



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 63226/2018

19/3/2018

In the matter between:

Tau Rollermeulle (Pty) Ltd

Appellant

And

Murcus M Farming CC

Respondent

JUDGMENT

Maumela J.

1. This matter came before court on the opposed motion roll. The applicant is Tau Rollermeule (Pty) Ltd, a company incorporated in terms of the Companies Act of the Republic of South Africa with registration number 2015/357344/44 with its registered address situated at 2 Gerge Street, Leeudoringstad, North West Province. The respondent is Murcus M Farming CC, registration number 2008/091707/23, a close corporation duly registered in accordance with the Close Corporation Act 1994: (Act No 69 of 1994) and which enjoys continued existence by virtue of the provisions of the Companies Act, with its 603, Wingerhof, 169 Bourke Street, Pretoria, Gauteng Province.
2. Before this court, the applicant instituted action against the respondent under case number 84019/2016 for payment of an amount of R 5 395 962-30 in respect of chicken feed sold and delivered by the applicant to the respondent.

BACKGROUND.

3. On the 15th of August 2016, the parties entered into a written agreement which was made an order of the court before the Honourable Molefe J. When the order was made, the respondent admitted indebtedness to the applicant in the amount indicated under paragraph 2 above, together with interests calculated at the rate of 12% per annum from the 23rd of September 2016. A “pending application” was only served on the 20th of August 2019. This was two years and nine months after the granting of the court order by Molefe J.
4. The Respondent made six payments in substantial amounts from July 2017, until March 2018. That was subsequent to the court order. Respondent’s sole director and its attorneys admitted the debt on various occasions subsequent to the court order.

RESPONDENT’S DEFENCES BASED ON THE NATIONAL

CREDIT ACT¹ (“NCA”). THE AGREEMENT SHOULD BE DECLARED RECKLESS.

5. The respondent argues that the claim by the applicant is predicated on what the court should consider to be reckless credit. Part D of Chapter 4 of the Act deals with reckless credit. This section does not apply to a credit agreement where the consumer is a juristic person [Section 78(1) of the Act].² as a result, such a defence is bad in law.

THE APPLICABILITY OF SECTION 129 OF “THE ACT”.

6. Section 129 of the National Credit Act³ (NCA), addresses the aspect of applicability or otherwise of the NCA. In that regard, the section provides that section 129 thus not apply:
- (a). where the consumer is a juristic person whose asset value or annual turnover exceeds R1 million;
 - (b). where the principal debt is R250 000 or more – even when the juristic person has an asset value or turnover of less than R1 million⁴.
 - (c). The agreement in question is a large agreement (over R250 000).

Respondent submits that its immovable property alone is worth R12 million. This property was bought in December 2010. (See Land Bank’s bond for R6,414858.00; Annexure “FA8”, p.55).

RESCISSION OF COURT ORDER OF 15 NOVEMBER 2016⁵.

7. The Respondent raises the issue that the preceding application was not served on it, alternatively that the application was served by hand. The parties agreed that their settlement be made an order of court.⁶ The Respondent made various payments and in

¹. Act Number 34 of 2005.

². See also Scholtz & Others: Guide to the National Credit Act, Volume 1, p.11 – 13; Gestalt Fund Managers (Pty) Ltd v Secura Systems Security (Pty) Ltd, 2015 JDR 1284 (GJ), par 15.

³. Supra.

⁴. Section 4(1)(a) of the Act read with GN 713 in GG 28893 of 1 June 2006. See also Guide to National Credit Act, Volume 1, p.4-7 – 4-9.

⁵. Respondent’s Heads, par 13 - 22.

⁶. Clause 2.2 and 3.7 of the settlement: Annexure “FA3”, p.26.

doing so, it admitted liability on various occasions subsequent to the settlement. Based on that, the applicant argues that the Respondent therefore acquiesced in the judgment. Applicant states that a Rule 42(1) application has to be brought within a reasonable time. It is trite that inordinate delay in itself is a good reason for refusing the relief.⁷

WAS THE ORDER ERRONEOUSLY SOUGHT OR GRANTED?

8. The court has to determine whether the order was erroneously sought or made. It has been shown in paragraph 4 above that the NCA does not apply. The court also has to determine whether or not there has been compliance with section 346 (4A) of the old Companies Act⁸ where it regards service on employees.
9. Applicant submits that it is not a requirement that service be effected upon employees at the commencement of the application. According to the applicant, the application must only be served on the employees, a reasonable time before the hearing. It submits that the test is merely whether persons who are entitled to be furnished with papers had adequate opportunity to consider the application and to decide to intervene. However, it contends that the application was served timeously on the employees, in February 2019. This is reflected in the service Affidavit which is attached as Annexure “SA4” as indicated on page 238 and Annexure “SA6”, page 240.
10. The Applicant makes the point that the fact that Respondent opposed this application renders the aspect of service to be academic. It points out that the application was in any event served both at the principal place of business, much as it was served at the registered address. See Service Affidavit, paragraph 2.3 and 2.7, p.229 and 230.

⁷. Erasmus Superior Court Practice, Volume 2 at D1 – 576; *Roopnarain v Kamalapathy*, 1971 (3) SA 3 (D).

⁸. Act number 61 of 1973.

SECURITY BOND.

11. The applicant submits that the Master's Certificate needs not accompany the application when filed with the Registrar or when served on the Respondent. It points out that the Master's Certificate must only accompany the application when it is heard and that it ought not be issued more than ten days before they date of the Notice of Motion.⁹
12. In motivating for the court to grant its application, Applicant pointed out that the Respondent is unable to pay its debts¹⁰. This can be proved on the basis of any facts which the court finds to be satisfactory. An unpaid demand or a *nulla bona* return merely constitutes an alternative means of proving inability to pay debts.¹¹ In order to obtain an order declaring insolvency against a party, an applicant is not obliged to prove that the defendant committed an "act of insolvency". Inability to satisfy a warrant is merely one factor, coupled with Respondent's own admission that it is unable to pay its debt.

DOES RESPONDENT HAVE SUFFICIENT ASSETS TO SATISFY A WARRANT AND JUDGMENT?

13. Among others, in order to determine whether to grant or refuse the application for the Winding-up of the Respondent, the court is to determine whether the respondent has sufficient assets with which to satisfy a warrant emanating from the judgment against it. No valuations are attached by the Respondent. The Applicant relies on the simple fact that the Respondent has failed to settle indebtedness since at least November 2016. Respondent's major asset has been sold. The land Bank obtained judgment against

⁹. Joffe *et al*: High Court Motion Procedure: A Practical Guide at p.5 – 14; Henochsberg, Volume 2, APPI-79.

¹⁰. Founding Affidavit, par 6.35, p.16; Section 344 read with Section 345(1)(c) and (2) Companies Act 61 of 1973.

¹¹. Joffe *op cit*, p.5 – 11.

Respondent for plus or minus R8 million¹² plus interest.

14. The application was not triggered when Respondent reneged on the article. Article: right promises to pay. Even if it was, the immovable property is the only asset of value. If it gets sold, there will be almost nothing left to execute upon. There is no proof of collusion between Eagles the four core is not with 24 **the** Applicant. Eagles wants property and the Applicant wants its money. The sale agreement is not confidential. It features in other court papers in the public domain. There is no reason why the Applicant would cut off rental payments in order to sue the Respondent because it was servicing the debt.¹³ The Applicant is fully entitled to sue the surety as it is liable jointly and severally in terms of suretyship.

BONA FIDE DEFENCE.

15. The court has to determine whether the defendant has a *bona fide* defence, against the claim or not. The Applicant submits that the High Watermark in this case is that the Chicken Feed “*may have been contaminated*”.¹⁴ The Defence never raised this before filing the Answering Affidavit. No letters or emails were sent about this. The test results got known on the 24th of November 2016.¹⁵ It is submitted that the Applicant relies on hearsay evidence. No affidavit from an expert was submitted to prove the results. A question arises about why the Respondent entered into a settlement whereupon he subsequently made six substantial payments if he was unhappy with the quality of the merchandise. The Chicken-Feed was already sold in 2016. Any potential counterclaim has long prescribed. The Applicant contends that the defence the Respondent raised is *mala fide* and contrived.

¹². Founding Affidavit, par 6.18, p.13; Answering Affidavit, par 24, p.74.

¹³. Paragraph 54, Respondent's Heads.

¹⁴. Answering Affidavit, par 69, p.89.

¹⁵. Annexure “LM11”, p.137 – 145.

IS RESPONDENT INSOLVENT?

16. In order to decide whether or not to grant this application, the court has to determine whether the Respondent is still solvent or not. The Respondent states that its property is worth R12 million. But such is only the amount of mandate to sell allowed by the Landbank. There has been no valuation done in order to prove market or forced sale value of the assets. It is submitted that the only yardstick is the sale to Eagles for R9 million. The Applicant points out that on the Respondent's own version, it has debts totalling over R15 million.¹⁶ Pending litigation suspending sale agreement, the proceeds will not materialise shortly.
17. The court also has to determine whether the Respondent's defence against the claim is *bona fide*. That defence has to be premised on reasonable grounds. It is trite that the *onus* is on the Respondent to prove that it has a *bona fide* dispute against the claim. The Respondent signed a settlement and it paid various amounts. It only raised its "defence" after the liquidation application was served. The application for rescission was only launched on the 20th of August 2019, which was almost three years after the settlement was made an order of the court. In doing so, the Respondent made various admissions of liability.
18. Respondent admits that it cannot pay the Applicant at the present moment.¹⁷ If the Respondent had liquid or readily realisable assets, it would have realised them in order to extinguish the debt. A liquidation application was already served as far back as September 2018. The Applicant is owed a substantial debt of R 5,070 963-40. The Respondent has made no payments since March 2018. Its major asset was sold for a sum less than the total of Applicant's and the Land Bank's debt. The Applicant argues

¹⁶. Annexure "JHV5", p.225 last paragraph.

¹⁷. Answering Affidavit, par 33, p.77.

that this is indication that the Respondent is unable to pay its debts. It also contends that there is no merit in Respondent's application for rescission. It contends that the court ought to grant the order liquidating the Respondent.

19. The Respondent submits that the court ought to dismiss this Application, alternatively that the application be suspended pending the finalization of the Application between the Respondent and the Applicant in terms of which the Respondent sought an order setting aside the Judgment and the Settlement Agreement upon which the liquidation application is premised. It submits that based on the points *in limine* alone, the Court has to dismiss the Application without considering the merits of the case.
20. The first point *in limine* revolves around the fact that there is a pending application for a declarator and for rescission of judgment. As indicated under paragraph 2 above, the Respondent launched an application under case number 84019/16, applying for an order providing *inter alia*, that:-
 - 20.1. A declaratory order be granted to the effect that the underlying Agreements to the Judgment (upon which the Liquidation Application is premised):-
 - (i). Constitute a Credit Agreement to which the provisions of the NCA apply;
 - (ii). Imply that the Agreements should be declared reckless in terms of Sections 80 (1)(a) or 80(1) (b) (i) or 80 (1) (b) of the NCA; and
 - (iii). Have the effect of setting aside all or part of the Respondent's rights and obligations under the Agreements.
21. The Agreements referred to are the following: -
 - 22.1. A Credit Application dated 17th October 2013¹⁸ concluded

¹⁸. Annexure "LM14" of the Supplementary Affidavit, p 195.

between the Respondent and the Second Applicant;
21.2. A Suretyship signed by the First Applicant in favour of the Respondent dated the 10th of March 2016; and
21.3. A Settlement Agreement¹⁹ dated the 27th of September 2016.

22. In terms of the pending Declaratory Application, the Respondent sought an order to the effect that in the event that the Court does not declare the Agreements referred to above as reckless, then the Applicant should be ordered to comply with the provisions of Section 129 (1)²⁰ as read with Section 130 of the NCA, prior to enforcing the Agreements.
23. The Applicant supplied the Respondent with goods on credit in the sum of R 5 395 962.30. The Respondent submitted in its Declarator Application that the granting of credit to the Respondent in the aforesaid sum of R5 395 962.30 is itself a reckless credit. At the time of the conclusion of the Credit Agreement, the Applicant failed to conduct an assessment as required by Section 81(2) of the NCA; alternatively, the Applicant having conducted an assessment as required by Section 81 (2), entered into the Credit Agreement with the Respondent despite the fact that the preponderance of the information available at the disposal of the Applicant indicated that –
- 23.1. The Respondent and its directors did not generally understand or appreciate the risks, costs or obligations under the proposed loan agreement; or
- 23.2. Entering into the credit agreement would make the Second Applicant to be over-indebted.
24. The defendant contends that the Applicant failed to comply with the provisions of Section 81 in that it could have prevented the reckless credit being made by way of following a proper

¹⁹. Annexure "FA3", p 25.

²⁰. Of the NCA.

assessment in terms of Section 81 (2). The Respondent requested the Court to set aside all or part of the Respondent's rights and obligations under the Credit Agreement as it may deem to be just and reasonable in the circumstances; alternatively that the court should suspend the force and effect of the Credit Agreement in accordance with Section 83 (b) (i) of the NCA.

25. Respondent submits that similar submissions were made in respect of the Suretyship and the Settlement Agreement. It further contends that flowing from the above, the Liquidation Application cannot be heard pending the finalization of the declaratory application.

RESCISSION OF THE COURT ORDER OF 15th NOVEMBER 2016.

26. Respondent launched an application for rescission of the Court Order in terms of Uniform Rule 42 (1) of the Court, alternatively, based on the common law for rescission. Following the conclusion of the Written Settlement Agreement, (preceded by a letter of demand²¹), and on the 25th of October 2016, the Applicant brought an Application seeking an order declaring the Settlement Agreement to be an order of court. A copy of the Application is attached to the Declaratory Application. That Application was not served on the Respondent in terms of the Rules relating to service of court process. The Respondent points out that no Notice of Set down was served on it. It submits that it was not represented in court, in person or by a legal representative. The Application for Rescission is based upon this failure to serve.
27. In the Rescission Application, the Respondent submitted that the Court Order was erroneously sought or erroneously granted as envisaged in Rule 42 (1) (a) of the Rules of the Court and that the

²¹. No Summons was issued by the Applicant.

Order of Judge Molefe should be viewed by this Court because one of those orders amounted to a failure of justice²². This is more so when placed in the NCA context, which imposes a duty upon the Court to ensure that those requirements are observed prior to any order being granted.

28. In its Rescission Application, the Respondent submits that Judge Molefe ought to have satisfied herself that: -
- 28.1. The Settlement Agreement did not constitute a credit agreement in terms of which the provisions of the National Credit Act apply; and/or
 - 28.2. The underlying agreement, (the Credit Application for the supply of goods), did not constitute a credit agreement in terms of which the provisions of the NCA apply; and/or
 - 28.3. That the Section 129(1) notice in terms of the NCA should have been delivered by the Applicant to the Respondent before the granting the Order.
29. The Respondent argues further that this is more so because the Settlement Agreement was not preceded by any summons or court application. More importantly, the Respondent was not legally represented before the Court at the time the Settlement Agreement was concluded and/or at the time the Application to make the Agreement an order of court was launched and/or at the time the Order was granted. The Respondent points out further that it was not even in court at the hearing and it was not even aware that the matter was enrolled for a hearing.
30. Respondent is adamant that non-compliance with Sections 129 and 130 of the NCA renders the process to be void. Thus, while s 129 (1) (b) prohibits the commencement of legal proceedings

²². The Respondent will rely on *S v Moodie* 1961 (4) SA 752 (A) at 759 A-D, and *Oliver v Attorney-General, Cape Provincial Division* 1995 (1) SA 455 (C) at 460. The Judgments were recently followed in an unreported Judgment of Boqwana J in the matter of *Jiyana vs Absa Bank Limited* (Western Cape Division, Cape Town). A copy is made available.

altogether, ('may not commence'), Section 130 makes it clear that where action is instituted without prior notice, the action is not void. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter.

31. The Respondent contends that flowing from the above, Judge Molefe's failure to satisfy herself in regard to that compliance, rendered her order to be a nullity or to be susceptible to rescission. In essence, the Respondent submits that the Liquidation Application cannot be adjudicated upon and/or be granted whilst the basis of the Liquidation Application itself is a subject of a pending rescission and declaratory application. A copy of the Respondent's Application for a Declaratory order has been made available to the Court, contained in a separate bundle.

SECOND POINT IN LIMINE: NON-COMPLIANCE WITH SECTION 346(4A).

32. The respondent charges that Applicant has failed to comply with certain prerequisite and peremptory statutory requirements in this Application and that this renders the Application to be irregular. It argues that by conduct, the Applicant has conceded that the points *in limine* have merit. It states that this is demonstrated by the attempt on the part of the Applicant to correct the irregularities post the Application. Section 346(4A) of the Companies Act of 1973 ("the Companies Act"), requires that an Applicant furnishes a copy of the Application to registered trade unions, (if any), employees, the South African Revenue Services and to the Respondent company. It also requires the filing of an affidavit by the person who furnished a copy setting out compliance.
33. The respondent avers that Applicant failed to comply with the provisions of Section 346(4A) in the following respects:-
 - (i). It is common cause between the parties that the Respondent's place of business is at Portion 51 of the Farm Modderfontein,

188 registration division I.P in the district of Ventersdorp, Province of North-West (“the Farm”). The Respondent has, at all material times, operated its chicken business at the Farm. The Applicant delivered chicken feeds to the Respondent at the Farm and was at all times well aware that the Respondent’s employees are at the Farm;

(ii). Despite the above knowledge, the Applicant delivered or served a copy of its Application at the Respondent’s registered address namely, 603 Wingerdhof, 169 Bourke Street, Muckleneuk, Pretoria. It has to be noted that the Respondent’s registered address is located at the block of flats where the Respondent’s Director resided at the time the Respondent was established and registered.

34. In February 2019, post the Application, the Applicant in an attempt to correct the irregularity and non-compliance with the provisions of Section 346 (4A), delivered the Application to the Respondent’s employees on the 18th February 2019²³. This is not in compliance with the provisions of the Companies Act which requires that the Application be furnished to the employees at the time the application is presented to court.
35. Furthermore, the Applicant has failed to serve the Application on the Respondent itself as required by Section 346(4A) (iv). The Application was instead served on one Mr. Erasmus of Eagles Valley Poultry²⁴. Mr. Erasmus had no authority or mandate to accept service of court process on behalf of the Respondent. This is borne out by the fact that no such mandate is attached to the papers. The Liquidation Application ought to have been served at the Respondent’s registered address. Service at the registered address was only made on 16th February 2019²⁵. The respondent

²³. Service Affidavit, Annexure “SA4”, p 238.

²⁴. Service Affidavit, p 229, at para 2.2.

²⁵. Service Affidavit, Annexure “SA3”, p 237.

argues that based on the above facts, the court has to find that the Application was not properly served and that this should render the Application to be irregular because of non-compliance with the provisions of the Companies Act and more specifically, the provisions of Section 346 thereof.

THIRD POINT IN LIMINE: SECURITY BOND

36. Section 346 (3) of the Companies Act requires a bond of security to be obtained which is not older than 10 (ten) days prior to the date of the notice of motion. The Applicant has failed to comply with these provisions in that: -
- (i). The Notice of Motion was issued by the Registrar of the above Court on the 30th of August 2018; and
 - (ii). The Bond of Security (Annexure “FA9²⁶”) was obtained by the Applicant on the 3rd of September 2018.
37. The Bond of Security was not obtained 10 (ten) days prior to the date of the Notice of Motion. In fact, the Bond of Security was obtained at least two (2) days following the date of the Notice of Motion. The Respondent submits that the bond of security must precede the date of the Notice of Motion as required by Section 346(3) of the Companies Act. It is on this basis that Respondent contends that the Application be found to be irregular. It submits that the application must be set aside because of non-compliance with the Companies Act. It makes the point that on this basis alone, the Application should be dismissed, with costs.

POINT IN LIMINE 4: NO *NULLA BONA* RETURN OBTAINED BY THE APPLICANT.

38. The Respondent makes the point that no *nulla bona* return had been obtained by the Applicant or the Sheriff of the Court as contemplated in Section 345 (1) (b) of the Companies Act. It argues that Annexure “FA6²⁷” to the Application does not

²⁶. Page 62.

²⁷. Annexure “FA6”, p 38.

constitute a *nulla bona* return. Annexure “FA6” does not indicate that the Respondent has failed to satisfy the Judgment or that the Respondent has failed to show any disposable property. As such the respondent argues that Annexure “FA6” does not satisfy the requirements of the provisions of Section 345 (1) (b) of the Companies Act.

39. This Application is ostensibly premised on the basis that the Respondent has committed an act of insolvency in that upon the demand of the officer whose duty it is to execute the Judgment, the Respondent failed to satisfy the Judgment or to offer to that officer disposable property sufficient to satisfy the debt. This is provided for in Section 8 of the Insolvency Act as read with Section 345 (1) (b) of the Companies Act of 1973. Simply put, the sheriff of the Court has never presented the Applicant’s Judgment to it for its satisfaction. In other words, the Respondent was never asked by the Sheriff of the Court to show any disposable or sufficient property to satisfy the Judgment.
40. The Respondent states that the Applicant was made aware that the Respondent is no longer operating at the Farm Property and that it is occupying the Farm Property on a rental basis. This acknowledgment on the part of the Applicant is confirmed in paragraph 6.3 of the Application. It is pertinently clear that the Applicant was well aware, at least since May 2017, that the Respondent will not be found at the Farm Property. Despite this knowledge, the Applicant proceeded to instruct the Sheriff to go to the Farm to execute the Judgment/Writ at the Farm. This was in the absence of the Respondent.
41. The Applicant’s attorney who has been in contact with the Respondent’s Director and who was communicating with him through telephone and WhatsApp [communication is confirmed in

paragraphs 6 – 14 of the Founding Affidavit²⁸) had an obligation to enquire around the whereabouts of the Respondent so as to ensure that the Writ or Judgment is executed on the sole Director of the Respondent.

42. Respondent contends that it owns, and has sufficient assets at its disposal to satisfy the Applicant's Warrant of Execution and Judgment. It makes the point that it has been in business since 2010 and has during its operations acquired a list of assets, movables and immovable. The lists include, *inter alia*, a truck, tractors, vehicles, operating machines, generators. The Assets were removed from the Farm in order to make way for the tenant at the Farm. Annexure "LM8"²⁹ is Eagles' request that the assets be removed. The respondent submits that the assets were then moved from the Farm and that is the reason why the Sheriff found no assets belonging to the Respondent at the Farm.

APPLICATION CONSTITUTES AN ABUSE OF PROCESS.

43. The Respondent contends that this Application for the winding up of the Respondent constitutes an abuse of process. It submits that it has demonstrated this point fully in its Affidavit and in the Supplementary Affidavit. The Respondent submits that this application was triggered by a pending Sale Agreement concluded between it and a company known as Eagles Valley Poultry ("Eagles"). Eagles is copied in this Application as it appears in the Notice of Motion³⁰. It makes the point that there is no basis whatsoever to cite or copy the Liquidation Application to Eagles other than for reasons set out in the its Affidavits.
44. Both Eagles and the Applicant are in the same chicken production and/or chicken product industry or business in the North-West and are, from time to time, represented by associated legal

²⁸. P 9 – 12.

²⁹. Annexure "LM8", p 132.

³⁰. Page 4.

representatives or law firms. The respondent points out that this alone, confirms that there is collusion between Eagles and the Applicant to liquidate the Respondent in order to ensure that a favourable liquidator is appointed by the Applicant who will then execute the suspended Sale Agreement to finality. A copy of the Sale Agreement is attached to the Application and marked as Annexure “FA7³¹”. The respondent states that it is unclear how a copy of the confidential Sale Agreement fell into the hands of the Applicant. It figures that the reason is in the fact that Eagles and the Applicant are in cohorts to ensure that it is liquidated in order to safeguard the interests of both Eagles and the Respondent. The respondent points out that a favourable liquidator can ensure that both its interests in those of Eagles are served.

45. The Respondent is adamant that this Court is duty-bound to prevent such an abuse. It referred to a letter by its attorneys of record, Ndobe Inc. Attorneys (“Ndobe”), addressed to the Applicant’s attorneys, De Kocks Incorporated (“De Kocks”). This was consequent to a telephone conversation held between Ndobe and De Kocks, which telephone conversation was held prior to the launch of this Application. A copy of the letter is marked as Annexure “LM1³²”.
46. During the telephone conversation, De Kocks indicated the following to Ndobe:-
- (i). Eagles’ attorney of record, Mr Henk Strydom (“Mr Strydom”) of Strydom Bredenkamp Attorneys is a well-known experienced insolvency attorney and a liquidation expert;
 - (ii). Mr Strydom has, from time to time, and in conjunction with De Kocks, successfully launched liquidation proceedings against various parties.

A COLLUSION BETWEEN EAGLES AND THE APPLICANT.

³¹. P 41 – 54.

³². P 102 – 103.

47. On the 22nd of January 2018, Eagles and the Respondent concluded an 'Offer to Purchase' in terms whereof the Respondent sold the Property to the Applicant, as per Annexure "FA7"³³. In terms of the Addendum to the Sale Agreement, the sale and transfer of the Property cannot be effected pending finalization of the Appeal or the Court Litigation between the Respondent and Land Bank, alternatively, pending a formal termination of the litigation process (by agreement between the Respondent and Land bank). A copy of the Addendum to the Offer to Purchase is "Annexure LM3"³⁴ ("Addendum").
48. The respondent submits that Eagles is currently frustrated by the condition (Addendum) it itself introduced to the Sale Agreement. The respondents submits that Eagles has since indicated its intention to renege from the Addendum and on or about the 29th of June 2018, Eagles launched an Application³⁵ to Court, seeking a relief to declare that the Addendum amounts to an extension and/or indulgence extended by the Applicant to it, (the Respondent); alternatively, that the Addendum should be declared invalid; further alternatively, that the Addendum was premised on a misrepresentation.
49. Eagles' Application was heard on the 30th of July 2019 and a Court Order dismissing the Application was granted on the 2nd of August 2019. The Respondent suggests that a strategy was hatched between Eagles and the Applicant that the rental payments should be cut off to enable the launching of this Application on the basis that the Respondent is no longer in a position to liquidate its indebtedness to the Applicant.
50. To further demonstrate the collusion, the Applicant and Eagles proposed that the Liquidation Application be heard simultaneously

³³. P 41-54.

³⁴. P 105 – 107.

³⁵. P 108 – 111.

by the above Court on the same date the Eagles' Declaratory Application was to be heard. The Applicant's attorneys addressed a letter to the Acting Deputy Judge President. The letter is contained in a separate bundle filed in this Application. The respondent points out that Eagles now seeks the assistance of the Applicant through this liquidation process because it is now aware that the Court Litigation between the Respondent and the Land Bank may take years to complete considering that the Court Litigation is still at Summary Judgment stage.

51. The Respondent submits that the Application for its winding up is an abuse of court process to favour both the Applicant and its associate, Eagles. Following the filing its Application seeking an order placing the Respondent into provisional liquidation, the Applicant instituted a Court action in the Magistrate's Court for the District of Ventersdorp under Case Number 193/2018 against a director of the Respondent personally. In terms of the Summons, the Applicant is claiming payment in the amount of R4, 753, 735.70 based on the alleged suretyship.
52. The Respondent states that the summons and the claim against the director of the Respondent is premised upon the same Court Order or Judgment upon which the liquidation Application is premised. It submits that the Summons and this Application constitute an abuse of process. At the time of the sale of the chicken feed by the Applicant to the Respondent, the latter lodged a formal complaint about the quality of the chicken feed products supplied by the Applicant to the Respondent. The Respondent, had at the time, lost revenue due to the ineffectiveness of the Applicant's chicken feed sold and supplied to the Respondent by the Applicant.
53. The Respondent consulted with Nutritional and analytical Chemistry experts to inspect and advise whether its suspicions about the quality of the Applicant's products are founded. The

Applicant's products were tested³⁶ for mycotoxin contamination. It submits that usually, when chicken feed has mycotoxin contamination, chicken tend not eat the feed or if they are really hungry, they will eat, resulting in them falling ill. The term "Vomitoxin" has been given to Deoxinivalenol, (a common mycotoxin) for this reason. Also, there can be microbial growth which cause the chicken not to eat the feed. Nutritional analysis would not pick this up. The Respondent states that it appears from the test that the Applicant's chicken feed may have been contaminated with some antibiotic residues which caused the chicken to not eat the feed because they either smell the residues or do not respond to medication.

54. The Respondent submits further that the Applicant had failed to provide it with a full accounting record reflecting all the payments it made against the purchase orders, delivery notes and Invoices. The Applicant is obligated to render a debasement of an account.

IS THE RESPONDENT COMMERCIALY INSOLVENT?

55. The respondent is adamant that it is not commercially insolvent. The Landbank proposed that the Farm be placed again in the market and be sold for a minimum value of R12 Million. The Landbank has been given a mandate to proceed to market the property with a view to obtain a higher price in the market. A Power of Attorney was executed by the Respondent in favour of Landbank³⁷. The objective of the Power of Attorney is to ensure that the sale proceeds are sufficient to cover other Respondent's debts such the Applicant's Judgment. The Power of Attorney is also referred to in the Application in paragraph 6.30.
56. The Respondent believes that the Farm will attract higher prices than that offered by the Eagles. The respondent points out that the proceeds of the sale of the Farm Property are sufficient to

³⁶ P137 - 145

³⁷. P 146- 147.

cover any indebtedness of the Applicant, (in the event that the Declaratory Application is not successful). This does not include the monies owed to the Respondent by the Applicant's associated company, Eagles, in respect of the rental owed which is in excess of R1.7 Million.

57. It is clear from the facts before this Court that with the exception of the Land Bank's mortgage bond the Respondent does not owe any other entity. The Land Bank's mortgage bond payment obligations are covered by the proceeds of the sale of the Farm Property. As a result the respondent submits that there is simply no basis to place the Respondent under liquidation in the circumstances.

CASE

LAW.

The Badenhorst Rule.

58. Given that sequestration or liquidations deal with the status of persons or entities, the bar for obtaining a provisional order is set higher than that which applies in applications for interim interdictory relief. The question whether the requirements are met on a *prima facie* basis is determined by assessing whether the balance of probabilities on the affidavits favour the Applicant's case³⁸. The test can be traced back to the well-known Judgment of Corbett JA (As he then was) in *Kalil v Decotex (Pty) Ltd*³⁹. In that matter; Corbett JA held that a Court can hardly decide an application for the provisional winding up of a company without reference to the respondent's rebutting evidence. Corbett JA then explained that the term "*prima facie*" case means that the balance of probabilities on all the affidavits should favour the granting of the application for provisional liquidation (or sequestration)⁴⁰.

³⁸. Investec Bank Ltd v Hugo Amos Lambrechts N.O Case No. 6570/2014 (unreported Judgment delivered by Rodgers J on 27 November 2014 at para 15). This Judgment was referred to by De Waal AJ in Standard Bank of South Africa Ltd v Sauer (unreported Judgment on 12 March 2019 at para 4).

³⁹. 1988 (1) SA 943 (A).

⁴⁰. *Kalil v Decotex (Pty) Ltd*, at 979 A.

59. As far as the first requirement is concerned, i.e. whether the Applicant has a claim against the respondent, the SCA added in *Kalil* that an application for liquidation should not be resorted to in an attempt to enforce a claim which is *bona fide* disputed. In respect of this requirement, the onus on the respondent is not to show that she is not indebted to the Applicant but she must merely show that the indebtedness is disputed on *bona fide* and reasonable grounds⁴¹. This is known as the *Badenhorst* rule⁴². In short, an application for provisional sequestration should not be used as a means of putting pressure on the respondent to pay a debt which is *bona fide* disputed. The Respondent submits that it has demonstrated that the debt is *bona fide* disputed⁴³, (and on reasonable grounds) and as a matter of fact, the debt may be set aside by the court hearing the Rescission and Declaratory Application.
60. The legal principle which suggest that the Applicant must establish its entitlement to an order on a *prima facie* basis was also emphasized by the courts in *One Stop Financial Services (Pty) Limited v Neffensaan Ontwikkelings (Pty) Limited*⁴⁴ and *Orestisolve v NDFT Holdings*⁴⁵. Company deemed unable to pay its debts and Section 345 Requirements not met by the Applicant. Although the founding papers is unclear if the Application premised on Section 344 and/or Section 345 of the old Companies Act, 61 of 1973, the Respondent has demonstrated in its papers that the Respondent is not a company deemed unable to pay its debts as contemplated in the aforesaid provisions.
61. The grounds for the final winding-up of a close corporation are the same as those that are applicable for the winding-up of

⁴¹. *Kalil v Decotex (Pty) Ltd*, at 980B – D.

⁴². With reference to the decision in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348B.

⁴³. *Hulse-Reutter v HEG Consulting Enterprises (Pty) Limited* 1998 (2) SA 208 (C) at 218D-219C

⁴⁴. Unreported Judgment by Rodgers J handed down on 17 June 2015 under Case Number 2002/28/14 (Western Cape Division, Cape Town).

⁴⁵. 2015 (4) SA 449 (WC).

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. Section 344 indicates circumstances under which a company can be wound up. Sub-section (f) provides that a company may be wound up by the Court if it is unable to pay its debts as described in Section 345. This section determines circumstances under which a company can be deemed to be unable to pay its debts. In that regard, this section provides the following:-

“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 any body 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*
 - (iii). 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*
 - (iv). It is proved to the satisfaction of the Court that the company is unable to pay its debts.”*

62. The Respondent argues that from obtaining the facts, the Applicant has not met the requirements for the application for a

final winding up to be granted. The Applicant is resisted on the basis that the Respondent is commercially solvent and is able to meet its day to day liabilities in the ordinary course of business. It is also contended that the Respondent has liquid assets or readily available assets at its disposal. It is contended therefor that out of the proceeds of such assets, the Respondent is able to pay its debts. The respondent points out that the fact that no *nulla bona* return was obtained by the Applicant is also an indication that it is not unable to pay its debts. The Respondent raised the point that it was never asked by the Sheriff of the court to show the assets in its possession which assets were removed from the Farm when the tenant took possession of the Farm.

63. In the case of *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*⁴⁶ the court stated the following: “As Caney J said in *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd*⁴⁷: ‘If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realizable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.’”
64. It is trite that in considering an application for winding up, it is the court which is to exercise its discretion on the basis of the available facts. Also underpinning this point, in the matter of *Standard Bank of South Africa v R-Bay Logistics*⁴⁸, the court stated the following :-“The possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f).” The respondent argues further that the jurisdictional requirements set

⁴⁶. 1993 (4) SA 436 at 440F.

⁴⁷. 1962 (4) SA 593 (D) at 59 7E-F.

⁴⁸. 2013 (2) SA 295 at 300 – 301, paragraph 27.

out in Section 345 (1) (a) have not been met in this matter in that the Applicant has never delivered a demand contemplated in Section 345 (1)(a)⁴⁹. It maintains that the Judgment in itself does not suffice and that the Applicant ought to have delivered the demand in order to meet the requirements of Section 345.

65. It is trite that where a Respondent's proven to be unable to satisfy a demand for a debt amounting to a sum not less than R100, the court is entitled to grant the application for final winding-up. In the case of *Lamprecht v Klipeiland (Pty) Ltd*⁵⁰, the following was stated: "[16] I have already found that the agreement [that] was made an order of court by Kruger AJ was valid. This leads me to find that the respondent conceded that the appellant had locus standi, that he was a creditor for a sum no less than R100 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.
66. Malan J (as he then was) stated the following in the case of *Body Corporate of Fish Eagle v Group Twelve Investments*⁵¹: "The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beek's case supra at 331F). If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts."

⁴⁹. (1) A company or body corporate shall be deemed to be unable to pay its debts if—has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due.

⁵⁰. [2014] JOL 32350 (SCA), para 16.

⁵¹. 2003 (5) SA 414 (W) at 428B-C.

67. However, in this case, the facts advanced by the Applicant fall short of proving that the Respondent is unable to pay its debts. The Respondent has demonstrated that it has a *bona fide* defense against the claim brought by the Applicant against it. Considering that the standard of proof required for purposes of demonstrating *bona fide* defense is lower, the court find that the submission advances by the Respondent suffices in constituting a *bona fide* defense on reasonable grounds. The court also takes into consideration that a possibility obtains that upon application for rescission, the Respondents may succeed.
68. The Respondent avers strongly that it stands to succeed in its application for rescission of the judgment in the top by my sister Molefe J. It is trite that at this stage, the Respondent is not obliged to prove that it will indeed succeed. However, if that were to be the case, (if the Respondent succeeds in its application for rescission), granting this application will have unduly overtaken valuable events. Consequently, the application for final winding up does not stand to be granted. In the result, the following order is made:

ORDER.

1. The Provisional Winding-up order is hereby discharged.
2. The Application for the Winding-up of the Respondent is hereby dismissed with costs and such costs to include those consequent upon the employment of counsel.

T.A.
Judge of the High Court of South Africa.

Maumela.

REFERENCES

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