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

Case No. 045881/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 17 May 2024

SIGNATURE:

In the matter between:

SA CONCERTS (PTY) LTD
(Registration Number: 2019/321417/07)

First Applicant

EDUARD HUGO HOLDINGS (PTY) LTD
(Registration Number: 2023/613380/07)

Second Applicant

EDUARD CHRISTIAAN HUGO
(Identity Number: 9[...])

Third Applicant

And

ALL ENCOMPASSING SWITCHING (PTY) LTD
(Registration Number: 2017/293995/07)

Respondent

Coram: Millar J

Heard on: 14 May 2024

Delivered: 17 May 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 17 May 2024.

ORDER

It is Ordered:

- [1] The forms and service provided for in the Rules of this Honourable Court are dispensed with, and that the application is heard as one of urgency in terms of Rule 6(12).
- [2] The respondent is placed under provisional liquidation.
- [3] A *rule nisi* is granted calling upon the Respondent and all interested persons to appear on 03 July 2024, at 10:00 ("*the return date*"), or as soon thereafter as counsel may be heard, so as to show good cause, as to why:
 - [3.1] a final order of liquidation should not be granted;
 - [3.2] the costs of this application, inclusive of the costs of two counsel, should not be costs in the liquidation; and
 - [3.3] further and/or alternative relief be granted to the applicants.
- [4] This Order of provisional liquidation is to be served:
 - [4.1] by the Sheriff, on the respondent at its registered address and principal place of business.

- [4.2] by the Sheriff, on the employees (if any) of the respondent, and on any trade union representing such employees at the respondent's registered address and principal place of business.
- [4.3] by the Sheriff, on the South African Revenue Services, Pretoria.
- [4.4] by hand upon the Master of the High Court, Pretoria.
- [4.5] by publication of the Order in one publication of each of "Die Beeld" and "The Citizen" newspapers; and
- [4.6] by publication of the Order in the Government Gazette.

JUDGMENT

MILLAR J

- [1] This is an application for the winding up of the respondent on the basis that it is *inter alia* unable to pay its debts¹. The application was brought as one of urgency. For the reasons which appear in this judgment, I regard the matter as urgent.
- [2] The first and second applicants are business entities operated by the third applicant (Mr. Hugo). The respondent is a company with which the applicants contracted and engaged, and which is represented by its CEO Mr. Lombard.

¹ Section 344(f) read together with Sections 345 (1)(c) and (2) of the Companies Act 61 of 1973. The Companies Act 71 of 2008 came into operation on 1 May 2011 however in terms of item 9 of schedule 5 of that Act, chapter 14 of the 1973 Act (which includes Sections 344 and 345) relating to the winding up and liquidation of insolvent companies remains in force.

- [3] The business of the applicants includes arranging and promoting music festivals throughout South Africa. It has been involved in a number of such events including the Mossel Bay Somerfees, the Dias Summer Festival and the Loslit Fees.
- [4] In 2023, Mr. Hugo was introduced to Mr. Lombard of the respondent, a service provider for ticket sales and cashless payment systems which could be used by the first applicant at the festivals and events organized by it. The respondent in turn introduced Mr. Hugo to Mr. Ferreira, who also worked for the respondent. Mr. Ferreira was introduced as the manager of a business called VTickets, which was the online platform for the sale of events tickets used by the respondent as part of the service it offered. Subsequent to this, the first applicant and the respondent entered into a business relationship. This relationship was governed by 3 inter-related written contracts.
- [5] The first contract styled as a memorandum of understanding, was signed on 9 July 2023. In terms of it, the respondent was required to secure corporate sponsorships for the first applicant in the sum of R5 million for the 2023 Mossel Bay Somerfees. In the event that it was unable to do so, it was obligated to make a minimum payment of R1 750 000.00 to SA Concerts.
- [6] The second contract, styled as a merchant service terms agreement, was also signed on 9 July 2023, which provided for in its terms the online ticket sales to the first applicant's events.
- [7] A third contract, styled as a service level agreement, also signed on 9 July 2023, provided for the cashless payment system to be used at the first applicant's events. This specific agreement allowed attendees at the first applicant's events to purchase credits and to preload cards to pay for food, drinks and merchandise at the events.
- [8] Collectively, the contracts provide for a situation where the respondent would collect the proceeds of ticket sales as well as the proceeds of other sales

and then transfer these into a virtual merchant wallet (VMW). This was for the benefit of the first applicant, who could then access the funds directly in that VMW.

[9] It is not in issue between the parties, that the VMW provides a practical way to allow the first applicant immediate access to the funds in it. What is in dispute in this regard, is whether or not the first applicant, being the party who had contracted with the respondent and held primary access to its own VMW, was entitled to create sub accounts within it into which monies due to other parties connected to the concerts and events could be credited.

[10] The indebtedness of the respondent to each of the applicants, arises out of funds in the VMW. It is the case for the applicants, that their access to the VMW has been blocked by the respondent without any cause and that the funds in the VMW, due to each of the applicants, is as follows:

[10.1] The first applicant claims that the indebtedness to it is in the sum of R1 556 723.24.

[10.2] The second applicant the sum of R98 395.97; and

[10.3] The third applicant, the sum of R186 603.98.

[11] The dispute concerning whether or not sub accounts could be create, relates specifically to whether or not there is any indebtedness on the part of the respondent to either the second or third applicant.

[12] The business relationship between the parties started well. The respondent paid R1 million towards its contribution for the sponsorship at the Mossel Bay Somerfees on 14 July 2023 and thereafter the parties collaborated without incident, for the Loslit Fees. On 16 December 2023, the respondent paid a further R200 000.00 towards the sponsorship reducing its indebtedness to R550 000.00.

[13] The Mossel Bay Somerfees started on 22 December 2023. The day immediately following, Mr. Hugo asserts that Mr. Lombard contacted him and requested that he refrain from transferring any funds from the VMW because the respondent was subject to an investigation by the Reserve Bank and an audit by ABSA Bank. He was told by Mr. Lombard that he feared that any payment made from the VMW would jeopardize the respondent's position with regards to the investigation and the audit.

[14] The Mossel Bay Somerfees ended on 1 January 2024. Mr. Hugo alleges that he made no withdrawals during this period but there is a withdrawal in the sum of R354 109.26 on 29 December 2023. According to Mr. Hugo, the VMW should have reflected:

[14.1] As due to the first applicant, a credit of R1 006 723.24 for ticket and bar sales;

[14.2] As due to the second applicant, a credit of R98 395.97 for the proceeds of a Christmas Market; and

[14.3] As due to various vendors, a credit of R186 603.98.

[15] From the transaction list relating to the VMW, provided by the respondent, it appears that:

[15.1] From 22 December 2023 until 2 January 2024, for the period during of the festival, no payments were made from the VMW.

[15.2] That as at 30 December 2023, the balance in the VMW was R485 751.68.

[15.3] During the period 2 January 2024 until 24 January 2024, deposits in the sum of R775 780.70 and withdrawals in the sum of R750

141.84 were made. Accordingly, when the withdrawal on 29 December 2023 is added, it would appear that withdrawals in excess of R1 million were made from the VMW.

[15.4] The closing balance and which appears to still be held in the VMW by the respondent is R511 390.54.

[16] In support of the allegations made by him, Mr. Hugo referred to a certificate signed by Mr. Ferreira on the letterhead of "Virtual. Wallet (Pty) Ltd" on 17 January 2024, in which it was stated that:

"Hereby confirm that an amount in extent of R781 000.00 (seven hundred and eighty-one thousand rands) is held by All Encompassing Switching (Pty) Ltd (hereinafter referred to as AE Switch) on behalf of SA Concerts (Pty) Ltd as proceeds for Somerfees Mosselbaai 2023.

AE Switch was used by Virtual. Wallet and SA Concerts as service provider to collect inter alia online ticket sales, gate ticket sales and vendor revenue. All card and cash payments as the event was collected and administered by AE Switch.

Due to circumstances beyond the control of ourselves and SA Concerts, payment of these funds to SA Concerts are delayed. According to our information AE Switch is undergoing a compliancy review by ABSA. Various vendors have however been paid during the course of this week and we trust that the payments to SA Concerts will follow soon as the matter is being resolved."

[17] A second and further certificate was issued by Mr. Ferreira on the same day recording that an amount "in excess of R200 000.00" was due to the first applicant.

- [18] A third certificate was also issued on 18 January 2024, confirming that *“all proceeds arising from the Christmas Market held at Mossel Bay 2023”* were held by the respondent.
- [19] It is readily apparent that the certificates issued by Mr. Ferreira, do not reconcile with the list of transactions on the VMW.
- [20] After 1 January 2024, Mr. Hugo, besides engaging with Mr. Ferreira, also engaged with Mr. Lombard. He contacted a representative of ABSA Bank, who also would appear to have discussed the matters raised by Mr. Hugo with Mr. Lombard. The representative of ABSA confirmed the contents of his discussions in an email, which was sent to both Mr. Hugo and Mr. Lombard. He recorded:

“Hi Eduard / Tiaan

As per my earlier call with you and Tiaan, I would like to re-iterate that neither me nor ABSA Bank are holding onto any funds of SA Concert or AE Switch. Kindly note that I do not hold any mandate or have authority to stop or block funds on any ABSA accounts. In discussion with Tiaan he stated that the R1,2 million outstanding funds is a personal matter between you and him and he will resolve it with you directly.

I have included Marsha Pillay who is the Coverage Banker for AE Switch who can confirm that none of AE Switch bank accounts have been blocked or frozen by ABSA.”

- [21] Mr. Lombard disputes ever having spoken to Mr. Hugo on 23 December 2023 or that Mr. Hugo could not transact on the VMW after 1 January 2024. The printout furnished by Mr. Lombard unfortunately, does not specify where the VMW was held, or who specifically transacted on the account at any

given time but in particular between the period of 2 January 2024 until 24 January 2024.

- [22] Furthermore, while Mr. Lombard admits that Mr. Ferreira was an employee of the respondent at all material times, he denies any knowledge of Virtual Wallet (Pty) Ltd or its involvement in the contractual arrangements between the first applicant and the respondent. This notwithstanding that he put up a printout (the origin of which is unknown) which reflects various payments made from the VMW purportedly by either Mr. Hugo or Mr. Ferreira.
- [23] Mr. Lombard asserts on a number of occasions in his answering affidavit, that he gave instructions to Mr. Ferreira in regard to transactions on the VMW. However, there is no explanation by him as to why Mr. Ferreira would issue the 3 certificates that he did. Furthermore, Mr. Lombard asserts that the first time he became aware of the certificates and the involvement of Virtual Wallet (Pty) Ltd was when he saw them. He does not say when he saw them for the first time but they and their content were obviously brought to his attention by Mr. Hugo and hence the discussion with the representative of ABSA Bank in regard to the specific issue recorded in all 3 certificates relating to ABSA's alleged blocking of the account.
- [24] The highwater mark of Mr. Lombard's defence in regard to the 3 certificates and the email, is that the applicants failed to attach confirmatory affidavits from either Mr. Ferreira or the representative from ABSA to confirm the contents.
- [25] There is no dispute that the respondent is in fact indebted to the first applicant. That this is so appears from the assertion of Mr. Lombard, when he says:

"4.4 The First Applicant made a serious error in the pricing of the tickets it sold, as the price was wrong and did not make provision for transactional costs and VAT. In the result the

Respondent was at a shortfall of almost R3.00 per transaction, as well as the VAT on every transaction. This is why the merchant wallet has not been reconciled. The dispute between the parties have caused this delayed and have not been resolved. A proper conciliation and determination of the Respondent's shortfall, which constitutes damages, will have to be undertaken. Until then, the first applicant cannot claim payment of an undetermined balance.

4.5 *Subject to the right of the Respondent to collect damages and or apply set-off against the Applicants, any available balance is tendered to the First Applicant."*

[26] While Mr. Hugo denies that he has transacted or withdrew any funds from the VMW since 22 December 2023, it is apparent that there were transactions.

[27] While Mr. Lombard says that Mr. Hugo did in fact transact, he goes on to say:

"... the First Applicant should not have had immediate access to the credit in its merchant wallet, as those funds are subject to a number of administrative checks and balances. For instance, cancellation of purchased tickets must be accounted for, costs of using the system and VAT implications. It is therefore not so that monies indicated in the merchant wallet would be available immediately. Even though an account might show a credit, it is not available until the funds actually clears, which can take anything from 2 to 3 days."

[28] While the amount of the respondent's indebtedness to the first applicant, is disputed, there is no explanation for why, although Mr. Lombard asserts that the process of reconciling "*can take anything from 2 to 3 days*" that now, inexplicably, some 5 months later such reconciliation has not occurred. If it

were only that the reconciliation was awaited, after the end of the Mossel Bay Somerfees, then there is no explanation for why Mr. Hugo would have procured the certificates from Mr. Ferreira or why Mr. Ferreira would have even issued such certificates.

[29] Insofar as neither Mr. Ferreira nor the representative from ABSA Bank have provided confirmatory affidavits in order to verify the contents of those documents, the fact that Mr. Hugo received those documents, which are corroborative and confirmatory of what he says, has not been placed in issue.

[30] Given the facts set out above, I find that the respondent is indeed indebted to the first applicant. The same cannot be said in respect of either the second or the third applicants. There is nothing to suggest any business relationship between the second applicant and the respondent, save for the certificate of Mr. Ferreira, which has not been confirmed under oath.

[31] Furthermore, deposits made into the VMW do not reflect the identity of the party for whom they are ultimately intended, such as the second applicant. Mr. Lombard denies the existence of any business relationship between the second applicant and the respondent and so on this aspect, there is a dispute which cannot be resolved on these papers. For this reason, I am unable to find that respondent is indebted, for purposes of the present application, to the second applicant.

[32] In regard to Mr. Hugo himself, while he has asserted that he made payments on behalf of the first and second applicants in his personal capacity and then took cession of those claims, there is nothing before me, other than his assertion, to evidence this². For this reason, I am similarly unable to find, for purposes of the present application that the respondent is indebted to Mr. Hugo personally.

² *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA).

- [33] Mr. Lombard on behalf of the respondent, did not raise any substantive defence to the claim of its indebtedness to the first applicant. Instead, he has laid criminal charges against Mr. Hugo and made allegations of wrongdoing against Mr. Hugo personally.
- [34] He attached to his answering affidavit, a copy of an affidavit, which he deposed to and furnished to the South African Police on 4 March 2024 where he initially made such allegations to Mr. Hugo and have been repeated in the papers filed in these proceedings. None of the allegations are substantiated.
- [35] It does bear mentioning that in the affidavit, to the South African Police, Mr. Lombard refers to a phone call between himself and a third party, who purportedly had a claim against the first applicant. In regard to that phone call, he says “. . . I stated that I would keep the funds due to SA Concerts back until there is enough to pay him and I will make sure he receives his funds.” This is consistent with the version of Mr. Hugo that access to the VMW was blocked.
- [36] Having found that the respondent is indebted to the first applicant, the question now be decided, is the amount of that indebtedness. It was argued on behalf of the applicants that having regard to the fact that the indebtedness was not denied but only disputed, provided the amount of such indebtedness was more than R100.00, this was sufficient in terms of the 1973 Companies Act.
- [37] In *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd*³, it was held that:

“In the result, in my view, the applicant had succeeded in making out a prima facie case that Standard is unable to pay its debts. The respondent, on the other hand, has failed to show on a balance of

³ 1976 (2) SA 856 (W) at 867D-F.

probabilities that the alleged debt upon which the applicant basis its claim is contested on bona fide and reasonable grounds (see Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at P.348b; Meyer, N.O v Bree St. Holdings (Pty) Ltd 1972 (3) SA 353 (T) at P.355B). In other words, the applicant has prima facie discharged the onus of showing that it has an enforceable claim upon which to base its application. The fact that the exact amount of that claim is disputed, does not affect the position (cf. Re Tweeds Garages Ltd (1962) 1 All E.R. 121)."

- [38] Save to dispute the amount of the indebtedness of the respondent to the first applicant by making the allegations that he has, against Mr. Hugo and claiming as he does, that the first respondent has suffered damages in consequence thereof, Mr. Lombard raises no substantive defence on the part of the respondent to the claim of the first applicant that it is indebted to it.
- [39] Furthermore, save for alleging that the granting of a winding up order in the matter would be devastating to the respondent, Mr. Lombard has failed to take the court into his confidence by making any disclosure in regard to the financial position of the respondent.
- [40] A number of points *in limine* were taken. None of these are meritorious. The first was that Mr. Hugo lacked authority to act on behalf of both the first and second applicants. Insofar as his authority to act on the part of the first applicant is concerned, it is not disputed that he is a director of the first applicant or that he at all material times represented the first applicant in its dealings with the respondent. In regard to the second applicant, since I have found that no case has been made out for the respondent's indebtedness to it, this is of no moment.
- [41] The second point *in limine* was that the merchant service terms agreement, the second contract entered into by the parties, provides that disputes are to

be submitted to arbitration. The present application is not brought for the purpose of resolving the dispute as to the amount of the indebtedness and for that reason, the arbitration clause finds no application.

[42] The third point *in limine* was that criminal complaints were laid by Mr. Lombard against Mr. Hugo. From the contents of the affidavit to the South African Police, it is readily apparent that the complaint in its terms relates to the conduct of Mr. Hugo personally. This complaint bears no relevance to the present application. In its terms, it is part of the dispute relating to what is alleged by Mr. Lombard to be a damages claim and for that reason, is also of no relevance to the present application.

[43] The present application is brought upon the basis that the respondent is unable to pay its debts.⁴ Section 345 of the Companies Act provides for when a company is 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 of 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 so 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

⁴ Section 344(f) of the Companies Act 1973.

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”

[44] The requirements for the bringing of the application are set out in Section 346 of the Companies Act. The Section provides in particular, that a copy of the application is to be served on any trade union or the employees themselves at the premises of the company.⁵ It is not in dispute that the registered office of the respondent (where the application was served) is in a gated residential estate. It would not have been readily apparent to the sheriff that the residential premises, besides being the registered address, were also the principal place of business.

[45] The respondent argued that the failure to serve a copy on the employees rendered the service of the application ineffective. There would be merit to this argument were the first applicant seeking a final winding up of the respondent. What is sought however, at this stage, is not a final winding up but a provisional order of winding up.

[46] In *EB Steamco (Pty) Ltd v Eskom Holdings Soc Ltd* ⁶, it was held that peremptory compliance with Section 346(4A)(a) was only required at the time that a final order was sought and that if service on the trade union or employees had not been effected at the time that a provisional order was sought and granted, the court grant an order directing how the application was to be furnished to employees. For this reason, I find no merit in the contention of the respondent in this regard.

[47] On 6 February 2024, the first applicant's attorney addressed a letter to the respondent at its registered address in which a demand for payment in the

⁵ Section 346 (4A)(a)(i) and (ii).

⁶ 2015 (2) SA 526 (SCA).

sum of R1 006 723.24 as being due to the first applicant, was made in terms of Section 345(1)(a) of the Companies Act.

[48] A further letter was sent on 20 February 2024 in terms of Section 345(1)(a) of the Companies Act demanding payment in the same amount but now including the claims of the second and third applicants.

[49] It was argued for the respondent, that it had not received the notices in terms of Section 345(1)(a) of the Companies Act. Curiously, Mr. Lombard, while denying that the letter of 6 February 2024 had been delivered to the respondent, stated that:

“On 8 February 2024, the first and third applicants made it known that “all legal processes against AE Switch is (sic) ceased which emanates from discussions between myself and Mr Hugo to desist from making false allegations against the respondent. I went through with my undertakings and laid a formal criminal complaint against the first and third applicants.”

[50] Similarly, in his affidavit of complaint to the South African Police, which was deposed to by him on 4 March 2024, he refers to what he claims are relevant conversations with persons who were alleged to be creditors of the first applicant and Mr. Hugo on 8 February 2024 and 20 February 2024. However, he makes no mention whatsoever of the discussion alleged to have taken place between himself and Mr. Hugo on 8 February 2024.

[51] It is not explained by Mr. Lombard, how, if the Section 345(1)(a) notice dated 6 February 2024 had not been received at the registered office of the respondent (which is also its place of business) that he would have known on 8 February 2024 that either the first or third applicant had commenced with legal proceedings against him. The only way in which he could have known, is if he had received the letter. In the circumstances, the only

reasonable inference to be drawn, from the version of Mr. Lombard, is that by at least 8 February 2024, the respondent had received the notice.

- [52] It was held in *Koekemoer v Taylor & Steyn*⁷, in regard to the statutory demand and deeming provision that these:

“Predicate situations where a company may well be able to pay its debts but is conclusively deemed not being able to do so i.e where a company has failed to respond positively to a statutory demand for payment or where a company has caused a return of nulla bona to be made in response to a warrant of execution.”

- [53] The respondent has admitted indebtedness to the first applicant, subject to the completion of its reconciliation, which was supposed to have taken 2 to 3 days after 1 January 2024. It is now 5 months later, and that reconciliation has not been undertaken.

- [54] It is in this conduct that the urgency of this application is found. In *Murray N.O and Others v Master of the High Court, Pretoria and Others*⁸ it was held:

“Another factor supporting the view I have taken is the inherent urgency of the insolvency proceedings. In ABSA Bank Ltd v De Klerk and related cases, 1994 (4) SA 835e at 838J-839A the court said:

‘There is frequently a large body of creditors whose rights are affected by sequestration, who may wish to be heard on the return day, and who may be prejudiced by delay. This inherent urgency leads Meskin to make the following recommendation in Insolvency Law at 2.1.7 at 2-34, a recommendation which I endorse and which the courts in this division have in fact applied:

⁷ 1981 (1) SA 267 (W) at 270.

⁸ [2023] ZAGPHC 457 (9 June 2023).

“It is respectfully submitted that any application for sequestration merely as such contains an element of urgency; if a case for sequestration can be made, ex hypothesis, a removal of his property of the control of the debtor and a suspension of enforcement of creditors rights of action and execution in the ordinary course as soon as possible.”

[55] It was argued for the respondent, that the matter was not urgent and that were it to be heard as a matter of urgency and granted, the order would *“place thousands of clients at risk”*.

[56] This is the very reason why I find the matter to be urgent – the failure to discharge its indebtedness and 5 month failure to reconcile the first applicant’s VMW, means that the manner in which the respondent is conducting its business places, not only the first applicant, but every other creditor at risk.

[57] It is of no assistance to the respondent, to rely on its own deliberate failure to conduct the reconciliation, in order to place its indebtedness to the first applicant in issue. This is to my mind contrived and disingenuous. For this reason, I find that the respondent is indebted to the applicant as provided for in Section 345(1)(a) i.e for an amount in excess of R100.00 and it is for that reason deemed to be unable to pay its debts.

[58] In *Body Corporate of Fish Eagle v Group 12 Investments*,⁹ it was held:

“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. If the respondent admits a debt over R100.00, even though the respondent’s indebtedness is less than the amount the

⁹ 2003 (5) SA 414 (WLD) at para [16].

applicant demanded in terms of s 345(1)(a) of the Companies Act demanded, 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."

[59] It is not in issue that the respondent has failed to make any disclosure of its financial position, choosing rather to rely on the unliquidated damages claim for which liability has not yet been established, it says it has¹⁰. The ineluctable inference in such circumstances is that the respondent is insolvent.¹¹

[60] In *De Waard v Andrew & Thienhaus Ltd*,¹² the court held:

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

[61] In *Imobrite (Pty) Ltd v DTI Boerdery CC*,¹³ in case where a similar defence that was raised by the respondent in this matter, it was held:

". . . second, the indebtedness in respect of the capital amount was not disputed at any stage; instead, the respondent's claim that the debt

¹⁰ *Uys and Another v Du Plessis* 2001 (3) SA 250 (CPD) at 255b-g.

¹¹ *JP van Schalkwyk Attorneys v Botha N.O* 2021 JDR 0607 (GP) at para [6.3] – [6.4].

¹² 1907 TS 722 quoted with approval in *ABSA Bank Limited v Rhebokskloof (Pty) Ltd and Others* 1933 (4) SA 436 (C) at 447C-F.

¹³ 2022 JDR 1554 (SCA) at para [16].

was incorrectly calculated was based on the alleged miscalculation of interest and the facility fee. Notably, despite remaining in default beyond the 21 – day period stipulated in the statutory demand, the respondent failed to tender to pay what is considered to be the correct amount, nor did it make any suggestions regarding how to discharge its indebtedness.”

[62] For the reasons set out above, I find that the indebtedness of the respondent to the first applicant has been established and that the respondent’s failure to discharge that debt has not been disputed on any *bona fide* or reasonable grounds¹⁴ and despite the elapse of the statutory period the indebtedness remains undischarged. For these reasons I intend to make the order that I do.

[63] In the circumstances, it is ordered:

[63.1] The forms and service provided for in the Rules of this Honourable Court are dispensed with, and that the application is heard as one of urgency in terms of Rule 6(12).

[63.2] The respondent is placed under provisional liquidation.

[63.3] A *rule nisi* is granted calling upon the Respondent and all interested persons to appear on 03 July 2024, at 10:00 (“*the return date*”), or as soon thereafter as counsel may be heard, so as to show good cause, as to why:

[63.3.1] a final order of liquidation should not be granted;

[63.3.2] the costs of this application, inclusive of the costs of two counsel, should not be costs in the liquidation; and

¹⁴ *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (AD) at 980C-G.

[63.3.3] further and/or alternative relief be granted to the applicants.

[63.4] This Order of provisional liquidation is to be served:

[63.4.1] by the Sheriff, on the respondent at its registered address and principal place of business.

[63.4.2] by the Sheriff, on the employees (if any) of the respondent, and on any trade union representing such employees at the respondent's registered address and principal place of business.

[63.4.3] by the Sheriff, on the South African Revenue Services, Pretoria.

[63.4.4] by hand upon the Master of the High Court, Pretoria.

[63.4.5] by publication of the Order in one publication of each of "Die Beeld" and "The Citizen" newspapers; and

[63.4.6] by publication of the Order in the Government Gazette.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 14 MAY 2024

JUDGMENT DELIVERED ON: 17 MAY 2024

COUNSEL FOR THE APPLICANTS: ADV. R RAUBENHEIMER
ADV. J STEYN

INSTRUCTED BY:

TSP INC CAPE TOWN

REFERENCE:

MR. S MCLOUGHLIN

COUNSEL FOR THE RESPONDENT:

ADV. C ZIETSMAN

INSTRUCTED BY:

LACANTE HENN INC

REFERENCE:

MR. A HENN

NO APPEARANCE FOR THE 5th or 6th RESPONDENTS