

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: **3460/2021**

In the matter between:

ATLANTIC OIL INLAND (PTY) LTD

Applicant

and

DATNIS TRADING (PTY) LTD

Respondent

[Reg No: 2013/172541/07]

JUDGMENT BY: SNELLENBURG, AJ

HEARD: 14 APRIL 2022

REASONS DELIVERED: 26 APRIL 2022

[1] After hearing arguments on the return date, the rule nisi issued on 3 March 2022 was confirmed and the respondent was placed under final liquidation with an order that the costs of the application are to be costs in the administration of the liquidation of the respondent.

[2] These are the reasons for my order.

[3] The applicant issued its application for the liquidation of the respondent on 28 July 2021. The application was opposed by the respondent by means of answering affidavit which was filed on 20 October 2021 and to which the applicant replied.

[4] The respondent was placed under provisional liquidation on 3 March 2022 and a rule nisi issued, calling upon all interested parties to advance reasons why a final order of liquidation should not be granted on the return date.

[5] No further reasons were advanced pursuant to the rule nisi and the respondent neither filed heads of argument, nor was there any appearance on its behalf on the return date.

[6] In terms of the 'Badenhorst rule' winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds.¹ "Where, however, the respondent's indebtedness has, prima facie, been established, the onus [evidential burden] is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds."²

[7] In **Afgri Operations Ltd v Hamba Fleet (Pty) Ltd** *supra*³, Willis JA on behalf of a unanimous bench reaffirmed 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"⁴ and 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 then in special or unusual circumstances only.⁵

[8] The test for a final liquidation application differs from that which is applied when the provisional order is considered.

¹ Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 348 and Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) ([1987] ZASCA 156) at 980D. Also see Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) par 6.

² Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, *supra*, par 6.

³ Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, *supra*, par 12.

⁴ The Court did remark that different considerations may apply where business rescue proceedings are being considered in terms of part A of chapter 6 of the Companies Act 71 of 2008. Such considerations are not relevant to these proceedings.

⁵ Afgri Operations Ltd v Hamba Fleet (Pty) Ltd, *supra*, par 12 and legal precedent referred to in footnote 16 of the judgment.

[9] The respondent's indebtedness to the applicant arises from an agreement for the supply by the applicant to the respondent of petroleum products for resale by the respondent and the installation of petroleum dispensing and service station equipment at the respondent's premises in Church Street, Vrede from where the respondent operates a fuel filling station.

[10] The applicant's application is premised on the following grounds:

10.1 The respondent is unable to pay its debts as envisaged by section 344(f) read with section 345 of the Companies Act 61 of 1973⁶ [commonly referred to as "the old Companies Act"];

10.2 The respondent is deemed to be unable to pay its debts as envisaged by section 345 of the old Companies Act;

10.3 It is just and equitable that the respondent be wound up as envisaged in section 344(h) of the old Companies Act and/or on the basis of section 81(1)(c)(ii) of the Companies Act 71 of 2008 [commonly referred to as "the new Companies Act" for sake of convenience] and insofar as the respondent may be solvent (which the applicant denies) it remains otherwise just and equitable for the respondent to be wound up.

[11] In this matter the respondent on its own version is in material breach of the agreement between the parties. It failed to comply with its obligations to make payment of amounts when they became due and payable and it procured petroleum products from alternative suppliers, which fact it concealed from the applicant.

[12] The applicant inter alia relies on two statutory demands which were duly served on the respondent in terms of the provisions of section 345(1) of the old Companies Act.

⁶ See item 9 of Schedule 5 of the Companies Act 71 of 2008.

The respondent neglected to pay the sums in full or to secure or compound for it to the reasonable satisfaction of the applicant.

[13] The respondent's version is fanciful and clearly untenable. It is not necessary to deal with the version in full.

[14] It must be said that the interpretation of the agreement advanced by the respondent in its answering affidavit is clearly untenable. So too the reliance on the agreement being void for vagueness. The parties implemented the agreement for approximately 7 years. As explained by Wallis JA on behalf of a unanimous Court in **Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited 2012 JDR 1734 (SCA)** para 15 with reference to the 'Endumeni Municipality⁷ rule of interpretation':

"In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties. This does not mean that, if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning. In that situation their conduct may be

⁷ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) par 18.

relevant to a claim for rectification of the agreement or may found estoppel, but it does not affect the proper construction of the provision under consideration.”

[I have omitted the footnotes from the passage]

[15] The parties did not implement their agreement in a manner that is inconsistent with any possible meaning of the language used.

[16] No genuine bona fide dispute exists that would justify dismissal of the application.

[17] The respondent has not rebutted the statutory presumption that it is not able to pay its debts.

[18] In **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd** *supra*, the Supreme Court of Appeal authoritatively held that the deeming provisions concerning the inability to pay its debts, contained in section 345 of the old Companies Act may be used to establish the insolvency of a company. The Court held that a commercially insolvent company may be wound up in accordance with chapter 14 of the old Companies Act, as is provided for in subitem 9(1) of schedule 5 of the new Companies Act and that factual solvency in itself is not a bar to an application to wind up a company in terms of the old Companies Act on the ground that it is commercially insolvent. “That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time.”⁸ Factual solvency will however always be a factor in deciding whether a company is unable to pay its debts.

[19] Even if the respondent was factually solvent, a fact that the respondent did not establish, the same would not be a bar to the liquidation of the respondent on the basis that it is commercially insolvent.

⁸ Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd, *supra*, par 17.

[20] In the circumstances the applicant has made a proper case for confirmation of the rule nisi and an order for final liquidation of the respondent.

[21] In the premises the following **ORDER** was made:

1. The rule nisi, issued on 3 March 2022, is confirmed and the respondent be and is herewith placed under final liquidation.
2. The costs of the application are to be costs in the administration of the liquidation of the respondent.

N SNELLENBURG, AJ

On behalf of the applicant : Adv. SJ Rautenbach

Instructed by : Phatshoane Henney

On behalf of the respondent : No appearance.