

SOUTH AFRICA / JUDGMENT

Stark Vieh (Pty) Ltd v Peter Carroll CC (UM 212/2022) [2023] ZANWHC 96 (15 June 2023)

[2023] ZANWHC 96

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

UM 212/2022

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

CASE

NO.: UM 212/2022

In

the matter between:

**STARK
VIEH (PTY) LTD
APPLICANT
And
PETER
CARROLL CC
RESPONDENT**

JUDGMENT

REDDY AJ

Introduction

- [1] On 15 November 2022, the respondent was placed under provisional liquidation in the hands of the Master of the High Court, North West Division on an urgent basis. On the urgent return date, the applicant sought an order for the final winding up of the respondent, a close corporation. The application is opposed.
- [2] There is no underscoring the urgency of the application. A provisional order granted, somewhat watered down urgency. The general law of application as regards urgency is trite. See: See *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) at 136H-137F, *Hultzer v Standard Bank of SA (Pty) Ltd* (1999) 20 ILJ 1806(LC) at 1809, *Imperial Logistics Advance (Pty) v Remnant Wealth Holdings (Pty) Ltd* [2022] SCA 143, Ex Parte: Nel N.O and Others ZAGPPC, 2014 (6) SA 545.
- [3] The applicant contended that by virtue of the fact that it being a creditor of the respondent for the following amounts:
- (i) R 13,444, 948 as at 24 October 2022, in respect of accrued capital and livestock management fees for the period 1 March 2022 to 24 October 2022; and
- (ii) R 122,483, 185,12 being the current estimated value of 7510 head of cattle, which the applicant purchased and placed under the control of the respondent and in its care and for which the respondent cannot account, therefore the respondent should be liquidated.
- [4] The winding-up of the respondent is founded on the premise that it is unable to pay its debts within the meaning of section 344(f) read with section 345(1)(c) of the Companies Act 61 of 1973. As such, it would be just and equitable that an order for the final winding-up of the respondent be granted, within the purview of section 346(1) (b) of the Companies Act 63 of 1973.

The description of the parties

- [5] It would be appropriate to provide a proper description of the parties and the legal nexus between them. The applicant is cited as Stark Vieh (Pty) Ltd, a private company duly registered and incorporated in terms of the company laws of the Republic of South

Africa, with its principal place of business situated at [...] H[...] Road, Douglasdale, Johannesburg, Gauteng. The respondent is Peter Carrol CC, a close corporation duly registered and incorporated in terms of the Close Corporation Act 69 of 1984 which enjoys continued juristic existence due to the provisions of the Companies Act, 71 of

2008. Notably, the respondent's registered address is within the court's area of jurisdiction.

The case for the applicant

- [6] The applicant is in the business of trading in livestock. To this end, the applicant enters into agreements with identified farmers. Founded on the agreements so concluded, the identified farmers would render services relating to the tending of livestock purchased by the applicant for subsequent on-sale for the benefit of both the applicant and the contracted farmer. In pursuit of this business objective, on 19 October 2020 at or near Lichtenburg, the applicant and the respondent duly represented by their authorized representatives concluded a written Contract Farming Agreement ("the CFA"). In terms of the CFA duly concluded, the respondent portrayed that it conducted the business of a livestock farmer and owned, alternatively was able to access agricultural land together with the necessary infrastructure to efficiently farm with livestock.
- [7] By virtue of the conclusion of the CFA, the respondent consented when requested to by the applicant to give credence to services as set out in the CFA. It was further agreed in terms of the CFA, that the parties sporadically conclude "Feeding Phase Information Schedules" within the CFA. The Feeding Phase Information Schedules would operate on the basis that the applicant would purchase new livestock which would be delivered to the respondent to be nurtured in terms of the CFA.
- [8] The Feeding Phase Information Schedules had a specific objective. The respondent was to raise the livestock. On the livestock reaching the required growth and specified weight markers in the Feeding Phase Information Schedule, the livestock would be sold to specified purchasers. The identified purchasers would then make payment directly to the applicant.
- [9] The CFA provided latitude for the respondent to act as an agent for the applicant, in that the respondent was explicitly allowed to vend livestock, the proceeds of the sale of such livestock would be used to purchase replacement live stock. The replaced livestock would also be the property of the applicant.
- [10] The respondent assumed liability for the payment of a capital management fee, which is defined as a monthly fee due and payable to the applicant for its services relating to the management, safe guarding and administration of its capital used to purchase the livestock. In terms of clause 2.1.7 of the CFA the respondent would become entitled to a contract farming fee defined as the fee payable by the applicant on the due fulfilment of all its duties under the CFA and each feeding phase information schedule.
- [11] In the main, the duties of the respondent are set out in clauses 5-7 of the CFA, titled as "Duties of the Contract Farmer". The duties of the respondent in terms of the latter clauses included the procurement of the livestock (clause 5.1), taking control of the livestock (clause 5.2), death and disease of animals forming part of the livestock (clause 5.3), feeding and care of the livestock (clause 5.4), the monitoring of growth performance, (clause 5.5) the notice of intention to supply to off-taker and the movement of livestock (clause 5.7)

- [12] A Feeding Phase Information Schedule would be concluded in respect of each feeding phase as set out in clause 2.1.12. It "means every cycle where the Contract Farmer takes possession of the livestock procured by or for Stark Vieh, with the purpose to feed and care for the livestock until sold to an Off taker in accordance with the terms of the Agreement." This schedule was to cohere specific details, inter alia the delivery date of the livestock, the nominated delivery address, a description of the breed and quantity of the livestock acquired, the feeding period and the supplier's information. The Feeding Phase Information Schedule was to be completed and signed by the applicant and respondent in respect of each new feeding phase. (Clause 2.1.13) The applicant would further be entitled to a livestock management fee. This livestock management fee, as well as the capital management fee, would become due and payable within 3 business days after the date that the applicant rendered an invoice to the contract farmer reflecting the amounts due.
- [13] Additionally thereto, the CFA provided in, clause 2.12, for a provision of a cession of the respondent's debts, as well as the conclusion of a Call Option Agreement.
- [14] The applicant contends that during the period 21 May 2019 to date, it purchased or was led to believe that it had purchased 10444 head of cattle with a corresponding value of R 171 045 579.52. Currently there are only 2934 head of cattle on the farm as opposed to 10444. In the view of the applicant this led to two ineluctable conclusions; firstly, respondent disposed of the livestock and retained the proceeds of the sale of the livestock and failed to transfer the proceeds thereof to the applicant as it was contractually obliged to in line with the CFA or secondly, the respondent did not purchase the
- livestock but was led to believe that the livestock was purchased.
- [15] On the mistaken belief that the livestock had been purchased, the applicant made payments of these amounts over to the respondent. On the second probability, the disposal of the livestock was only permitted in terms of clause 5.6 of the CFA and sale of livestock other than set out in the CFA would be theft. Either of these hypothesizes would have resulted in the contravention of the CFA.
- [16] In respect of the unaccounted cattle, the proceeds thereof have not been received by the applicant, neither has the respondent volunteered an acceptable explanation for the unaccounted cattle. The total cattle should be 10444, with an equated value of R 171 045 579.52. Notwithstanding the CFA authorizing the respondent to purchase replacement stock, the applicant was not privy to the respondent's decision to the purchase of replacement livestock.
- [17] The applicant contends that the respondent had breached the provisions of the CFA by not maintaining the livestock numbers as it was obliged to do. These breaches occurred when the respondent did not maintain the livestock numbers as agreed and failed to account for livestock that had been sold. The respondent failed to keep the applicant abreast of the sale of the livestock.

- [18] In terms of the CFA, the applicant avers that the respondent is currently indebted to the applicant for the period 1 March 2022 to 24 October 2022 in the amount of R 13 444 948.53, in respect of accrued capital management and livestock management fees. The respondent had the benefit of monthly generated invoices which have been presented to the respondent. The invoices are within the knowledge of the respondent, who did not contest the accuracy of the invoices but failed and or neglected to honor the payments. Erratic part payments have been made without the full payments of the monthly fees, which is in breach of the CFA.
- [19] The respondent's failure to comply with the CFA resulted in various correspondence being exchanged between the parties. No substantial information requested by the applicant was provided. On 24 October 2022 a meeting was held at the office of the respondent's attorneys, wherein a decision was taken that a recount of the livestock would take place. This was to be done in the presence of all relevant stakeholders.
- [20] The following day the applicant and the respondent's representatives conducted the recount of the applicant's livestock. The recounting process ascertained that cattle totaling 2934 belonging to the applicant were noted. The accuracy of the recount was signed off by all the representatives of the applicant and the respondent. The impartiality of the recounting process was confirmed by independent auditors.
- [21] The applicant appointed Messrs. Jakob Jan Dekker Ouditeure (the Dekker report) to perform a solvency test and liquidity assessment on the respondent pursuant to section 4 of the Companies Act, 71 of
2008. The following pertinent findings were made:
- "11.25 The fair value of liabilities by far exceeded the available potential cash excluding the sale of vehicles and the farming equipment on 31 August 2022.,
- 1 1.26 Based on the net purchases of cattle at 10 October 2022 Peter Carol CC should have 10444 heads of cattle, paid for by Stark Vieh, under its control. A physical stock count however revealed that only 2934 heads of cattle was under the control of Peter Carroll CC.
- 1 1.27 Stark Vieh, as the contractual owner of the cattle purchased was entitled to the missing 7510 cattle at R20-000 per head of cattle Peter Carroll CC needed an approximate R 150 200 000 to reinstate the missing cattle.
- 11.28 Finally, the outstanding capital and management fees payable by Peter Carroll CC to Stark Vieh amounted to R 13 444 948 at October 2021.
- 11.29 Based on the available information Peter Carroll CC was not in a position to pay its debts within the 12 months after 31 August 2022.
- [22] In the view of the applicant, the respondent is unable to pay its debts when the debts became due and payable, as such the respondent is commercially and factually insolvent.

The case for the respondent

- [23] In view of the respondent the origin of the relationship between the applicant and the respondent began during May 2019, when the applicant and one of the respondent's related entities, Stark Vieh Zwei (Pty) Ltd, embarked on a similar agreement. Of significance is the fact that the applicant conflated the May 2019 agreement and the CFA agreement of October 2020.
2020. The relevance of mentioning the collective existence of both these agreements is that the applicant was unable to materially distinguish between both agreements, which has led to its own implosion.
- [24] The payments made over the period May 2019 to 10 October 2022 is disputed. A cursory examination from inter alia invoices, delivery notes and bank statements totaling a sum of R41 842 087.14 was not paid. In addition the applicant failed to consider and account for 6519 head of cattle that had been delivered to various off-takers. Further, the applicant has failed to account for 1959 head of cattle purchased directly from the respondent as well as 1493 head of cattle directly sold by the applicant. The respondent by virtue of various calculations attempts to raise a bona fide dispute.
- [25] In respect of the administration fee, the averred amount of R 13.4 million is supported by a statement. The inaccuracy of this amount is exposed by the inclusion of amounts for cattle purchased by the applicant.
- [26] In paragraph 70 of the answering affidavit the following is stated:
- "The applicant further fails to disclose to the honorable Court that it opened up a cash management account with Investec Bank for the respondent. Monies were held in this account on behalf of the respondent and on 23 September 2022 the applicant transferred R5 million from the Invested account to itself, in 5 separate transactions of R1 million each. However, the applicant only accounts for three payments made in annexure FA6 and nowhere does the other R2 million reflect to the benefit of the applicant. I attach a copy of the Investec Bank Statement for September 2022 hereto marked as annexure "PC10"
- [27] The respondent initially admits that the administration fee invoice for October 2022 in the amount of R6 546 501.37, remains unpaid.

In a supplementary affidavit, the respondent addresses the administration fee as follows:

"10.2 the applicant asserts that the respondent owes it an amount of R 13 444 948.53 in administration fees. Similarly, this is incorrect and the respondent in fact owes the applicant a sum of R5 695 026.50 for administration fees."

- [28] This payment (in whichever amount) will be made from funds that are being held by Cavalier Abattoir as well as the cattle still on the farm but ready to be moved. The respondent ardently denies the averment that it is factually or commercially insolvent. This contention is fortified by critical findings made against the auditor's report filed by the applicant, and the conclusions that it is factually and commercially insolvent.
- [29] The respondent contends that in terms of the CLA agreement disputes between the parties should be resolved by way of arbitration. If the insolvency process will not result in a settlement of the disputes between the parties, a viable option for consideration should be a statement and debatement of account. Due cognizance was taken that the respondent had filed security for R35 million at the time of the hearing.

The Law on Final Liquidation

- [30] The legislative framework as regards the winding-up proceedings of close corporations by a court are set out in the provisions of Part IX of the Close Corporations Act 69 of 1984, ("the CCA") in part by Chapter XIV of the Companies Act 61 of 1973, certain provisions of the Insolvency Act 24 of 1936, and the Companies Act 71 of 2008.

- [31] The applicant is now obliged to found its liquidation application on the grounds in section 344 and 345 of the Companies Act 61 of 1973. (See *FirstRand Bank Ltd v Lodhi 5 Properties Investment CC* 2013(3) SA 212 (GNP) at [35]) The grounds for the final winding-up of a close corporation are the same as those that are applicable for the winding-up of companies. An applicant for the winding-up of a close corporation must rely on the grounds set out in Section 344 and 345 of the Companies Act, 61 of 1973. Section 344 provides for instances in which a company can be wound up. Subsection (f) provides that a company may be wound up by the court if it is unable to pay its debts as set out in section 345 which provides as follows:

"345 When company deemed unable to pay its debts.—(1) A company or body corporate shall be deemed to be unable to pay its debts if—

- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—
 - (i) has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or
 - (ii) in the case of anybody corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, 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; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.”

[32] In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd & Another* 2015 (4) SA 449 (WCC) Rogers J stated with reference to the relevant legal principles, the following

“[7] In an opposed application for provisional liquidation 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 (Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 975J 979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a prima facie case.)

[8] 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 disputed on reasonable grounds. 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. In the context of liquidation proceedings the rule is generally known as the Badenhorst rule, from the leading eponymous case on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H - 348C, and is generally now treated as an independent rule, not dependent on proof of actual abuse of process (*Blackman et al, Commentary on the Companies Act Vol 3 at 14 - 82 to 14 - 8*). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers, but also whether the claim is bona fide disputed on reasonable grounds. A court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (*Payslips Investment Holdings CC v Y2K Tee Ld* 2001 (4) SA 781 (C) at 783G - I). However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (*Hulse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane ad Fey NNO Intervening)* 1995 (2) SA 208 (C) at 218D- 219C).

[9] 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 but must instead apply the Plascon-Evans rule. (*Paarlwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) para 4; *Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd* [2010] ZAWCHC 339 paras 8 10; *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) para 4.

[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the Badenhorst rule. If there are genuine disputes of fact regarding the existence of the application, it 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 affidavits 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 thus not be determined in liquidation and that it must be shown that there was service of the demand on the respondent 'b leavin the same at its registered office'.

Discussion

[33] Affidavits in motion proceedings fulfil a dual purpose, namely to place essential evidence in support of or in opposition to the granting of the relief claimed before the court, and to define the issues before the court. (See: *Swissborough Diamonds (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999(2) SA 279 (W) at 323G). An examination of all the affidavits placed before this Court, irrefutably confirms that the applicant as a creditor has established that it has the necessary locus standi to pursue the winding-up of the respondent.

[34] In the answering affidavit deposed to on 15 November 2022, Mr. Pieter Johannes Carrol in his nominated capacity as Trustee of the respondent at paragraph [7] admits as follows:

"I do admit that the admin fee invoice for October 2022 has not yet been paid and the amount of R 6 546 501.37 remains payable. This amount will comfortably be settled by monies currently held by Cavalier Abattoir as well as the delivery of the cattle still on the farm. but ready to be moved. "

As alluded to supra on 19 November 2022, the respondent repeats its indebtedness to the applicant, peculiarly in the sum of R5 695 026.50. Notwithstanding the difference in amounts, the admitted indebtedness is incontrovertible.

[35] There is no underscoring of the prejudicial effect of these admissions. Fanciful interpretations aided by semantics does little to detract from the ordinary meaning of the admissions. These admissions should signal the death knell of the respondent's resistance to the winding up order, as it is evident that the respondent is unable to pay its debts, within the meaning of section 344 (f) of the Companies Act 71 of 1973. The next peremptory enquiry should then follow, as intended in section 345 (1) (c), whether it would be just and

equitable that an order be granted for the respondent's final winding up.

- [36] I however turn to deal with the 7510 head of cattle, which the applicant purchased and placed under the control of the respondent and in its care and for which the respondent cannot account. The rand value of these head of cattle is estimated to be R 122 483 185.12. This is no doubt an astronomical sum and warrants exposition.
- [37] Consequent and in response to the respondent's inability to settle the capital and livestock management fees and its failure to deliver the obligatory management reports, the applicant addressed correspondence in the form of a letter dated 8 September 2022. This triggered a response from the respondent. A follow-up email was sent wherein the applicant inter alia requested specifically from the respondent an undertaking notifying the applicant in advance of how many head of cattle the respondent intends to sell and to whom.
- [38] The communication culminated with the applicant on 20 September 2022, providing the requested information regarding the cattle. The applicant, inter alia informed the respondent that "according to the applicant's records the number of cattle should be 10 411 as at 31 August 2022, alternatively cattle with a value of R163 251 239.62 had to be present on the farm." Subsequent purchases and sales accounted for by the respondent resulted in an adjustment in the number of the cattle to 10 444 as at 10 October 2022.
- [39] To this end, no firm response was elicited from the respondent regarding the information that was requested. Notwithstanding the intervention of attorneys, the requested information was not forthcoming. An arranged meeting followed on 24 October 2022, at which it was agreed that a recount of the livestock would be done in the presence of all relevant stakeholders.
- [40] The following day, the recount occurred as prearranged. The cattle tallied 2934, which belonged to the applicant. Considering that the applicant purchased 10 444 head of cattle, the unaccounted cattle numbered 7510. ($10\,444 - 2934 = 7510$). The value unaccounted for is R122 483 185.12
- [41] During the cattle recount, the son of the applicant, Mr. Peter Carrol, admitted, according to the applicant that the unaccounted cattle were in fact sold by the respondent without following the CLA and that the proceeds of the cattle so disposed of were appropriated by the respondent. This is denied by the respondent.
- [42] The respondent contends that the dispute between it and the applicant are multifarious and extensive in nature. In terms of the calculations made by the sons of Mr. Peter Carol Snr, the applicant has been either paid for or remunerated for 638 head of cattle, more than which was purchased by the applicant. In the premises the counterclaim does not only include a claim for repayment of overcharged administration fees made by the applicant since 2019. In the second answering affidavit, the respondent speaks of the overcharging of management fees over many months as being one of the claims the respondent intends to institute against the applicant.

[43] The Dekker report by virtue of a reconciliation of cattle balance, made the following conclusive findings:

- (i) 11 235 head of cattle were purchased.
- (ii) The total number of cattle sold from which the applicant benefitted was calculated as 651.
- (iii) The calculated head of cattle that should be in the care of the respondent is therefore calculated at 10 584. This calculated as the total number head of cattle purchase, from the applicant, payments less the head of cattle sold from which the applicant received payment.
- (iv) The calculated cattle that should be in the care of the respondent differs by 140 head of cattle from the 10 444 calculated in the 3 November 2022 report. This was due to the purchase of cattle on 8 April 2021, RI 000 000 (including vat) in value, that was correctly initially reflected as negative 65 cattle purchased, while the correct number of cattle purchased was 75.
- (v) The calculated equivalent net cost to the applicant of the 10 584 cattle that should be in the care of the respondent was calculated as R171 097 709.

[44] The respondent contends that 6519 head of cattle were delivered to a list of off-takers. The records of the applicant confirm that the proceeds of the sale of only 651 head of cattle were paid over to the benefit of the applicant. For the 5868 head of cattle sold by the respondent, the applicant derived no benefit. As the proceeds of the sale of 5868 head of cattle sold by the respondent were not paid to the applicant, this number of cattle should have been repurchased by

the respondent and resultantly should be in the care of the respondent.

[45] The Dekker report sets out in detail the documentation and basis for the ultimate conclusions, irrespective of an attempt to discredit the findings by the respondent's auditor. What stands out from the Dekker report is that none of the defences raised by the respondent offers any resistance to the application for the winding up of the respondent.

[46] Security was subsequently filed by the respondent in the sum of R35 million. At the time of hearing the administration invoice fee, even on the calculated amount of the respondent, had not been paid, notwithstanding the respondent filing security.

[47] Innes CJ, in *De Waardt v Andrew & Thienhaus Ltd* 1907 TS 727 at 733 posited as follows:

"Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. This is not sprung upon him...Of course; the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I will always look with great suspicion upon, and examine very narrowly, the position of a debtor who says "I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities." To my mind the best proof of solvency is that a man should pay his debts: and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."

- [48] Stripped of verbiage, the facts are, for present purposes, straightforward. The respondent is indebted to the applicant, by the respondents own admission. By the respondent's own admission, the applicant is a creditor of the corporation in respect of an amount of not less than R 100. It is undeniable that the applicant has the necessary locus standi; unquestionably that the respondent on its own version is indebted in the amount of R6 546 501.37. or R5 695 026.50
- [49] In *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* (326/2021) [2022] ZASCA 143 (24 October 2022) at paragraph [33] and [37] the following was stated:
- [33] Where, however. the respondent's indebtedness has prima facie been established the onus is on it to show that this indebtedness is indeed disputed on a bona fide and reasonable grounds...
- [37] The question which arises is whether the respondent has established that it has reasonable grounds for disputing the existence of the appellant's claims. This calls for scrutiny of the allegations forming the basis of the respondent's defences." See: *Orestisolve (Pty) Ltd t/a Essa Investments v NFDT Investment Holdings (Pty) Ltd* 2015 (4) 429 (WCC) at paragraphs 7-13
- [50] The respondents aver that their counterclaim does not only include a claim for 638 head of cattle that the applicant received but also a claim for repayment of over charged "admin - fees made to the applicant since 2019". The averment of a counterclaim is unsubstantiated and at best opportunistic. Rogers J assessed the varied approaches to the question of a disputed counterclaim for damages in *Ter Beek v United Resources CC and Another* 1997(3) SA 314 (C) and *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd*
- [2012] ZAWCHC. The respondents have not asserted that in terms of the CFA, a counterclaim is an objectively reasonable ground to resist payment of the applicants claim.
- [51] Rogers J noted at paragraph [47]:
- "respondent has no right to withhold payment on the basis of an alleged counterclaim for damages even if it had prima facie merit would not constitute a defence as such to the claim for payment because an illiquid claim for damages cannot be a set off against a liquidated claim. ...In such a case the court in action proceedings might nevertheless in terms of Rule 22(4) postpone the giving of judgment on the main claim until the determination of the counterclaim. However a court would be unlikely to adopt this course in the face of a contractual provisions such as clauses 37 and 38."

[52] The respondents have not succeeded in establishing that its indebtedness is disputed on bona fide and reasonable grounds, inclusive of a potential counter claim. See *Kalil v Decotex (Pty) Ltd and Another* 1988(1) SA 943 (A). The Badenhorst principle enunciates the idea that winding up is not an appropriate procedure to be availed of by a creditor whose claim is bona fide disputed on reasonable grounds. Given the admission of the respondent, this principle does not find application.

Is it just and equitable to order the winding up?

[53] It is settled law that the two types of discretion exercised by courts are often referred to as a discretion in the narrow sense and a discretion in the wide sense. See: *Trencon Construction Pty Ltd v Independent Development Corporation and Others* 2015 (5) SA 245 (CC).

[54] In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited*

[2013] ZASCA 173:

"[17] That a company's commercial insolvency is a ground that will iustify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe: more often than not, creditors do not have knowledge of the assets of a company that owes them money - and cannot be expected to have: and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets

[55] In *Agri Operations Limited v Hamba Fleet (Pty) Limited* 2021 (1) SA 91 (SCA) the following was stated:

"[11] As to the general principles concerning the exercise of a discretion by a court, the Constitutional Court's judgment in the *National Coalition for Gay and Lesbian Equality & others v The Minister of Home Affairs & Others* has made it clear that an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles or a misdirection of the facts or that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles. The court a quo was mindful of the fact that its discretion must be "exercised on judicial grounds."

[12] ...The court a quo did not keep in view the specific principle that generally speaking, an unpaid creditor has a right, *ex debito iustitiae*, to a winding-up order against the respondent company that has not discharged that debt.... 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" (footnotes omitted)

[56] The applicant had locus standi, that it was a creditor for a sum no less than R 100 and further that it was due and payable. There is no dispute that although the section 345(1) (a) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdictional requirements set out in section 345(1) (a) have been met. That being found, it is incontestable that this Court in these circumstances has a narrow discretion in the refusal of a winding up order. See: *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24; 2022 (1) SA 91 (SCA) para [12]. *De Waard v Andrew and Thienhaus Ltd* 1907 TS 727 at 733, *Service Trade Supplies Ltd v Dasco and Sons Ltd* 1962 (3) SA 424 (T) at 428B-D.

[57] I therefore find that it is just and equitable to order the final winding up of the respondent. There is no reason to deviate from the usual cost order in applications of this nature.

Order

- (i) The respondent is placed under final winding-up in the hands of the Master of the High Court.
- (ii) That the costs of this application shall be costs in the liquidation.

A REDDY

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Appearances

For the Applicant: Adv Kruger Instructed by: Scholtz Attorneys c/o Smit Stanton Inc 29 Warren Street Golfview MAHIKENG For the Respondent: Adv Pistor SC Instructed by: Labuschagne Attorneys 19 Constantia Drive Riviera Park MAHIKENG Date of hearing: 10 November 2022 Date of judgment: 14 December 2022

Reasons

15 June 2023

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Prepared on 10 October 2026 · Esheria