

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: 2022/6023
2022/14299
2022/14300

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

B.C. WANLESS

12 June 2023

CASE NUMBER: 2022/6023

In the matter between:

CREAM MAGENTA 98 (PROPRIETARY) LIMITED
(Registration Number: 2004/023499/07)

First Applicant

ELDACC (PROPRIETARY) LIMITED
(Registration Number: 1995/011941/07)

Second Applicant

and

GRINDROD BANK LIMITED
(Registration Number: 1994/007994/06)

First Respondent

REGISTRAR OF DEEDS

Second Respondent

CASE NUMBER: 2022/14299

In the matter between:

GRINDROD BANK LIMITED
(Registration Number: 1994/007994/06)

Applicant

and

CASE NUMBER: 2022/14300

In the matter between:

GRINDROD BANK LIMITED
(Registration Number: 1994/007994/06)

Applicant

and

CREAM MAGENTA 98 (PROPRIETARY) LIMITED
(Registration Number: 2004/023499/07)

Respondent

JUDGMENT

WANLESS AJ

Introduction

- [1] This matter was heard as a Special Motion and involved no less than three (3) separate opposed motions. Whilst these opposed motions were never formally consolidated, it was agreed between the parties that they would be set down before this Court on the same day and argument presented to this Court in respect thereof. Thereafter, this Court would deal therewith in a single judgment.
- [2] The three (3) applications are as follows:
- 2.1 An application instituted by CREAM MAGENTA 98 (PTY) LTD ("*Cream Magenta*") and ELDACC (PTY) LTD ("*Eldacc*") against GRINDROD BANK LIMITED ("*Grindrod*") under case 2022/6023 ("*the interdict application*");
 - 2.2 An application by Grindrod for the winding-up of Eldacc under case 2022/14299 ("*the Eldacc liquidation*"); and
 - 2.3 An application by Grindrod for the winding-up of Cream Magenta under case 2022/14300 ("*the Cream Magenta liquidation*").
- [3] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down

thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be “converted”, or more correctly “transformed”, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

Constitutional points

- [4] In all three applications, Adv Shaw, who appeared on behalf of Eldacc and Cream Magenta, sought to raise a number of constitutional points. Adv Smit, on behalf of Grindrod, took the position that these constitutional issues were not properly before this Court.
- [5] It is now fairly trite that a Court may not ordinarily raise and decide a constitutional issue, in the abstract, which does not arise on the facts of the case in which the issue is sought to be raised.¹ In the Heads of Argument filed on behalf of Cream Magenta and Eldacc, repeated reference was made to a Supplementary Affidavit and an amended Notice of Motion (presumably in the interdict application) but no such documents were ever delivered; found on CaseLines or referenced in the indices delivered by Cream Magenta and Eldacc.
- [6] More importantly, there was no substantive application setting out definitively and accurately the particular provisions of particular legislation which Cream Magenta and Eldacc sought to be declared unconstitutional.
- [7] Even if there had been such an application, supported by facts by way of affidavit, Cream Magenta and Eldacc failed to deliver a rule 16A notice, which should have contained a clear and succinct description of the constitutional issues concerned so as to bring the constitutional challenge to the attention of persons who may be affected thereby or who may have a legitimate interest in the matter.²
- [8] Such an application would have further required the joinder of a number of interested parties, especially the Minister of Trade and Industry and the Minister of Justice, as well as the Master of the High Court. The Constitutional Court, on a number of occasions, has emphasised that when the constitutional validity of an Act of Parliament is impugned, the Minister responsible for its administration must be a party to the proceedings inasmuch as his/her views and evidence tendered ought to be heard and

¹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) at paragraph 43.

² *Reitz Action Group v City of Cape Town* 2004 (5) SA 545 (C) at 20 and 21.

considered. When the constitutional validity of legislation is an issue, considerations of public interest and of separation of powers come to the fore.

- [9] Ordinarily, Courts should not pronounce on the validity of impugned legislation without the benefit of hearing the State organ concerned on the purpose of the legislation; its legitimacy; the factual context; the impact of its application and the justification, if any, for limiting an entrenched right. The views of the State organ concerned are also important when considering whether and on what conditions to suspend any declaration of invalidity.³
- [10] In light of the foregoing, it was clear at the hearing of the application that Cream Magenta and Eldacc had not complied with the requirements of a constitutional challenge in any respect. Accordingly, this Court declined to hear argument on the constitutional points as raised by Cream Magenta and Eldacc and the matter proceeded in respect of the remaining issues to be decided by this Court.

Application by Eldacc and Cream Magenta for the admission of a supplementary affidavit

- [11] At the hearing of the application and at the commencement of the argument in the matter, an application (from the Bar) was made by Adv Shaw on behalf of Eldacc and Cream Magenta for the admission of a supplementary affidavit deposed to by one ALVO CULVERELL. This was opposed by Grindrod.
- [12] For reasons no longer relevant for the purposes of this judgment (being matters of record) the aforesaid application was dismissed by this Court.

The interdict application

- [13] In this application Cream Magenta and Eldacc are the First and Second Applicants whilst Grindrod is the First Respondent. The Second Respondent is the Registrar of Deeds. When penning this judgment this Court has unashamedly borrowed heavily from both the Heads of Argument and Supplementary Heads of Argument filed by Adv Smit. These provide valuable structure to a confusing application coupled with highly unusual relief sought by the Applicants.
- [14] Cream Magenta and Eldacc seek the following relief:
- 14.1 to interdict Grindrod from exercising its credit control and/or credit recovery procedures, including any and all litigious processes in the recovery of outstanding debts owed by Cream Magenta and Eldacc to Grindrod as well as

³ *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 7.

unidentified guarantors of Cream Magenta and Eldacc until such time as the mortgage bond registered in favour of Grindrod over Erf 276 Elandshaven, Extension Four, Germiston ("*Erf 276*") has been removed from the records of the Registrar of Deeds and a reasonable time has been awarded to Cream Magenta and Eldacc to sell or finance Erf 276 in order for payment to be made to Grindrod ("*the first order*");

14.2 that Grindrod be directed to remove the first mortgage bond from Erf 276 ("*the second order*") at its cost; and

14.3 in the alternative to the second order and in the event of refusal or failure by Grindrod to remove the first mortgage bond from Erf 276 that the Registrar of Deeds remove the first mortgage bond (s) over Erf 276 at Grindrod's cost and that the sheriff sign and execute all documents on behalf of Grindrod to give effect thereto ("*the third order*").

[15] It was submitted on behalf of Grindrod that considering the fact that Cream Magenta and Eldacc are indebted to Grindrod; that Grindrod holds security *inter alia* by virtue of mortgage bonds over immovable properties owned by Cream Magenta and Eldacc; that Cream Magenta and Eldacc are in default of their obligations to Grindrod and that the conclusion together with the terms and conditions of the various written agreements and security instruments are not in dispute, it is not surprising that Cream Magenta and Eldacc failed to prosecute the application; failed to deliver a practice note and heads of argument and that their attorneys withdrew on 2 June 2022.

[16] It is common cause that the written agreements and the mortgage bond registered over Erf 276 have not been set aside. No such relief is sought by Cream Magenta and Eldacc. Grindrod, an admitted creditor of Cream Magenta and Eldacc, is entitled to act in accordance with its contractual rights, to recover the debts owed to it and to execute against security.

[17] In *Gundwana*⁴ the Constitutional Court accepted that execution is not an odious thing and is part and parcel of normal economic life.⁵ No suggestion is made on the application papers before this Court that there would be a disproportionality between the means used in the execution process to exact payment of the judgment debt compared to other available means to attain the same purpose. It was submitted by Adv Smit that there are no other proportionate means to attain the same end and execution is unavoidable. It is common cause in this matter that Cream Magenta and Eldacc have not made payment to Grindrod.

⁴ *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).

⁵ *Gundwana* at paragraph 54.

- [18] In any event, submits Grindrod, the first order as sought by Cream Magenta and Eldacc is almost unprecedented, highly exceptional and would make serious inroads into the rights of an admitted creditor, such as Grindrod, to recover debts owed to it and, in the absence of payment, to execute upon security afforded to it. The result thereof would be unconstitutional and would result in the arbitrary deprivation of rights of Grindrod and would be contrary (and in breach of) Grindrod's constitutional rights to fair administrative justice.
- [19] It was further submitted that the application was vexatious in effect. The relief sought is without judicial precedent and has not been prosecuted or withdrawn when the defects were exposed. In the result, Grindrod seeks the dismissal of the application with punitive costs on the scale as between attorney and client.⁶
- [20] As correctly pointed out by Counsel for Grindrod, Cream Magenta and Eldacc elected to launch the application and to apply for the relief by way of motion proceedings. Motion proceedings are concerned with and designed for the resolution of legal disputes based on common cause facts.⁷ Therefore the application is to be adjudicated on the version of Grindrod unless it can be rejected outright (if that version is bold, uncreditworthy or raises fictitious disputes of fact, is palpably implausible or far-fetched or is so clearly untenable that the Court is justified in rejecting them merely on the papers).⁸
- [21] No suggestion has been made in the replying affidavit, or anywhere else, that the version of Grindrod should be rejected by this Court. On that basis and considering the disputes, together with the fact that Cream Magenta and Eldacc did not prosecute the application, it was submitted on behalf of Grindrod that the interdict application should be dismissed on this basis alone.
- [22] Cream Magenta is the registered owner of Erf 276 and of Erf 274 Elandshaven Extension 4, Germiston ("*Erf 274*"). Erf 276 is a consolidated Erf, consisting of portions of land which were consolidated on 7 October 2021 in terms of section 40 of the Deeds Registries Act ("*the Act*") which included the remaining extent of Erf 145 and portion 2 of Erf 147, the first of which included a subdivision of portion 1 of Erf 145 and a subdivision of portion 2 of Erf 145, Elandshaven.
- [23] According to Cream Magenta and Eldacc, the subdivision and consolidation of the property of Cream Magenta (being Erven 274 and 276) was brought about by the sale of property by Eldacc to Sanlam Insurance Limited ("*Sanlam*") on 6 March 2018.

⁶ *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597; *In re Alluvial Creek Ltd* 1929 CPD 532 at 535.

⁷ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

⁸ *Zuma* at paragraph 26.

- [24] In terms of that sale agreement, it was seemingly contemplated that portion 2 of Erf 147 Elandshaven would be subdivided from Erf 147 Elandshaven and consolidated with the remaining extent of Erf 145 Elandshaven, to form a new Erf 276 Elandshaven.
- [25] It appears that the subdivisions, consolidations, and town-planning went ahead and that development on some parts commenced towards December 2018.
- [26] During May 2020, Cream Magenta applied for finance with Grindrod against a first mortgage bond, registered over the already developed commercial warehouse and office complex, mainly constructed on the old Erf 146 and partially on the old Erf 154, which, after the consolidations, became known as the consolidated Erf 174.
- [27] Grindrod agreed to finance Cream Magenta against the registration of a mortgage bond, *alternatively*, mortgage bonds, over immovable properties which mortgage bond, *alternatively*, mortgage bonds, was/were registered on 26 August 2020, some two years after the town-planning, subdivisions and consolidations were finalised.
- [28] There is no dispute between the parties as to the validity of the various written agreements or the lending made by Grindrod to Cream Magenta; or the validity of the registration of the mortgage bond or that Cream Magenta, Eldacc and their (unidentified) guarantors are in default of their obligations to Grindrod.
- [29] It is further common cause that the consent of Grindrod was required by Cream Magenta and Eldacc to register the transfer of the subdivisions and consolidations and that on 5 or 6 October 2021, Grindrod granted the consent; the registration of the subdivisions and consolidations were complete and the registrations thereof took place on 7 October 2021.
- [30] Cream Magenta and Eldacc fell into arrears with payments in respect of the mortgage bond over Erf 274 as from 10 October 2021 and had meetings with the representatives of Grindrod on 13 and 19 October 2021. It was proposed, by Mr Culverwell, that Cream Magenta be extended a further facility of R10-million which would be temporarily covered by a short-term bond over the so-called service centre and wash bay facility together with Erf 276, until the sale of the property. This request was refused.
- [31] It is further common cause that Cream Magenta is indebted to Grindrod in an amount of more than R40-million and Eldacc in an amount of more than R57-million.
- [32] In order to secure the debts of Cream Magenta and Eldacc, a first mortgage bond was registered over the immovable properties which were, at that stage, described as Erven 145 and 146, Elandshaven.
- [33] As correctly pointed out by Adv Smit, Cream Magenta and Eldacc, as applicants, put it no higher than averring that Grindrod refused to release the erf from its bond and

that they were under the impression that Erf 276 was unencumbered but, nowhere in the Founding Affidavit, do they set out any facts or legal grounds in support thereof.

[34] The successors to the previously described Erven 145 and 146, now described as Erven 274 and 276, are still the subject matter of the mortgage bond registered in favour of Grindrod.

[35] In the Answering Affidavit, Grindrod pointed out that in terms of the Deeds Registries Act, consolidation of two properties could only be achieved in two ways:

35.1 Either the owner must obtain a cancellation of the bond before registering the consolidation; or

35.2 The owner must apply, with the consent of the mortgagee, for the consolidation, on the basis that the new erf will be substituted for the original property under the bond.

[36] In terms of subsection 40(5)(a) of the Deeds Registries Act:

"If a portion only of the land represented on the new diagram is mortgaged, a certificate may not be issued unless the bond is cancelled: provided that on the written application of the owner and with the consent of the mortgagee, all the land included in the new diagram may be substituted for the land originally mortgaged under the bond."

[37] Furthermore, as indicated in the answering affidavit, it is not contended by Cream Magenta and Eldacc that Cream Magenta obtained the cancellation of the bond or the consent to the cancellation of the bond. Therefore, the only other avenue was for the new erf to be substituted in the place of the old erven under the bond. This is exactly what happened in this matter.

[38] It must be noted that Cream Magenta and Eldacc failed to place before this Court the application for consolidation which application makes it clear that Mr Culverwell was at all times aware that the mortgage bond in favour of Grindrod would remain extant.

[39] Adv Smit also points out that Mr Culverwell concedes, in the Replying Affidavit, that he and thus Cream Magenta and Eldacc, were unaware of the requirements of the consent having to be in writing. Thus, he effectively concedes that the application has no merit. Furthermore, the fact that the mortgage bond has not been set aside means that it exists as a fact and it has legal consequences that cannot simply be overlooked. This (submits Adv Smit) is really the end of the application.

[40] In respect of the first order, it is clear from the application papers that Cream Magenta and Eldacc have not advanced any factual or legal basis in support of their proposition

that an admitted creditor, such as Grindrod, can be interdicted from exercising its internal and external credit control and recovery procedures.

[41] Further, this Court can find no basis for the relief sought either in terms of contract, statute or the common law. Certainly, none is set out by Cream Magenta or Eldacc. No statutory provision is mentioned; no contractual provision is mentioned and no common law principle identified, in support of the notion that a creditor can be interdicted from exercising its rights against a debtor.

[42] It is trite that in order to successfully apply for a final interdict (as is sought in terms of the first order) three requirements have to be met by an applicant, namely:

42.1 A clear right;

42.2 An injury actually committed or reasonably apprehended; and

42.3 The absence of any other satisfactory remedy available to the applicant.

[43] Cream Magenta and Eldacc have failed to establish any of the requirements for a final interdict. There is no jurisprudence in support of the proposition that a creditor can be interdicted from exercising its rights in similar circumstances. Indeed, a Court would be very cautious to do so, considering that it would impact the fundamental rights of a creditor to free and fair access to this Court.⁹

[44] Both the second and third orders are aimed at cancellation of the mortgage bond over Erf 276 in order that Erf 276 is no longer encumbered and no longer serves as security to Grindrod.

[45] In terms of the bond which it is common cause is registered over Erf 276, it shall remain of full force and effect, notwithstanding any indulgence or release of any other securities and no addition to and no alteration, variation or consensual cancellation of any provisions of the bond and no waiver by Grindrod of any of its rights thereunder, would be of any force or effect unless reduced to writing and signed by both Cream Magenta and Grindrod. Cream Magenta shall not be entitled to require that the bond be cancelled until such time as Cream Magenta has directed a written request to Grindrod that the bond be cancelled and Grindrod had agreed in writing that the full indebtedness of Cream Magenta to Grindrod has been paid and discharged. This has not happened.

[46] In the premises, as is clear from the foregoing, the interdict application must be dismissed. As to costs, Grindrod seeks an order for costs on the scale of attorney and client. It is trite that a Court has a general discretion when awarding costs to be

⁹ *Corderoy v Union Government (Minister of Finance) 1918 AD 512 at 517.*

exercised judicially. As is clear from that stated earlier in this judgment the interdict application was ill-founded and had no prospects of success. That said, it was vexatious in the sense that it was instituted in the first place and then not proceeded with. Ultimately, it has not only mulcted Grindrod in unnecessary costs but has wasted valuable Court resources and time. Under the circumstances, it is only just and equitable that the costs of this application be paid by Cream Magenta and Eldacc on a punitive scale, jointly and severally, one paying the other to be absolved.

The Eldacc liquidation

- [47] Grindrod seeks an order for the winding-up of Eldacc.
- [48] It is common cause in this application that Grindrod and Eldacc concluded a written mortgage bond facility agreement ("*the facility agreement*") on 5 November 2020 in terms of which Grindrod made available to Eldacc two facilities, the first in a maximum amount of R55 880 500.00 and the second in the amount of R3 576 500.00.
- [49] In terms of the facility agreement the first facility would be repaid over two different periods, the first being the development period during which interest would be compounded and capitalised and the second being the lease period, commencing on 8 July 2012 after the bond was registered on 10 December 2020 (the development period would terminate on the earlier of the registration of the bond or the development completion date – in this instance the registration of the bond came first in time) which resulted in the repayment period becoming operative during which Eldacc was obliged to pay to Grindrod the net rental income for the calendar month commencing on the lease period payment date and the minimum amount of R567 000.00 escalating at 9% per annum.
- [50] On 1 September 2021, Grindrod and Eldacc concluded an addendum in terms of which the development period was extended by a further three months.
- [51] Save for a bare denial, it is not disputed that Eldacc went into default immediately.
- [52] Email correspondence followed upon the default which Eldacc acknowledged receipt of, wherein the default, the arrears and the failure to remedy the default, were not disputed.
- [53] On 18 January 2022, Grindrod delivered a letter of demand to Eldacc requiring payment of further arrear amounts. Once again, Eldacc failed to remedy its default.
- [54] On 9 February 2022, Grindrod's attorneys sent a letter of demand to Eldacc, demanding payment of the accelerated indebtedness of R55 124 549.90 and R2 391 800.65. The demand was served by Sheriff and save for disputing the efficacy

of the notice the fact that the demand was directed and received is not disputed by Eldacc.

- [55] In the premises, the deeming provisions of subsection 345(1)(a) of the Companies Act 61 of 1973 (*“the 1973 Companies Act”*)¹⁰ became operative and resulted in Eldacc being deemed unable to pay its debts.¹¹
- [56] In addition, the failure of Eldacc to make payment of the amounts owed since 2021 and of the accelerated debt, despite demand, is, as submitted on behalf of Grindrod, cogent *prima facie* proof of its inability to pay its debts.
- [57] A company is unable to pay its debts when it is unable to meet current demands on it or its day-to-day liabilities in the ordinary course of business, in other words, when it is *commercially* insolvent. The test is *not* whether the company’s liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant.¹²
- [58] It was submitted by Adv Smit that Eldacc does not meet the case of Grindrod, in any respect. In its Answering Affidavit, reference is made to the registration of a mortgage bond securing the facility loans and it is contended that (somehow) the consolidation of properties – some over which served as security by virtue of the mortgage bond registered in favour of Grindrod – should have resulted in the release of others from the mortgage bond, is of no assistance. It does not influence the fact that Eldacc is indebted to Grindrod and that Eldacc is commercially insolvent. At best, it will influence the value of the security of Grindrod when it submits its claim for proof in the winding-up of Eldacc. This submission is a good one. Further, the probabilities of same have already been dealt with earlier in this judgment when dealing with the interdict application.
- [59] It was further submitted that the assertion that the quantum of Grindrod’s claim is incorrect is unfounded but, in any event, is no defence to a winding-up application.¹³

¹⁰ Which finds operation through item 9 of Schedule 5 of the Companies Act 71 of 2008; *Boschpoort Ondernemings (Pty) Ltd v African Bank 2014 (2) SA 518 (SCA)*.

¹¹ *Van Zyl NO v Look Good Clothing CC 1996 (3) SA 523 (SE) at 531*.

¹² *Murray NO and Others v African Global Holdings (Pty) Ltd and Others 2020 (2) SA 93 (SCA) 28; African Bank Ltd v Rhebokskloof (Pty) Ltd and Others 1993 (4) SA 436 (C) 440F-H*.

¹³ *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Other 1976 (2) SA 856 (W) 867 referring to Re Tweeds Garages Ltd (1962) 1 ALL ER 121*.

- [60] This is because Eldacc suggests that it is factually solvent and this is no answer to an application for liquidation based on commercial insolvency.¹⁴ In any event the financial statements show a net profit after taxation of R4 992 954,00 which is insufficient to pay more than R5-million of the almost R60-million of debt which is due, owing and payable by Eldacc to Grindrod. This, submits Adv Smit, is a clear demonstration that Eldacc has no means with which to repay the debts owed to Grindrod.
- [61] In the circumstances, it is submitted that Grindrod is entitled to an order placing Eldacc under final, *alternatively*, provisional winding-up and Eldacc has not advanced exceptional circumstances for this Court to exercise its discretion to refuse the winding-up application.¹⁵

The Cream Magenta liquidation

- [62] Grindrod seeks an order winding-up Cream Magenta.
- [63] It is common cause that Grindrod and Cream Magenta concluded a written mortgage bond facility agreement ("*the Cream Magenta facility agreement*") on 12 August 2020 in terms of which Grindrod made available to Cream Magenta the sum of R42 677 500.00 of which R29 200 000.00 would be utilised to settle amounts owing by Cream Magenta to Mercantile Bank and R12 300 000.00 would be utilised for working capital.
- [64] In terms of the Cream Magenta facility agreement, Cream Magenta was obliged to pay Grindrod the amount of R433 369.00 per month, escalating at 9% per annum and it is common cause that Cream Magenta has failed to pay the monthly instalments to Grindrod since October 2021. It is also common cause that Grindrod directed a letter of demand to Cream Magenta on 5 January 2022 requiring Cream Magenta to remedy the default which it failed to do.
- [65] It is further common cause between the parties that on the 18th of January 2022 Grindrod directed a further demand to Cream Magenta requiring payment of further arrear amounts which Cream Magenta also failed to pay. By virtue of the default, Grindrod became entitled to and did accelerate the payment of the full debt in terms of clause 13.19 of the Cream Magenta facility agreement and demanded repayment of the sum of R40 077 313.09. This letter of demand was served by Sheriff.
- [66] It is further common cause, or not seriously disputed on the application papers before this Court, that Cream Magenta has failed to pay this amount to Grindrod. In the circumstances, the deeming provisions of subrule 345(1)(a) of the 1973 Companies

¹⁴ *Murray NO supra*; *Johnson v Hirotech (Pty) Ltd* 2000 (4) SA 930 (SCA) at 6.

¹⁵ *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA); *FirstRand Bank v Evans* 2011 (4) SA 597 (KZD) at 27.

Act¹⁶ became operative and resulted in Cream Magenta being deemed unable to pay its debts.¹⁷

- [67] In addition, the failure of Cream Magenta to make payment of the monthly instalments since October 2021 and of the accelerated debt, despite demand, is cogent *prima facie* proof of its inability to pay its debts.¹⁸
- [68] At this stage it should be noted that essentially what applies at paragraphs [57] to [61] of this judgment in respect of the Eldacc liquidation is equally applicable to the Cream Magenta liquidation. Those paragraphs should be read as if specifically incorporated herein (applied where necessary to Cream Magenta) and will not be repeated in order to avoid burdening this judgment unnecessarily.
- [69] In respect of Cream Magenta's financial statements, these show a net profit after taxation of R1 620 042.00 which is insufficient to pay more than three months' instalments in terms of the Cream Magenta facility agreement. This, submits Adv Smit, is once again a clear demonstration that Cream Magenta has no means with which to repay debts owed to Grindrod.
- [70] In the premises, it is submitted that Grindrod is entitled to an order placing Cream Magenta under final, *alternatively*, provisional winding-up and that Cream Magenta has not advanced exceptional circumstances for this Court to exercise its discretion to refuse the winding-up application.

Conclusion

- [71] Prior to the hearing of this Special Motion, this Court convened a conference in terms of, *inter alia*, subrule 37(8). At that conference the parties were requested to convene a further meeting at which they discussed various issues resulting in a minute which ultimately contributed significantly to curtailing the argument placed before this Court on the day of the hearing. At the aforesaid meeting, Grindrod recorded that its grounds for the liquidation applications are that Cream Magenta and Eldacc are commercially insolvent (unable to pay their debts as contemplated by subsection 344(f) of the 1973 Companies Act as read with subsections 345(1)(a) and (c) of the 1973 Companies Act).
- [72] Also at the said meeting, it was recorded on behalf of Cream Magenta and Eldacc that the liquidation applications were opposed on two grounds:

72.1 First, that the companies are not insolvent; and

¹⁶ *Boschpoort (supra)*.

¹⁷ *Van Zyk (supra)*.

¹⁸ *Ibid*.

72.2 Second, that there is a factual dispute between the parties in respect of the mortgage bond registered by Cream Magenta in favour of Grindrod over a part of an immovable property, which dispute and state of affairs of the companies were created through the actions of Grindrod.

[73] In the matter of *Boschpoort*¹⁹ the Supreme Court of Appeal (“SCA”) held that for decades our law has recognised two forms of insolvency: Factual insolvency (where a company’s liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities).²⁰

[74] Also in *Boschpoort* the SCA stated that it has been a reality of law which has served us well through the passage of time that a company’s commercial insolvency is a ground that will justify an order for its liquidation. The reasons are not hard to find: the evaluation 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 obtruse economic exercises as to valuation of a company’s assets. Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the Companies Act 71 of 2008 (“the 2008 Companies Act”) is for an effective legal environment in respect of companies.²¹

[75] Further, in *Afgri*²² the SCA held that, generally speaking, an unpaid creditor has a right, *ex debito justitiae* to a winding-up order against a respondent company which has not discharged that debt. The Court’s discretion to refuse an order is a very narrow one, exercised in special or unusual circumstances only. Once the indebtedness has *prima facie* been established the onus is on the company to show that the indebtedness is disputed on *bona fide* and reasonable grounds.²³

[76] In this matter, this Court finds that it is significant that neither Cream Magenta nor Eldacc dispute the conclusion of the facility agreements; the registration of the mortgage bonds; the fact that Grindrod advanced the funds to Cream Magenta and Eldacc and their failure to repay the debts.

¹⁹ *Boschpoort (supra)*.

²⁰ *Boschpoort* at paragraph 16.

²¹ *Boschpoort* at paragraphs 16-17.

²² *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd (supra)*.

²³ *Afgri* at paragraphs 6, 7, 12, and 17.

- [77] Further, it is not in dispute that on 23 July 2021 application was made by Cream Magenta for the consolidation of certain land, wherein it was expressly recorded that the portions to be consolidated were mortgaged in favour of Grindrod and that Cream Magenta “...do hereby apply for the consolidated land as represented on the said Diagram to be substituted for the aforesaid land mortgaged under the said Bond.” This document in fact contradicts the version of Cream Magenta and Eldacc in its entirety.
- [78] On 1 September 2021, Grindrod and Eldacc concluded an addendum in terms of which the development period was extended by a further three months. At that point, no issue was taken by Eldacc with the registration of the mortgage bond by Cream Magenta and no payment was made by Eldacc.
- [79] On 18 January 2022, Grindrod delivered a letter of demand requiring payment of the increased arrear amount and on 9 February 2022, a letter was delivered demanding payment, which Eldacc failed to adhere to and was deemed to be unable to pay its debts within the meaning of subsection 345(1)(a) of the 1973 Companies Act. At the same time, similar demands were directed to Cream Magenta who also failed to make payments to Grindrod.
- [80] Cream Magenta and Eldacc opposed the liquidation applications based on a contention that the companies are not insolvent. The primary question, therefore, is whether the companies have shown that they own liquid assets or readily realisable assets available to meet their liabilities as they fall due and to be met in the ordinary course of business and, thereafter, whether the companies will be in a position to carry on normal trading. In other words, whether the companies can meet the demands on them and remain buoyant.²⁴
- [81] The only real attempt at providing this Court with some evidence is the reliance by both Cream Magenta and Eldacc on outdated financial statements as at 2020 and a submission that the companies are “*solvent according to balance sheets*”. This is, as correctly submitted by Adv Smit for Grindrod, in the context of the SCA authorities and in the context of the statutory provisions of the 1973 Companies Act, of no assistance.²⁵
- [82] In the premises, this Court finds that it cannot be disputed that Cream Magenta and Eldacc, who are admittedly indebted to Grindrod, are commercially insolvent. No facts are set out in the Answering Affidavits which would persuade this Court to exercise its very limited discretion in their favour.

²⁴ Murray NO (*supra*) at paragraph 28.

²⁵ Generally speaking, up to date financial statements are required to demonstrate solvency. See *Stroti v Nugent and Others* 2001 (3) SA 783 (W) 808 and 809.

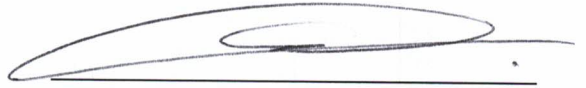
[83] This Court therefore has no hesitation in accepting the submissions of Grindrod's Counsel as set out in this judgment that, *inter alia*, both Cream Magenta and Eldacc are commercially insolvent and that they should be wound-up with costs to be costs in the winding-up procedure.

[84] The only outstanding issue for this Court to decide is whether to grant a provisional or final winding-up order in respect of both companies. Grindrod has asked for a final winding-up order. No submissions on this issue were forthcoming from the legal representatives of Cream Magenta and Eldacc. The Practice Directive of this Division states that an applicant should always seek a final winding-up order in the Notice of Motion. No argument was placed before this Court on behalf of either Cream Magenta or Eldacc as to why a provisional winding-up order should be granted rather than a final winding-up order. It seems to this Court that having regard to, *inter alia*, the fact that Grindrod would appear to be the major creditor in both liquidation applications; the winding-up process will unearth all other creditors and the time that has elapsed since Cream Magenta and Eldacc first became indebted to Grindrod, it would be just and equitable if a final winding-up order was granted. Further, all formal requirements have been complied with and no failings in that regard were brought to the attention of this Court.

Order

[85] This Court makes the following order:

1. The application under case number 2022/6023 is dismissed;
2. Cream Magenta 98 (Pty) Ltd and Eldacc (Pty) Ltd are ordered to pay the costs of the application under case number 2022/6023 on the scale of attorney and client, jointly and severally the one paying the other to be absolved;
3. Eldacc (Pty) Ltd is finally wound-up under case number 2022/14299;
4. The costs of the winding-up application under case number 2022/14299 are to be costs in the winding-up;
5. Cream Magenta 98 (Pty) Ltd is finally wound-up under case number 2022/14300;
6. The costs of the winding-up application under case number 2022/14300 are to be costs in the winding-up.



B.C. WANLESS

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 27 February 2023
Ex Tempore: 06 June 2023
Transcript: 12 June 2023

Appearances:

For Grindrod: JE Smit
Instructed by: Edward Nathan Sonnenbergs Inc.
c/o DRSM Attorneys

For Cream Magenta: D Shaw (with JH Wentzel)
Advocates with Trust Accounts

For Eldacc: D Shaw (with JH Wentzel)
Advocates with Trust Accounts