place of business;

(iii) A trade union representing the employees of the respondent, if any;

(iv) The South African Revenue Services;

(f) The provisional liquidation order shall be published in one edition respectively of the Daily News and "Die Beeld" newspapers.

MADONDO DJP

Date reserved: 17 February 2017

Date delivered: 15 June 2017

For Applicant: Adv L Mills

Instructed by: Hayes Incorporated

Locally represented by:

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Ref: Mr Damian Bon/Heidi Scholl

For Respondent: Adv A E Potgieter SC

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Ref: SSP/M.Motala

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