

SOUTH AFRICA / JUDGMENT

Grenco Projects and Construction CC v Hermanus Esplanade Dev Co (Pty) Ltd (4260/2024) [2024] ZAWCHC 172; [2024] 3 All SA 504 (WCC); 2024 (6) SA 500 (WCC) (18 June 2024) [2024] ZAWCHC 172

COURT

Western Cape High Court, Cape Town

BEFORE

A Kantor

CASE / FILE NUMBER

4260/2024

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FLYNOTES:

COMPANY – Winding up – Unable
to pay debts –
Payment
certificates for JBCC construction contract – Arbitration
pending – Debt due and payable – Requirements
restated
– Payment certificates are not immune from dispute –
Clauses specifically provide for implementation
in context of an
arbitration proceeding – Applicant's claim not
disputed on bona fide and reasonable grounds
– Liquidation
application stayed pending finalisation of arbitration proceedings
– Companies Act 61 of 1973,
s 345.
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case
No: 4260/2024
In

the application between: GRENCO
PROJECTS AND CONSTRUCTION CC
Applicant
and
THE
HERMANUS ESPLANADE DEV CO (PTY) LTD
Respondent

Heard: 14 June 2024

Judgment: 18 June 2024

JUDGMENT

KANTOR, AJ:

1. This matter concerns the role of payment certificates issued in terms of a JBCC construction contract in liquidation proceedings, particularly in relation to the question as to how, and to what extent, a respondent can dispute an applicant's claim in terms of such certificates in good faith and on reasonable grounds, as contemplated in what is known as the Badenhorst rule, canvassed in some detail below.
2. The applicant applies for the respondent's provisional liquidation. It contends that the respondent is indebted to it in a significant sum in the millions which is due and payable. In asserting its claims, the applicant relies on payment certificates issued by the respondent's principal agent in terms of a JBCC contract identified below. All of those certificates form the subject matter of the disputed in arbitration proceedings, which are currently underway.
3. The applicant relies on two grounds for the winding-up of the respondent in terms of section 344 of the Companies Act 61 of 1973 ("the 1973 Act"): an alleged inability on part of the respondent to pay its debts (section 344(f)), alternatively that it would be just and equitable for the respondent to be wound up (section 344(h)).
4. The respondent opposes the application.

Applicable legal principles

- (1) Inability to pay debts
5. Section 344(f) of the 1973 Act provides that a company may be wound up by the Court if it is unable to pay its debts as described in section 345 thereof. Section 345 of the 1973 Act determines, inter alia, that a company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted for not less than R100 then due has served on the company, by leaving at its registered office, a demand requiring the company to pay the sum so due, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the

reasonable satisfaction of the creditor (section 345(1)(a)(i)), or if it is proved to the satisfaction of the Court that the company is unable to pay its debts (section 345(1)(c)).

6. Section 345(2) of the 1973 Act provides that in determining for the purpose of section 345(1) whether a company is unable to pay its debts, the Court shall also consider the contingent and prospective liabilities of the company.
7. 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 for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources (*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597C-H).
8. The fact that the value of a company's assets may exceed the amount of its liabilities (i.e. that it is factually solvent) does not preclude a finding that the company is unable to pay its debts. Such a finding may be made if these assets are not readily realisable and the company has no funds with which to meet current demands. The fact that a company in such a state is solvent in the sense that the value of its assets exceeds its liabilities is, however, a factor to be considered in the exercise of the Court's discretion whether to wind up (*ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F-441A).
9. The fact that a company is factually insolvent (in the sense that the value of its assets is exceeded by its liabilities) is not per se a ground upon which it can be wound up, but it may be a factor in proving that the company is unable to pay its debts, within the meaning of section 345(1)(c) of the Act (*Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) at paragraph [6]).

(2) Just and equitable

10. Section 344(h) of the Act provides that a company may be wound up by the Court if it appears to the Court that it is just and equitable that it should be wound up. A finding that a company should be wound up on the grounds that it is just and equitable to do so, does not postulate facts but a broad conclusion of law, justice and equity, as a ground for winding-up. The reaching of the conclusion by the court that winding-up would be just and equitable involves the exercise, not of a discretion, but of a judgment on the facts found by the Court to be relevant. Once, however, such conclusion is reached, the making of the order for the winding-up does involve the exercise of a discretion (*Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc* [2008] ZASCA 64; 2008 (5) SA 615 (SCA) at paragraph [16]).

(3) Onus

11. Where 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. Where the application for a provisional order is opposed and, on the evidence contained in all the affidavits a prima facie case for the grant of the provisional winding-up order is not established on a balance of probabilities,

then ordinarily the Court should refuse the application (Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 976A-980A, Payslip Investment Holdings CC v Y2K Tec Ltd 2001 (4) SA 781 (C) at 783F-I).

- (4) Debt bona fide disputed on reasonable grounds
12. Winding-up proceedings ought not to be used to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt (Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd (case no 326/2021)
- [2022] [ZASCA] 143 (24 October 2022) at paragraph [33]). This rule is commonly known as the ‘Badenhorst rule’ after Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (20 SA 346 (T) at 347H-348C in which it was formulated. A detailed explanation is contained in Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (C) at 267F to 270H).
13. Where prima facie the indebtedness exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds. Where this onus is discharged, the application should fail even if it appears that the company is nevertheless unable to pay its debts (Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WCC) at paragraph 8).
14. Where an applicant at the provisional stage shows that the debt prima facie exists, the onus is on the respondent to show that it is bona fide disputed on reasonable grounds (Gap Merchant at 267J).
15. The respondent must satisfy two requirements, namely, its bona fides and the reasonableness of the grounds relied upon. Bona fides relate to the respondent’s subjective state of mind, whilst reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute a defence in law. These two elements are nevertheless interrelated because inadequacies

in the statement of facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts (Gap Merchant at 269G-J)

16. The following was held in Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998
- (2) SA 208 (C) at 219F-220C (approved in subsequent decisions of this court, such as Gap Merchant at 269G-J) which illustrates the relatively low bar at which the bona fide dispute on reasonable grounds of the applicant’s claims is set (comparable to that in summary judgment, with underlining added):

“I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application

with success. Apart from the fact that they dispute the applicants' claims, and do so bona fide, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their and their company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial. This is not an application for summary judgment in which, in terms of Supreme Court Rule 32(3), a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits “the material facts relied upon therefor”.... It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide, and I must emphasise again that their bona fides are not here disputed, to allege facts which, if approved at a trial, would constitute a good defence to the claims made against the company. Where such facts are not within their personal knowledge, it is enough, in my view, for them to set out in the affidavit the basis on which they make such allegations of fact, provided that they do so not baldly, but with adequate particularity. This being the case, they may, in my judgment, refer to documents and to statements made by other persons without annexing to their affidavits such documents or affidavits deposed to by such persons, subject of course to the qualifications which I have mentioned and, in particular, to the Court being satisfied, as it is in this case, of their bona fides.’

17. In Kalil at 979C-980A it was confirmed that the Court must decide the probabilities by taking the full conspectus of allegations into account, and decide the issue on all the allegations as they appear on the affidavits, read as a whole.
18. The respondent's case should be set out in an adequate and reasonably convincing manner in order that the dispute can be said to be bona fide and founded on reasonable grounds. There is no requirement that a respondent should demonstrate a probability of a good defence to the claim, only that there is a dispute to the claim. This principle is trite and repeated in many decided cases, such as Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998
- (2) SA 208 (C).
- (5) Discretion of the court
19. If a case for winding-up is made up, section 347(1) confers a discretion on the court whether to wind-up the company or to grant another order:

“The Court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company Page 12 of 55 Prepared by: have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.”

20. As in all matters relating to a winding-up, the Court may have regard to the wishes of the creditors and the members and may direct that meetings of creditors or members be held to ascertain those wishes (Orestisolve at paragraphs 17 to 20).
21. The discretion is narrow where no other creditors express their opposition to a winding-up and the applicant creditor has a debt which the company cannot pay as it is entitled, ex debito justitiae, to a winding-up order *Afgri Operations Limited v Hamba Fleet (Pty) Limited* 2022 (1) SA 91 (SCA) at paragraph 12).[1]
- (6) Abuse of process
22. In addition to its statutory discretion, the court has an inherent jurisdiction to prevent the abuse of its process and, therefore, even where a ground for winding-up is established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide bringing about of the company's liquidation for its own sake, eg the attempt to enforce payment of a debt bona fide disputed (*Wackrill v Sandton International Removals (Pty) Ltd and Others* (supra) at 293B-E).

The JBCC contract, payment certificates and demands

23. The parties concluded a written JBCC construction contract on 27 December 2021 (“the Agreement”). Terms of the Agreement include:
 - 23.1. The principal agent shall regularly issue payment certificates to the applicant with a copy to the respondent until and including the issue of the final payment certificate (clause 25.2).
 - 23.2. The respondent shall pay the applicant the amount certified in an issued payment certificate within 14 calendar days, including default interest and/or compensatory interest (clause 25.10).
 - 23.3. The applicant may terminate the Agreement where the respondent has failed to pay an amount certified by the due date (clause 29.14.5).
 - 23.4. The right to terminate may not be exercised where the contractor is in material breach of the agreement (clause 29.19).
 - 23.5. A determination given by an adjudicator shall be immediately binding upon and implemented by the parties notwithstanding that either party may give notice to refer the dispute to arbitration (clause 30.6.3).

23.6. Where the adjudicator has given a determination, either party may give notice of dissatisfaction to the other party and to the adjudicator within 10 working days of receipt of the determination or an extended time-period provided in the applicable rules for adjudication whereafter such dispute shall be referred to arbitration (clause 30.6.4).

23.7. Arbitration shall not be construed as a review or appeal of an adjudicator's determination and any determination by the adjudicator shall remain in force and continue to be implemented unless and until overturned by an arbitration award (clause 30.7.1).

24. The principal agent initially refused to issue certificates in respect of certain amounts claimed by applicant (these would have been certificates 18, 20 and 21). This refusal was referred to adjudication by applicant in terms of the Agreement. The dispute centred mainly on whether the date of practical completion should be extended which, if granted, would result in applicant becoming entitled to extension of time ("EOT") claims ("EOTs"). Where the date of practical completion fell would determine whether EOT claims (due to applicant) or penalties (due to respondent) would apply. The adjudicator decided in favour of the applicant, whereupon the principal agent issued payment certificates 18 (for R4 842 560.56 of which R623 174.41 has been paid, leaving a balance of R4 219 386.15), 20 (for R1 418 766.38) and 21 (for R42 978.23) which certified sums due to applicant. The principal agent also issued payment certificate 23 (R1 292 552.65). These four payment certificates will be referred to as "the Payment Certificates".
25. The total amount certified for payment in the Payment Certificates which is unpaid is R6 973 683.41.
26. The respondent disputes the Payment Certificates and has not paid the claims of the applicant in terms thereof. The disputes in respect of the Payment certificates were already referred to arbitration last year, with an arbitrator having been appointed in December 2023 and the Statement of Claim and Defence having been served and filed. During oral argument I was informed by Mr J van der Merwe (I mention the initial of his first name because counsel who appeared for the applicant was Mr D Van der Merwe), who appeared with Mr van Staden for the respondent, that the Replication has been delivered, that preparation for the arbitration is underway and that the arbitration will be finalised this year (i.e. within the next six months).
27. On 3 July 2023, the applicant served a demand in terms of section 345(1)(a) of the Act on the respondent by leaving it at its registered address. The respondent responded by recording its disagreement that it was indebted to the applicant and explaining why this was so. The applicant responded by launching a previous application for liquidation under case number 13117/2023 of the court on 1 August 2023. The parties then agreed that the respondent would make a payment to applicant in respect of work done, and that the balance of the claims would be held in abeyance pending overall settlement discussions. The respondent then paid the applicant for work done as reflected on payment certificates 17 and 18, but not for the EOTs which it disputed.

28. On 28 August 2023 the applicant served a second section 345(1)(a) statutory demand concerning payment certificate 18. Respondent points out that this was the subject of the agreement referred to in the preceding paragraph.
 29. The parties engaged in overall settlement discussions but the matter was not resolved.
 30. While respondent has disputed its underlying liability and the validity of the payment certificates and articulated the basis for this, the section 345(1)(a) statutory demand letters were not challenged in the sense of not complying with the formal requirements of section 345(1)(a) of the 1973 Act.
 31. The instant application for liquidation was launched under the above case number on 28 February 2024.
 32. In oral argument, it crystallised that the two main issues were whether applicant's claim was bona fide disputed by respondent on reasonable grounds and whether the court should not grant a liquidation order in the exercise of its discretion.
 33. The first of these two issues will be considered in three parts below:
 - 33.1. Whether a defence to applicant's claims underlying the Payment Certificates (as opposed to a defence to payment per se in terms of those certificates) is raised by respondent bona fide and on reasonable grounds.
 - 33.2. Whether as a matter of general principle interim payment certificates are immune to attack.
 - 33.3. Whether the effect of clauses 30.6.3, 30.6.4 and 30.7.1 of the Agreement is that the amounts certified in the Payment Certificates must be paid notwithstanding that they may be overturned in the arbitration, even if the answers to the above two issues are in the affirmative (i.e. in respondent's favour).
- Whether a defence to applicant's claims underlying the Payment Certificates (as opposed to a defence to payment per se in terms of those certificates) is raised by respondent bona fide and on reasonable grounds
34. The applicant's claims are based on the abovementioned Payment Certificates. It is common cause that these claims (and other disputes between the parties) were referred to arbitration on 30 November 2023 and that the arbitration is currently pending. The arbitrator was appointed on 5 December 2023, the applicant's statement of claim was delivered on 12 February 2024, and the respondent delivered its statement of defence on 30 April 2024. From the Bar I was told by Mr J van der Merwe that since the delivery of papers in this application, that the Replication has been delivered, that preparation for the arbitration is underway and that the arbitration will be finalised this year (i.e. within the next six months).

35. Sixteen days after the applicant delivered its statement of claim in the arbitration on 12 February 2024, it brought this application for liquidation on 28 February 2024. In doing so, it relies in the main on the following terms of the Agreement:
- 35.1. Clause 25.10 of the Agreement which provides as follows:
- “The employer shall pay the contractor the amount certified in an issued payment certificate within fourteen (14) calendar days of the date for issue of the payment certificate [CD] including default interest and/or compensatory interest.”*
- 35.2. Clause 30.6.3 of the Agreement which provides as follows:
- “A determination by the adjudicator shall be immediately binding upon and implemented by the parties notwithstanding that either party may give notice to refer the dispute to arbitration.”*
- 35.3. Clause 30.6.4 of the Agreement provides as follows:
- “Where the adjudicator has given a determination, either party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the determination, or an extended time period provided in the applicable rules for adjudication whereafter such dispute shall be referred to arbitration.”*
- 35.4. Clause 30.7.1 of the Agreement provides as follows:
- “Arbitration shall not be construed as a review or appeal of an adjudicator’s determination. Any determination by the adjudicator shall remain in force and continue to be implemented unless and until overturned by an arbitration award.”*
36. During the course of 2023, the applicant submitted a number of claims to the principal agent for extension of time in payment certificates 18, 20 and 21. The principal agent found that there was no merit in the applicant’s EOT claims and rejected them. All these claims were referred to adjudication during 2023. The appointed adjudicator decided the EOT claims and the additional two claims in the applicant’s favour. The applicant then submitted two further claims, in payment certificate 23, which was certified by the principal agent.
37. In terms of clause 30.6.4 of the Agreement, the respondent gave notice of its dissatisfaction with the adjudicator’s determinations and the disputes were consequently referred to arbitration.
38. In this section the question of whether a bona fide defence is made out on reasonable grounds to the claims underlying the Payment Certificates is explored.
39. The respondent has detailed the basis upon which it disputes the applicant’s various claims, which form the subject matter of the pending arbitration proceedings. This is explored further below. The applicant has sought various extensions of the practical completion date with consequent adjustments to the contract value. The respondent has at all material times maintained the view that the applicant was not entitled to those extensions and was in fact liable for penalties. This all depends on where the date of practical completion is finally

determined to fall. That will be determined in the arbitration.

40. The respondent relies on the expert evidence of a delay analyst in the context of building contracts and practical completion dates, Mr Harris ("Harris"). The grounds upon which it disputes the claims are dealt with in the lengthy and detailed time delay expert report prepared by Harris. Harris also signed a confirmatory affidavit in which he set out some further information. In essence, his conclusions are:

42.1 The applicant's critical path to practical completion during the period within which the alleged delays occurred are set out. Harris assesses whether the activities which the applicant alleges were delayed were on the critical path to practical completion i.e. whether these delays had an impact on the date by which practical completion could have been achieved.

42.2 Harris explains the importance of documents that are required by the applicant to prove its claims in the arbitration proceedings. He explains that these documents, which should be in the contractor's

possession, do not exist, and are also independently dispositive of the claims.

42.3 Harris concludes that the applicant's failure to achieve practical completion was exclusively due to the applicant's fault: according to him none of the risk events relied on by the applicant, either individually or collectively, caused the applicant to suffer any delay to the practical completion. If he is correct, then applicant was not entitled to any EOT claims and was liable to respondent for penalties for delay.

42.4 For example, he explains that the applicant placed the crane which was used on the project in a position which blocked the entrance to the construction site's underground area. This meant that when

the removal of the crane was substantially delayed (which is common cause), the contractors were unable to access and construct the underground services for the period of the delay. The applicant was solely responsible for the placement of the crane.

43 Harris' conclusions appear to me to hold some prima facie weight.

44 The applicant contends that the Harris report is negligible in value, alleging that the protocol adopted by Harris presents 'guidance only' and is not binding on the parties unless agreed. That it is not binding is obvious and unexceptional and takes the matter

no further.

45 Applicant also contends that there is 'no credible, nor reliable nor accepted evidence that supports the respondent's case.' However, as the authority dealt with above illustrates, the court is not required to determine the credibility of the evidence presented by Harris in these proceedings. That is for the arbitrator to determine. Added to this is the fact that the applicant has failed to provide any independent evidence or substantive response to the detailed Harris report. The applicant has not dealt with the Harris report and affidavit to any material extent. It

remains effectively unchallenged.

46 If the Harris report is upheld in the arbitration, the date of practical completion determined will result in an amount of R1 430 000.00 being due to respondent by applicant in respect of payment certificates 18, 20 and 21. Payment certificate 23 certifies an amount of R1 292 552.65 being due to applicant by respondent. The net result is an amount of R137 447.35 due to respondent by applicant.

47 Applicant contended that this was not good enough because the retention amount of R689 544.73 (which exceeds the above balance) was not taken into account. The simple answer is that this item was not certified and as things stand it is not currently due and payable to applicant. In my view, therefore, it does not play a role in the instant enquiry.

48 Insofar as the requirement in clause 25.10 that “The employer shall pay the contractor the amount certified in an issued payment certificate”, Mr J van der Merwe gave the example in oral argument of buying a pack of cigarettes (probably a poor example, because with sin taxes I (even though a non-smoker) do not think a pack costs more than R100) and agreeing in writing that he is obliged to pay after a week, but then not doing so because the cigarettes were soggy. He would then have a defence on bona fide and reasonable grounds for the purposes of an application for liquidation and the Badenhorst rule, despite the formally agreed obligation to pay by a certain date. Similar considerations mutatis mutandis were discussed in oral argument in the case of a lease obliging payment of rent on the first day of each month and a failure to pay.

49 I am therefore of the view that applicant’s claims underlying the payment certificates are bona fide disputed by respondent on reasonable grounds.

Whether the interim payment certificates are, in general, immune to attack

50 The conclusion in the above section, while being a sine qua non to respondent satisfying the Badenhorst rule (i.e. without that conclusion being made in respondent’s favour, applicant’s claims will not be bona fide disputed on reasonable grounds), is not enough: respondent must also satisfy the court that even if such an underlying defence is accepted to exist, the Payment Certificates are not immune from attack (i.e. that an underlying defence is not irrelevant as to whether the Payment Certificates can be challenged).

51 In respect of interim payment certificates, it was held as follows in *Umlazi Civils Pty Ltd v Concor Construction t/a Conradie Development* (20967/2021) [2023] ZAWCHC 161 (10 July 2023) at paragraph 34 to 41 (underlining added):

“[34] Contrary to the thrust of Mr Sievers’s argument, the indications are that our jurisprudence has also come to reject what Nienaber J, in Thomas Construction (Pty) Ltd (in liq.) v Grafton Furniture Manufacturers (Pty) Ltd [1986] 2 All SA 357 (N); 1986

- (4) SA 510 (N), called ‘the now discredited case of Dawnays’. The learned judge described Lord Denning MR’s reference to an interim certificate as the equivalent of cash or a bill of exchange as ‘pure hyperbole’. He proceeded (at 516B-E SALR), ‘If that remark was intended to convey that the certificate is immune against attack or defence, the comparison is, with respect,

misleading, notwithstanding the apparent deference with which the expression was quoted in *Smith v Mouton* ... at 13H. Lord Denning’s construction has certainly not been universally accepted in our case law ... The better view, with respect, is that all defences remain open to a claim based on an interim certificate, including set-off or a counterclaim for damages for breach of the very contract which spawned the certificate ... ’

- [35] It is arguable that what Nienaber J termed the ‘better view’ (a view obviously dependent on the provisions of the given contract) was implicitly endorsed by Botha JA in the judgment on appeal in that matter. There, with reference to a contention by the appellant’s counsel (similar to that asserted by Mr Sievers) that the certificate was ‘sacrosanct’, Botha JA responded, ‘That cannot be right. Counsel was elevating the recognition of a cause of action into a postulate that there can be no answer to it’. Like Trollip JA in *Smith v Mouton* (A) *supra*, the learned judge found it unnecessary to decide whether there was any limitation on the type of answer that was permissible. It is noteworthy, however, that he did not embrace the appellant’s counsel’s argument ‘that it would be limited to cases of fraud and the like’, and refrained from expressing any doubt concerning Nienaber J’s statement of the ‘better view’.
- [36] I described earlier in this judgment the various provisions of the contract between the applicant and the first respondent that appeared to be most relevant for the purposes of the case. None of them gives the interim certificate the character of something that vests an absolute or temporarily final right to payment of the amount certified thereby if there is a dispute. The adjudication and arbitration provisions point the other way. There is nothing in the contract that I have found or been referred to that indicates that the employer waived or abandoned the right to raise any contractual defence that might be available to it to resist a claim for payment in terms of an interim payment certificate.
- [37] It was not entirely clear to me on the papers whether the issue of the first respondent’s alleged entitlement to delay damages is an issue in the pending arbitration proceedings between the parties. I was initially inclined to the view that it would be necessary for the first respondent to show clearly that it was if it sought to raise its claim in that regard in opposition to any obligation to pay the amount certified in certificate no. 17. Upon reflection, however, I have concluded that the question was, with respect, correctly disposed of by Viscount Dilhorne in *Gilbert-Ash* in response to a comparable argument by the contractor’s counsel in that matter. Lord Dilhorne said (at p. 720) –

‘Counsel for the respondent felt compelled to concede, in my view rightly, that the employer if sued in an action for the amount stated as due in an interim certificate, would be entitled to challenge the certificate on the ground that the work included in the calculation of that amount was not properly executed; though counsel contended that in order to resist payment on this ground the employer would have to have already submitted to arbitration the dispute as to whether or not the certificate was in accordance with the conditions of the contract and then to apply for a stay of action under section 4 of the Arbitration Act 1950. The arbitration clause, however, does not make an award a condition precedent to a right of action, let alone a condition precedent to a right of defence; and I see no grounds in law to prevent the employer from defending the action by setting up the contractor’s breach of warranty in doing defective work even though this involves challenging the architect’s certificate that that work had been properly executed.’

- [38] That all of the issues raised by the first respondent in opposition to the application are questions before the arbitrator in any event seems implicit in the submission by the first respondent’s counsel that the need to determine the dispute between the parties concerning the applicant’s entitlement to payment of the sum certified in payment certificate no. 17 would fall away once the pending arbitration proceedings were determined. The applicant’s counsel did not take issue with the submission, and the applicant did not seek to respond to the averment in the supplementary answering affidavit that ‘[t]he outcome of [the] arbitration proceedings will be determinative of the present application’. That the pertinent disputes are all before the arbitrator is also supported by the first respondent’s call upon the applicant on 9 May 2023 to agree to postpone or withdraw the application because of the pending arbitration.
- [39] I appreciate that the cause of action in this application, predicated on certificate no. 17, is different from the causes of action in respect of the claims (and counterclaims) before the arbitrator, but it nevertheless seems obvious, in the context of the grounds of opposition relied on by the first respondent in these proceedings, that the result of the application necessarily depends on the arbitrator’s award. In view of the parties’ agreement that the arbitration will finally settle their disputes, the applicant cannot obtain enforcement of the disputed payment certificate, save in respect of the first respondent’s admitted indebtedness, until the arbitrator has made his award. And once the arbitrator has made his award, the certificate will be enforceable only to the extent of its consistency with the award.
- [40] The applicant would therefore have been well advised to have agreed to the first respondent’s proposal that the application be postponed until after the completion of the arbitration proceedings. It was misdirected in pressing for judgment in the application at this stage. In the absence of an application for postponement by the applicant or one for a stay by the first respondent, the court has been forced into having to give a determinative judgment at an inopportune time.

[41] As the applicant is seeking final relief on motion, the matter falls to be decided applying the evidential principles rehearsed in Plascon-Evans. The court is not in a position to regard the factual premises for the first respondent's contestation of payment certificate 17 as so far-fetched or clearly untenable as to justify being rejected on the papers. The consequence is that the application for payment in the certified amount exceeding the first respondent's admitted indebtedness must be dismissed. The dismissal will have the effect of an order of absolution from the instance. Any right that the applicant might have to payment of the balance of the amount certified in terms of certificate 17 will be determined by the arbitrator's award."

52 This court in Umlazi therefore confirmed (at paragraph

34) the legal position that defences may be raised to interim payment certificates, including set-off or a counterclaim for damages for breach of the very contract which spawned the certificate. In my view, it follows that this includes EOT disputes.

53 Clause 25.10 of the Agreement provides as follows:

54 The equivalent clause in Umlazi provides as follows: "[t]he Employer shall pay to the Contractor ... the amount certified in each Interim Payment Certificate within 35 days after the Engineer receives the Statement and supporting documents ..." It is, in its essence, the same as clause 25.10 in the instant matter.

55 On the authority of Umlazi, this clause therefore does not have the consequence that payment must be made pending determination of the underlying dispute in arbitration.

56 As a result, I am satisfied that the Payment Certificates are, as a matter of general principle, not infallible and are not immune from dispute.

Whether the effect of clauses 30.6.3, 30.6.4 and 30.7.1 of the Agreement is that the amounts certified in the Payment Certificates must be paid, notwithstanding that they may be overturned in the arbitration, despite the answers to the above two issues being in the affirmative (i.e. in respondent's favour)

57 The applicant relies on clauses 30.6.3, 30.6.4 and 30.7.1 of the Agreement (all quoted verbatim above) to contend that its claims are undisputed for the purposes of these proceedings. To me, this is the core aspect on the crucial issue of whether applicant's claim for payment per se in terms of the Payment Certificates (as opposed to the claims underlying the Payment Certificates) is bona fide disputed on reasonable grounds.

58 Even though repetitious, I consider it important in respect of this enquiry to stress the distinction between the questions as to whether there is a bona fide dispute on reasonable grounds:

58.1 of the claim for payment per se (independent of the claims underlying the Payment Certificates);

58.2 of the claims underlying those Payment Certificates (which is the subject of the first enquiry dealt with above and identified in paragraph 33.1 above).

59 Paragraph 36 of Umlazi provides a good way to identify this issue in contradistinction to those in the above two sections (underlining added):

“I described earlier in this judgment the various provisions of the contract between the applicant and the first respondent that appeared to be most relevant for the purposes of the case. None of them gives the interim certificate the character of something that vests an absolute or temporarily final right to payment of the amount certified thereby if there is a dispute. The adjudication and arbitration provisions point the other way. There is nothing in the contract that I have found or been referred to that indicates that the employer waived or abandoned the right to raise any contractual defence that might be available to it to resist a claim for payment in terms of an interim payment certificate.”

60 The core question therefore is whether there are any clauses in the Agreement which “give the interim certificate the character of something that vests an absolute or temporarily final right to payment of the amount certified thereby if there is a dispute.”

61 If payment is not to be made in the context of (1) the pending arbitration proceedings and
(2) the dispute of the claims underlying the Payment Certificates having been made bona fide and on reasonable grounds, then the application falls to be dismissed.

62 On the other hand, if payment is to be made, notwithstanding (1) the pending arbitration proceedings and (2) the dispute of the claims underlying the Payment Certificates having been made bona fide and on reasonable grounds, then the question is whether the existence of these two factors means that the claim for payment in terms of the Payment Certificates per se (as opposed to the claims underlying them) is disputed bona fide and on reasonable grounds or whether the applicable clauses compel payment notwithstanding the existence of these two factors.

63 The answer to that question lies in whether there are any clauses in the Agreement which “give the interim certificate the character of something that vests an absolute or temporarily final right to payment of the amount certified thereby if there is a dispute.”

64 Clause 25.10 of the Agreement provides as follows:

65 This has been dealt with above and my conclusion is that it does not have the aforesaid consequence and effect.

66 Clause 30.6.3 of the Agreement provides as follows:

67 Clause 30.6.4 of the Agreement provides as follows:

68 Clause 30.7.1 of the Agreement provides as follows:

69 Respondent contends that on a proper interpretation of clause 30.6.3, to ‘implement’ an adjudicator’s determination is to ‘put it into effect’ (respondent used this meaning of ‘implement’ in the Oxford Dictionary, Thesaurus, and Wordpower Guide, 2001 edition) in the terms provided for therein. The contention is further that implementation does not include remedies that do not put the adjudicator’s award into effect in terms, such as a liquidation application, and that had it been the intention of the parties to include such a spectrum remedies, they could have included express words in the Agreement affording such remedies, including a liquidation application. Put another way, respondent contends that on a proper interpretation of these clauses an application for liquidation is excluded.

70 Respondent contends that the applicant is therefore not applying for the implementation or the enforcement of the adjudication determination in these proceedings, because the applicant is applying for the respondent’s liquidation. Respondent contends that this is not analogous to implementation or enforcement, relying on *Electrolux v Rentek Consulting* 2023 (6) SA 452 (WCC) at

[9] to [15]. That matter concerned a defence of *lis alibi pendens* in circumstances in which a party had launched action proceedings for payment of a debt and thereafter launched liquidation proceedings against the same debtor based in the same debt. The Court held that the defence of *lis alibi pendens* failed because different facts had to be averred and liquidations affected third parties. This does not assist in deciding whether implementation excludes liquidation and is limited to suing for payment. I therefore disagree that this supports respondent’s argument. In this regard, the core finding in *Electrolux* is in paragraph 15 thereof as follows:

“... it is apparent that the cause of action for the recovery of a liquidated debt from the respondent is different from the set of facts which give rise to an enforceable claim for the liquidation of the respondent. In addition, the nature of the relief sought in the action proceedings are without doubt different from the type of relief sought in the application for the liquidation of the respondent. In the action proceedings, a creditor seeks to enforce a claim against a debtor. On the other hand, liquidation proceedings are designed to set the machinery of the law in motion to declare a debtor insolvent and the estate of the debtor is then taken over for the benefit of third parties and not only the creditor who instituted liquidation proceedings against the debtor.”

71 Respondent referred to the following reported decisions concerning the enforcement of an adjudicator’s determination: *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014

- (1) SA 244 (GSJ), *Famatome v Eskom Holdings SOC Ltd* 2020
- (1) SA 204 (GJ) and *Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd* 2022
- (2) SA 395 (SCA). These were all cases in which the contractor sought to enforce an adjudicator’s awards in its terms, from which it has become settled that payment must be made in terms of an adjudication determination pending an arbitration. Respondent’s point was that none of them concerned an application for a liquidation based on the adjudication awards.

72 In my view that does not address the point in issue: just because those cases did not concern liquidation does not mean liquidation is excluded. On the contrary, none of those cases held as such and, in my view, cannot be used as authority for such a principle.

73 Mr J van der Merwe, after having traversed the above material in argument in response to questions from the bench, stated in regard to this interpretation point that 'standing alone this is not the best point'. I agree.

74 The applicant does state in its replying affidavit that it does not apply for the enforcement of the adjudication determinations. That is not determinative of the question.

75 The real question, in my view, is whether, notwithstanding the above clauses of the Agreement, the fact that the claims underlying the Payment Certificates have been bona fide disputed on reasonable grounds (as I have found above), means that payment per se in terms of the Payment Certificates themselves is bona fide disputed on reasonable grounds.

76 In oral argument, Mr J van der Merwe submitted that once there is a real dispute as to the claims underlying the payment certificates, certification and adjudication does not finally determine those disputes and they remain subject to challenge.

77 I agree with these submissions, but am of the view that they beg the real question which is whether pending the determine of that dispute (in arbitration) the clauses of the agreement relied on by the applicant require payment.

78 In oral argument, respondent also contended that to find that the terms of the Agreement require payment, notwithstanding the existence of a bona fide dispute on reasonable grounds of the claims underlying the Payment Certificates, would render the Badenhorst rule totally ineffective. I disagree: if the claim based on the Payment Certificates per se as a matter of law and contractual interpretation cannot be contested on the basis that the claims underlying those Payment Certificates are bona fide disputed on reasonable grounds, this has the effect that, while the ambit of defences is substantially narrowed, any applicable defence, such as payment or waiver or abandonment, could still be raised in terms of the Badenhorst rule. Respondent has not made out such a case.

79 The core difference, in my view, between clause 25.10, on the one hand, and clauses 30.6.3, 30.6.4 and 30.7.1, on the other hand, is that the former does not provide for implementation of the adjudication determinations pending arbitration as the other clauses do.

80 One can understand this: Clause 25.10 precedes an adjudication. As appears from clause 30 of the Agreement, adjudication is intended to be an expeditious procedure in which a determination is made by a third party. It is understandable that there is no requirement of implementation provided for in the Agreement pending adjudication. On the contrary, (1) arbitration will invariably and inevitably take materially longer, (2) counsel for both parties submitted that cash-flow for the contractor is important and a reason for the requirement for payment in terms of payment certificates, which is therefore a more important factor in the context of the longer arbitration procedure, (3) there has been an adjudication by a third party

and (4) there is a marked contrast between clause 25.10 and clauses 30.6.3 and 30.7.1 insofar as implementation is concerned.

81 It has become settled that payment must be made in terms of an adjudication determination pending an arbitration: *Stocks & Stocks v Gordon* 1993

- (1) SA 156 (T), *Rodon Projects (Pty) Ltd v NV Properties (Pty) Ltd and another* [2013] 3 All SA 615 (SCA); *Tabular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014
- (1) SA 244 (GSJ), *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd v Bombela Civils JV (Pty) Ltd* (GSJ case number 2012/7442), *Tenova Mining and Minerals (Pty) Ltd v Stellenbosch Municipality & Another* (28 February 2019).

82 In respondent's heads of argument, it was submitted that no cases could be found dealing with clauses of the nature of clauses 30.6.3 and 30.7.1 in the context of a liquidation application. In oral argument Mr J van der Merwe quite properly informed the court that he had located an unreported judgment of this court in this respect, namely *Böhnke NO and Others v JW Blue Construction Management* (22866/2019) [2020] ZAWCHC 101 (20 May 2020). In that matter:

82.1 The relevant dispute resolution provisions of the JBCC Agreement were for all intents and purposes the same as at issue in the instant matter:

"22.4 Where a dispute is referred to adjudication: ...

22.4.2 A determination given by the adjudicator shall be immediately binding upon, and implemented by the parties ...

22.5 Where the dispute is referred to arbitration:

22.5.1 The resolution of the dispute shall commence anew. The arbitration shall not be construed as a review or appeal from any adjudicator's

determination

and that any such determination by the adjudicator shall remain in force and continue to be implemented until overturned by an arbitration award."

82.2 The court found that the amount in terms of the payment certificate had to be paid.

82.3 The issue of whether a dispute on the claims underlying the payment certificates was raised bona fide on reasonable grounds was considered in the context of the exercise of the court's discretion to refuse to order a winding-up.

83 The court in *Böhnke* was not called on to, and did not, grapple with the question as to whether the clauses providing for 'implementation' were to be interpreted to exclude the entitlement to apply for liquidation. That submission of respondent does appear to be a novel one. I have dealt with it above and have found that it has no merit.

84 Mr J van der Merwe also attempted to apply his cigarette example in this context. I do not believe it negates the effect of clauses 30.6.3 and 30.7.1 for the reasons set out above, in essence because these clauses specifically provide for implementation in the context of an arbitration proceeding.

85 In my view, therefore, the effect of clauses 30.6.3 and 30.7.1 is that payment must be made pending arbitration notwithstanding that (as I have found) respondent has established that the claims underlying the Payment Certificates are bona fide disputed on reasonable grounds.

Conclusion

on whether applicant's claims are bona fide disputed on reasonable grounds

86 I therefore conclude that applicant's claim for payment in terms of the Payment Certificates per se (as opposed to the dispute of the claims underlying those Payment Certificates) is not disputed on bona fide and reasonable grounds.

Whether the respondent is able to pay its debts

87 As dealt with above, the applicant relies on two statutory demands in terms of s 345(1)(a)(i) of the 1973 Act which are not challenged in the sense of not complying with the formal requirements of section 345(1)(a) of the 1973 Act.

88 Accordingly, respondent is deemed unable to pay its debts and it is unnecessary to consider the respondent's averments as to its actual commercial solvency.

89 The respondent's papers, in any event, did not disclose any readily realisable assets which would be sufficient to pay the amounts of the certificates. While there are two properties which are in the process of being transferred, the net proceeds thereof are not disclosed and, compounding this, the bondholder, Sasfin Bank, is still owed R4.5 million according to respondent. Respondent does mention that a related company which shares the same sole director as respondent and which is liable to applicant in the amount of R19 803 229, owns an unencumbered property with a value of approximately R52 million. How readily realisable that asset may be, however, is not explored in the papers. The draft financial statements of respondent record that the loan by this related company to respondent is "unsecured, bear no interest and are repayable as agreed between the parties from time to time".

Conclusion

on the case to wind-up on the basis of inability to pay debts

90 In my view, applicant has made out a case for its locus standi and for the winding-up of respondent in terms of section 344(f) of the 1973 Act.

Just and equitable

91 The applicant alleges that it would be just and equitable for the respondent to be wound up. The applicant did not present any case on this ground of liquidation besides relying on its allegations as to the commercial insolvency of respondent.

92 The applicant has not made an inadequate attempt to satisfy the grounds which have been outlined in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350E-G, and followed in a line of authorities thereafter, for example *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting And Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA).

93 In my view, the applicant has failed to satisfy the requirements that it would be just and equitable for the respondent to be wound up.

The Court's discretion

94 Section 347(1) of the 1973 Act (quoted above) provides that the Court may grant or dismiss any application for liquidation (under section 346), or adjourn the hearing thereof, conditionally, or unconditionally, or make any interim order or any other order it may deem just.

95 Prior to the introduction of the 2008 Act, generally speaking, an unpaid creditor had a right, *ex debito justitiae*, to a winding-up order against a respondent company that has not discharged the debt owed to it. This does not however mean that the court is obliged to grant an order. The options contemplated in section 347(1) remain in the exercise of a discretion by the court.

96 As dealt with above, the discretion is very limited where a creditor has a debt which the company cannot pay as it is entitled, *ex debito justitiae*, to a winding-up order.

97 Respondent argued that section 347(1) must be read within the context of the introduction of the 2008 Act, and the objectives spelled out in section 7 thereof, which occasioned the court in *Absa Bank Limited v Newcity Group (Proprietary) Limited* 2012 JDR 1413 (GSJ) at paragraph 30-31 to question whether the doctrine that a "creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt" remains good in law, which the court answered in the negative. The court held that it seems now to be incorrect to speak of an

'entitlement' to a winding up order simply because an applicant is an unpaid creditor. It commented that the rights of creditors no longer have supremacy and have been levelled with those of shareholders, employees, and the public interest too (at paragraph 31). The Court concluded at paragraph 31 that 'the age of creditor supremacy is over.' The reasoning in *Newcity* was followed in this division by in *Hendrik Dippenaar NO & Others v Business Venture Investments No 134 (Pty) Ltd* [2014] 2 All SA 162 (WCC) at paragraph 45 et seq.

98 However, subsequent to and notwithstanding the above two cases, the SCA in *Afgri Operations Limited v Hamba Fleet (Pty) Limited* 2022 (1) SA 91 (SCA) (at paragraph 12) confirmed, with reference to *Newcity*, that, generally speaking, the *ex debito justitia* principle applies, but that different considerations may apply where business rescue proceedings were being considered, as was the case in *Newcity*:

“Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. Different considerations may apply where business rescue proceedings are being considered in terms of Part A of chapter six of the new Companies Act 71 of 2008. Those considerations are not relevant to these proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a ‘very narrow one’ that is rarely exercised and in special or unusual circumstances only.”

99 As in *Afgri Operations*, business rescue is not relevant to the instant matter.

100 In *Afgri Operations* (at paragraph 18) the SCA did not refuse an order of liquidation in the exercise of its discretion. In that application, the respondent asserted a counter-claim, but failed to adequately deal with the grounds thereof. The Court, on the facts, found that the genuineness of the counter-claim had not been established.

101 What is of importance is the converse: in the event of a genuine counter-claim (or, I believe, a defence on the merits to a claim underlying an interim payment certificate), the court may exercise its discretion in the respondent’s favour to refuse an order of liquidation.

102 What is therefore also of importance from *Afgri Operations* (at paragraph 18) are the factors which the SCA considered to be relevant in this regard which it summarised in paragraph 18:

“As mentioned earlier, in this particular case the inertia of the respondent in pursuing its right of action alleged in the counterclaim generates a considerable sense of unease about the genuineness of its contestation. There are other relevant factors too: the illiquidity of the claim, the failure even to attach the summons, the failure to respond to the s 345 demand, the lack of any indication that the respondent may be solvent and the fact that the respondent does not appear to be trading.”

103 These factors are listed below in sub-paragraphs below and underlined. What follows the underlined wording is comment on whether they are considered to apply against respondent in the instant matter:

103.1 The inertia of the respondent in pursuing its action alleged in the counter-claim generated a considerable sense of unease about the genuineness of its contestation: The extant arbitration proceedings in which respondent is participating, an arbitrator has been appointed and pleadings have been delivered. The answering papers in this matter were in fact delivered late because respondent was preparing its Statement of Defence in the arbitration, as explained in its application for condonation.

103.2 The illiquidity of the counter-claim: The defence and counter-claim are a product of the days relevant to the practical completion date once determined and the penalty of R10 000 per day provided for in the Agreement.

103.3 The failure of the respondent to even attach the summons: Both parties referred to the arbitration and the pleadings, which were tendered to the court.

103.4 The failure to respond to the section 345 demand: Respondent responded in terms to the demands. It has also produced the detailed Harris report.

103.5 The lack of any indication that the respondent may be solvent: The respondent's financial position is set out in the answering affidavit to the effect that its assets exceed its liabilities and that, even if the applicant is to succeed in the arbitration proceedings, the respondent's net financial position would be positive to the extent of R10 million. The respondent has recently, in January 2024, settled most of its liability to Sasfin Bank in respect of Sasfins Bank's loans and profit share in the development in the amount of more than R63 million (R4.5 million remains of the liability). The respondent has two loan claims in its favour against two related companies (all three companies have the same sole director). One of those companies has an unencumbered property valued at over R50 million (Helderberg Laboratories CC v Sola Technologies (Pty) Ltd 2008 (2) SA 627 (C), a full bench decision of this division in which it was held at paragraph 16 that the source of funding is irrelevant).

103.6 The fact that the respondent does not appear to be trading: Respondent is still finishing its current development (two properties are still to be transferred and the funds received) and, as a property developer, is looking for further developments.

104 It does not appear to me that any of the above factors in Afgri Operations are present in the instant matter to any material degree.

105 Further factors raised by respondent in favour of the exercise of the discretion to refuse a winding-up:

105.1 On the facts placed before the court, there is a reasonable prospect that the arbitration proceedings may be determined in the respondent's favour and be dispositive of the applicant's claims. This has already been dealt with in some detail above.

105.2 Respondent contends that the granting of a liquidation order will adversely affect third party rights. For example, the rights of third-party purchasers in respect of the five-year liability for structural defects in their favour.

105.3 Respondent contends that there will be knock-on effects for the related companies which together are liable to respondent in the amount of over R35 million. However, those companies have the same sole director as respondent, being the deponent to the answering affidavit, Mr Francois Steenkamp, which I think waters this aspect down materially.

105.4 Mr J van der Merwe informed the Court from the Bar that the Arbitration will be heard this year (i.e. within the next six months). This couples with the fact that the respondent has not been idle in the arbitration process, the arbitrator having been appointed and pleadings having been delivered. I was informed from the Bar that the Replication has been delivered since the delivery of the papers in this matter and that pre-arbitration procedures are now under way. The factor of the arbitration and its progression are incorporated into the order in this matter which is recorded below.

105.5 Mr J van der Merwe submitted that the practical realities of liquidation is that it is unlikely that the liquidators would proceed with the arbitration. There may be an element of reality, although very far from absolute, to this argument.

105.6 Mr J van der Merwe submitted that there was an unlikelihood of recovery for respondent from applicant should it pay the disputed amount to applicant and then be successful in the arbitration and become entitled to repayment of that amount which runs into millions. This submission is based on a letter written by applicant's 'independent accountants' to applicant in which it records the fact of applicant "... not receiving payments on outstanding certified payment certificates, which caused major cash flow issues in the business." As these are the payment certificates in dispute in this matter, if respondent pays them before the arbitration, there is a valid question mark over whether applicant will be a position to repay the amount involved. Respondent contends that this is the reason why it was not prepared to pay any further disputed amounts to applicant.

106 Submissions made by Mr D van der Merwe, who appeared for respondent, included:

106.1 He contended that the sole director of respondent, Mr Steenkamp, does not say the draft 2023 annual financial statements are correct. In my view, this is incorrect. Mr Steenkamp deals with them in some detail in the answering affidavit.

106.2 He contended that the draft annual financial statements were not audited. This is correct, but the year-end is 31 December 2023. In my view, this is therefore not a factor which can be held against respondent.

106.3 Applicant has only R91 000 in cash in bank account. While this may be true, as dealt with above, respondent has two properties which are soon to be transferred and funds made available (unfortunately the papers do not disclose the amount which will become available, which is a negative for respondent) and loan claims of over R35 million against two related companies of which Mr Steenkamp is the sole director ("the Related Companies"), one of which owns an unencumbered property valued at over R50 million.

106.4 No bank statements have been provided.

106.5 Nothing was provided in proof of the payment made to Sasfin Bank of R63 million.

106.6 The question as to why Sasfin Bank would demand payment now, being an indication of its own concerns with respondent. Mr J van der Merwe submitted that Sasfin Bank has its own issues, but none of that was explored on the papers and cannot be taken into account.

106.7 Approximately R10 million was paid by respondent to the Related Companies between the 2022 and 2023 financial years. This factor is watered down to an extent by the fact that one of those companies has an unencumbered property valued at R52 million, being an indication that the funds have not been dissipated and are supported by a significant asset.

106.8 There is no detail given in regard to the allegation of respondent's future developments.

106.9 The Related Companies depend on respondent for their continued liquidity.

106.10 Undertakings and promises of payment were made which fell away. This is watered down to some extent by the reason given for this (the letter in regard to applicant's cash-flow problems referred to above).

107 Core to the conclusion I make in regard to discretion is that all of the factors mentioned in Afgri Operations dealt with above are by and large satisfied by respondent. This has led me to conclude that respondent has presented a case which narrowly gets it over the line insofar as the exercise by the court of its discretion is concerned.

108 That does not mean that the application is to be dismissed, which I do not consider to be appropriate on the facts of this matter. Section 347(1) of the 1973 Act provides for other remedies in the exercise of the Court's discretion. It permits the Court to stay the liquidation proceedings pending finalisation of arbitration or action proceedings. For example, in *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016), the SCA stayed the liquidation application pending action proceedings which had already been instituted.

109 I am therefore of the view, in the exercise of the court's discretion, that the liquidation application should be stayed pending finalisation of the arbitration proceedings. Should the applicant prove a claim against the respondent which remains unpaid after arbitration, then it may enrol this application with papers duly supplemented. In the context of the facts of this matter, I would add one aspect to the order in *Freshvest*, based on the submission made from by Mr J van der Merwe that the arbitration proceedings should be concluded this year (i.e. within 6 months), namely that applicant may enrol this application with papers duly supplemented in the event that, if dates for the arbitration to be heard and completed before 15 December 2024 are made available to respondent, and the arbitration hearing is not completed due to respondent's failure to participate in the arbitration on those dates without having compelling reasons for such failure.

Costs

110 Despite the application for liquidation being stayed, as ordered below, it is to be borne in mind that applicant made out a case for liquidation and that respondent has only escaped liquidation (at least temporarily) by the exercise of the discretion of the court in what can be described as the narrowest of margins. I am therefore of the view that applicant should be awarded its costs of this application to date against respondent.

111 Uniform Rule 67A requires a scale to be set in respect of an order for costs, failing which scale A applies. There is some complexity in this matter and the costs order herein will be on Scale B, as contemplated in Uniform Rule 67A, read with Uniform Rule 69. Any further costs orders which may flow from the order granted in this matter will be in the discretion of the court which may hear the matter, which includes the scale thereof. I do not consider it appropriate to pre-empt any aspect thereof.

Order

112 It is accordingly ordered as follows:

1. The application for the winding-up of the respondent is postponed sine die, with respondent to pay the costs of this application to date on scale B in terms of Rule 67A as read with Rule 69.
2. Should the applicant be successful in the arbitration that has been instituted by it against respondent ('the pending arbitration') in establishing a claim of not less than R100 against the respondent, it may then set the winding-up application down for hearing on the same papers, duly amplified as needs be.
3. Should the applicant fail to establish a claim of not less than R100 against the respondent in the pending action, or fail to prosecute the pending arbitration to its final conclusion, then the winding-up application will be deemed to have been dismissed and any costs which may have been incurred in respect thereof not covered by paragraph 1 of this order shall be paid by applicant, including the costs of two counsel, where applicable.
4. Applicant may set the winding-up application down for hearing on the same papers, duly amplified as needs be, in the event that dates for the arbitration to be heard and completed before 15 December 2024 are made available to respondent and the arbitration hearing is not completed due to respondent's failure to participate in the arbitration on those dates without having compelling reasons for such failure.

A Kantor

Acting Judge of the High Court

For the Applicant: Adv D J van der Merwe

For the Respondent: Adv Jannie van der Merwe SC

Adv M van Staden

- [1] The citation from the judgment as reported in Saflii refers to “Hamba”, while that in the SA Law Reports refers to “Hambs”. I have utilised the former, assuming a typographical error in the SA Law Reports and because “Hamba” is a well-known South African word while “Hambs” is not.

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