

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-072737

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 02 October 2023

WJ du Plessis

In the matter between:

BROTHER INTERNATIONAL (PTY) LTD

APPLICANT

and

**BOPANG DISTRIBUTION AND LOGISTICS
(PTY) LTD**

RESPONDENT

JUDGMENT

DU PLESSIS AJ

- [1] On 2 August 2023, in an urgent application, this court granted an order placing the Respondent under provisional liquidation. This application deals with the return date for the winding-up order to be made final. The Respondent opposes the application, requesting the court to extend the rule *nisi* to allow for further exchange of paper between the parties.

- [2] The Applicant is the Respondent's only significant creditor and its only source of income. It generates income by purchasing Brother products from the Applicant and "on selling" them to Mustek Ltd, a third-party distributor.¹ The Respondent states that it is merely a BEE conduit between the Applicant and Mustek to obtain the necessary procurement points to continue to obtain government contracts.² For this, the Respondent received a 1% markup on the products delivered to Mustek.
- [3] It worked as follows: The Applicant and Mustek would negotiate the items that were required for distribution. Mustek would then place the order with the Applicant, and the Applicant would render a pro forma invoice to the Respondent, with the 1% markup. This invoice will then be sent to Mustek for payment, who will pay the Respondent, who will then in turn pay the Applicant after deducting the 1% markup. The Applicant would then deliver the products directly to Mustek.³
- [4] On 3 July 2023, the Respondent received a payment of R15 461 542,46, from which it had to deduct 1% and then pay the Applicant. It did not do so immediately but undertook to pay this amount to the Applicant by 12 July 2023. It did not. It is this non-payment that gave rise to the urgent application for winding up. The Applicant has also thereafter elected to terminate its contractual relationship with the Respondent.
- [5] Instead of paying the Applicant, the Respondent paid an amount of R15 000 000 into an undisclosed account around 3 July 2023. The Applicant did not know about this, and even though the Applicant asked several times that the Respondent indicate where the funds are, or to pay the money into the Respondent's attorney's trust account pending the outcome of their litigation, the Respondent refuses. It, instead, asks this court to extend the *rule nisi* to allow it to properly formulate its counterclaim against the Applicant.

¹ This is evident from AA par 16.2 and paras 65 and 71.3.

² Answering Affidavit in the urgent application, para 49.

³ Answering Affidavit in the urgent application, para 51.2.

- [6] The counterclaim is for an alleged R200 000 shortfall in payment of the 1% markup over the last seven years, the expenses it had to incur for running the company, and an increase of the markup from 1% to 10%. Preliminary calculations of their accountants indicate that the Respondent may have a claim of between R40 million and R250 million against the Applicant and Mustek, and thus they decided to withhold the R15 million payment, pending discussions with their legal advisors.⁴
- [7] The Respondent also emphasises the fact that apart from the distribution agreement entered between the Applicant and the Respondent, they also entered into an agreement to develop the Respondent as a black-owned enterprise. As such, the Respondent was the Applicant's Enterprise and Supplier Development beneficiary, which were to be developed to ultimately operate independently in the distribution and logistics industry. However, this failed. This means, the Respondents contend, that there is a *bona fide* triable issue to be determined between the parties which renders a final winding-up of the Respondent inappropriate.
- [8] At the date of hearing this application, no counterclaim was filed. This could not have been done in time for this application, the Respondent explains, because of the short time between the hearing date of this application and the service of the provisional order has left them with insufficient time to properly deal with this matter. This was because his wife instituted, what the Respondent calls, a baseless criminal complaint instituted against him by his wife, who is allegedly working with the applicant and Mustek. The allegation is that she will withdraw the charges if the Respondent makes payment to the Applicant. It was thus difficult to deal with the criminal proceedings (with different attorneys) and this Application (with the current attorneys) at the same time. On top of that, he had to "expedite" the divorce proceedings, which have taken up time and resources. Furthermore, counsel who have been briefed on this matter had to travel abroad on short notice, making further consultations difficult. Therefore, the delay in this matter is not unreasonable.

⁴ Answering Affidavit in the urgent application, para 74.

However, what the Respondent requests is more time to properly consult with its legal representatives and formulate its claim against Mustek.

- [9] It has also, in the meantime, appointed new accountants to draft a report that it seeks to rely on in its counterclaim. So far the report confirms that the Respondent has a potential claim of up to about R 268 million against the Applicant and/or Mustek. This is apart from the potential claim against the parties at the Broad-Based Black Economic Empowerment Commission, and a complaint against VBI at the Legal Practice Council.
- [10] In its request for an extension of the *rule nisi*, the Respondent points out that the Applicant has alternative and contractual remedies available. Amongst other things, there is a cession agreement that it can, and indeed did, call up. And while the Applicants pointed out in the urgent application that by 1 August 2023 the debt will be R29 529 206,62, the Respondents state this is false and that the Applicant misled the urgent court by not disclosing that it received the approximately R14 million directly from Mustek, and that it perfected the cession agreement. The Applicant's attorneys were informed that they view this conduct in a serious light, but have not responded to it. This alone, the Respondents contend, would be enough to discharge the *rule nisi*.
- [11] The Respondent further asserts that there will be no prejudice to the Applicant should the *rule nisi* be extended. This is because a provisional liquidator has been appointed by the Master of the High Court. This liquidator has taken control of the company and the employees, who have thus far fully cooperated with the requests that have been received from the provisional liquidator. What is now necessary, the Respondents aver, is for all the interested parties to be afforded the usual procedures and time periods to approach this court or to potentially intervene.
- [12] The Applicant argues that the Respondent is not entitled to the postponement it seeks. It denies that the Respondent has a *bona fide* and reasonable dispute against the Applicant, stating that the sole purpose of this application is to delay the winding-up application. It finds the explanations offered by the Respondent as to the delays unacceptable. The Applicant states that they already knew from 2 August 2023 that

the return date is 4 September 2023. On 10 August 2023, the Respondent's attorneys even undertook to deliver a further answering affidavit against the provisional order, before the return date. Furthermore, the Applicants state that there is not sufficient detail as to what kept the Respondent busy in the criminal case and the divorce (that has not been instituted yet). As for the unavailability of counsel, no confirmatory affidavit was filed to confirm that this is true, and neither is this an excuse. Despite all these delays, the Respondent's attorneys at no time indicated that they take issue with the return date, or that they were not prepared to argue the case. Instead, the Respondents only served an application to extend the rule nisi date on the Respondent 19h35 on the 4th of September 2023, while the matter was set down for hearing on 7 September 2023.

- [13] Instead, the Applicant states, that the reason for delaying the winding-up is because it does not have a bona fide and reasonable dispute to its indebtedness to the applicant. The claim, as set out in the initial winding-up application, is based on the Respondent's allegation that it was underpaid and that the negotiated markup on sales prices to Mustek was not enough to cover its expense and should have been much higher. The Respondent alleges that the Applicant and Mustek mistreated and abused them. However, the Applicants argue that this has no prospects of success, as the law does not permit courts to regulate contractual relationships because one party drove a harsh bargain and even if it is argued that the contracts are so unfair as to be contrary to public policy, the law does not permit the court to create a new contract for the parties. The contract from which the claim arises is also a contract with Mustek, not with the Applicant. If the claim is based on a breach of promise, such claim is precluded by the operation of the non-variation clause of the distribution agreement between the parties. Lastly, if the claim is that the arrangement between the Respondent and the Applicant is unlawful Broad-Based Black Economic Empowerment Act⁵ "fronting", it cannot enforce such a claim against the Applicant, since no party is allowed to benefit from its unlawful conduct.

⁵ 53 of 2003.

- [14] Regarding the fact that a liquidator has been appointed, the Applicant states that the Respondent's sole director and its employees have not cooperated with the liquidators. Despite being requested to furnish the liquidators with, *inter alia*, bank statements, VAT numbers, tax numbers, and the details of the bank account into which the R15 million was deposited, the Respondents have not done so. In the absence of giving such information, the liquidators cannot take control of the respondent or investigate its affairs. If the liquidator then must go to court to compel the Respondent to comply, the whereabouts of the R15 million will remain unknown - the reason for the application. Furthermore, allowing for the finalisation of the application to be delayed when the Respondent is not cooperating with the provisional liquidator would cause a delay in the administration of justice and would defeat the purpose for which the provision order was granted on an urgent basis. The Respondent says that this is all hearsay and not based on any evidence.
- [15] As for perfecting the session while applying for the winding up, the Applicant argues that it is within its rights to pursue both paths, as the causes of action, relief and consequences when successful the two processes are different. All it had to do was to make out a case for winding-up in terms of ss 344 (f) read with 345(1)(c) of the Companies Act,⁶ showing that the Respondent is unable to pay its debts. The fact that the Respondent did not pay the R15 461 542, 46 is proof of such. The availability of the cession agreement does not change the fact that the Respondent is unable to pay its debts. Having to call up the cession reinforces the fact that the Respondent cannot pay its debts. The session agreement and the payment, it states, were dealt with in the papers and argument in the urgent court, the court was aware.
- [16] Lastly, the Respondent has not identified a third party that wants to intervene, and since the Applicant is the only significant creditor it is unlikely. No party has notified the Applicant's attorneys that they want to intervene, despite the publication of the provisional order.

⁶ 61 of 1973.

Issues to be determined

- [17] This court is tasked with determining whether the provisional winding-up order should be made final, with specific reference to s 344(f) read with s 345(1)(c) of the Companies Act 1973,⁷ and whether it will be just and equitable to wind up the Respondent under s 344(h) of the Companies Act 1973,⁸ or s 81(1)(c)(ii) of the Companies Act 2008.⁹ Tied up with this is the question of whether the Respondent has demonstrated that there is a *bona fide* dispute on reasonable grounds concerning the debt, which would prevent a final liquidation order. Likewise, the question of whether the court should exercise its discretion to order the final winding-up of the Respondent on a just and equitable basis, in circumstances where there are several public policy issues and allegations of Broad-Based Black Economic Empowerment Act¹⁰ legislation contraventions levelled against the Applicant.
- [18] S 81(1)(c)(ii) of the Companies Act¹¹ provides that a court may order a solvent company to be wound up if one of the creditors has applied to the court for an order to wind up the company on the grounds that it is otherwise just and equitable for the company to be wound up. This requires the company to be factually and commercially thinner.¹² This is a discretionary power¹³ that must be exercised on judicial grounds.¹⁴

⁷ 61 of 1973.

⁸ 61 of 1973.

⁹ 71 of 2008.

¹⁰ 53 of 2003.

¹¹ 71 of 2008.

¹² *Murray NO v African Global Holdings (Pty) Ltd* [2019] JOL 46303 (SCA), 2020 (2) SA 93 (SCA) para 23

¹³ *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (D) at 844.

¹⁴ *Irvin & Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 244

[19] In *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd*,¹⁵ the court concluded that "[t]he just and equitable ground for winding-up is not a catch- all to simply liquidate a company that is, for example, running its business at a loss or reducing its scale. But, in my opinion, where a company [...] (c) has virtually closed its head office, (d) is diverting funds which should be used to pay its debts to an overseas concern on grounds which are not satisfactorily explained, (e) to excuse the non-payment of its liabilities sets up a contrived and baseless counterclaim, and (f) has transferred assets outside the ordinary course of a business, it is just and equitable that the creditors should be protected from further losses and that it should be prevented from disposing of assets and incurring further liabilities". The justice and equity of the winding-up must be considered by weighing up the competing interests of all concerned.¹⁶ As an independent ground for winding up, it also is the ground under which the courts can take into account how a company is being run or conducted.¹⁷

[20] Ss 344(f) and (h) of the Companies Act 1973,¹⁸ provides that a court may wind up a company that is unable to pay its debts and/or if it appears to the Court that it is just and equitable that the company should be wound up. S 345(1)(c) states that a company is deemed to be unable to pay its debts if it is proved to the satisfaction of the court that it is unable to pay its debts. If a creditor seeks the winding-up and the application is not opposed by other creditors, the court has a narrow discretion, as an unpaid creditor who cannot obtain payment and brings a claim in terms of the Act is entitled *ex debito justitiae* to such an order.¹⁹

¹⁵ [1999] 2 All SA 268 (W).

¹⁶ *Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) at 136.

¹⁷ *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W).

¹⁸ 61 of 1973.

¹⁹ *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662.

[21] Regarding the existence of a counterclaim, in *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd*²⁰ the Supreme Court of Appeal stated the following:

[12] 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.[...] 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.

[13] As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects the court a quo applied 'the wrong principle[s]'. There must be no room for any misunderstanding: the onus is not discharged by the respondent merely by claiming the existence of a counterclaim. The principles of which the court a quo lost sight are: (a) as set out in *Badenhorst and Kalil*, once the respondent's indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide.

[22] From this, the following emerges: an unpaid creditor has a right to a winding-up order if the Respondent has not discharged its debt, and the discretion to refuse such a winding-up is a narrow one. The existence of a counterclaim in itself is not enough to resist winding up.²¹ Neither is the calling up of a session. Additionally, considering that the Respondent showed some inertia in pursuing the counterclaim, the illiquidity of the claim, and the fact that there is simply no indication that the Respondent is solvent and able to pay its debts, this all justifies the granting of a final order. The Respondent also did not take the court into its confidence by indicating that the R15 million is indeed in a secure account and available should its counterclaim be unsuccessful. In the absence of the above, the damage that the Applicant suffers if a final order is not granted outweighs the harm that the Respondent may suffer. This is even more so when considering that, on the Respondent's version, it is still collecting documents (which should be readily available) to cooperate with the liquidator's request, without explaining the delay.

²⁰ 2022 (1) SA 91 (SCA).

²¹ Paras 18.

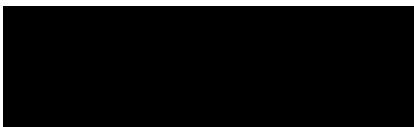
[23] Moreover, as far as the claim to the markup is concerned, none of it pertains to the agreement with the Applicant. The Applicant sold the products to the Respondent, it is in the on selling of the products to Mustek that the markup lies. Likewise, the Applicant is not bound by the Broad-Based Black Economic Empowerment Act.²² If there is a *bona fide* claim, the liquidator will be bound to pursue it.

[24] Lastly, if the allegation of fronting is true (which I am not deciding on), it will be a criminal offence in terms of s 130 of the Broad-Based Black Economic Empowerment Act,²³ and will constitute, by analogy to fraud, sufficient reason for winding-up the Respondent on just and equitable grounds.²⁴

Order

[25] Therefore, I make the following order:

1. The respondent's application for an extension of the return date is dismissed.
2. The rule *nisi* issued on 2 August 2023 is confirmed and the respondent is placed in final winding-up.
3. The costs of the winding-up application, as well as the applicant's cost in opposing this application, are costs in the liquidation.



WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

²² 53 of 2003.

²³ 53 of 2003.

²⁴ *Cuningham v First Ready Development* 249 2010 (5) SA 325 (SCA) para 35.

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Date of the hearing:

07 September 2023

Date of judgment:

02 October 2023