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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO.: 35882/2022

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

26/04/2024

DATE

SIGNATURE

In the matter between:

FIRSTRAND BANK LTD

Applicant

and

SMARTPURSE SOLUTIONS (PTY) LTD

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 26 April 2024.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

[1] The applicant FirstRand Bank Limited approaches this court for an order under section 344(f) read with sections 345(1)(a)(i) or (c), and with with section

346(1)(b), of the Companies Act, 1973, in turn read with item 9 of schedule 5 of the Companies Act, 2008, for the final winding up of the respondent, SmartPurse Solutions (Pty) Ltd.

[2] In other words, the applicant says first that the respondent has failed to comply with a letter of demand served on it under section 345(1)(a)(i). Where an applicant brings itself within the purview of section 345(1)(a)(i), this triggers the application of section 344(f). In other words, under section 344(f), the respondent may then be wound up.

[3] In the alternative, the applicant says that, under section 345(1)(c), the respondent is actually unable to pay its debts. If an applicant demonstrates that inability, this also triggers the application of section 344(f). Then, under section 344(f), the respondent may be wound up on this ground, too.

[4] Under a loan agreement concluded between the parties in 2017, the applicant advanced money to the respondent. As appears from the facts recounted below, the respondent ran into difficulties repaying that loan.

[5] The respondent raises four defences. It says that, on one or more of the defences, the application for its final winding up ought to be denied. First, it contends that, since the loan agreement contains “*built-in remedies*” that serve to enforce and protect the applicant’s rights in the loan agreement, this application is an abuse of process. Second, it argues that the application is premature since the applicant failed to comply with the remedial plan provided for in clause 14.2.7.1 in appendix 1 to the loan agreement. Third, the respondent argues that, since neither the applicant’s letter of demand under section 345(1)(a)(i), nor this application was served on its *domicilium* address, as required by clause 20.1.2 in appendix 1 to the loan agreement, those were irregular steps. Fourth, the respondent contends that the applicant approaches this court with unclean hands.

CONDONATION

[6] This application was brought on 20 October 2022. The answering affidavit was due within fifteen days after the respondent had given notice of its intention to oppose. The answering affidavit was delivered only on 10 February 2023.

[7] The respondent seeks condonation for its late delivery of its answering affidavit. It explains that, under rule 35, it had sought a clearer copy of the loan agreement. In December 2022, Mr Ndobe, representing the respondent, had also experienced difficulties accessing his e-mail messages because of damage to his laptop computer. The respondent avers that the lateness of the delivery of the answering affidavit has not caused any prejudice. The applicant does not oppose the condonation sought.

[8] In my view, in these circumstances, good cause has been demonstrated for the condonation sought. What is more, it is in the interests of justice that condonation be granted.¹ Accordingly, the late delivery of the answering affidavit is condoned.

FACTS

The loan agreement of 12 April 2017

[9] On 12 April 2017, in Sandton, the applicant and the respondent concluded a written loan agreement, comprised of a loan schedule and appendix 1, namely the applicant's standard terms and conditions.

[10] Under that agreement, the applicant would advance R9m to the respondent, so that it might acquire Portion 12 of Erf 1159 Sunninghill, Extension 74, in Gauteng. Over 84 months, the respondent would repay the loan, including interest, in monthly instalments of R154,101.93. The respondent would register a first covering bond of R9m over the property.

[11] Also on 12 April 2017, two directors of the respondent, Messrs Mokoena and Ndebele, executed two separate suretyship agreements in favour of the applicant.

Further terms of the loan agreement

[12] Under the loan agreement, an event of default included the respondent's failure to pay an amount due under the loan agreement; its failure punctually to pay municipal fees, charges, rates or taxes (and the like) for the property (and not remedying such breaches within seven days of notice having been given); and its failure, during the term of the loan agreement, to record a trading profit in one or more years of trading (unless the applicant in writing condoned it).

[13] Were the respondent to commit an event of default, the applicant would be entitled to accelerate or demand payment of all the amounts owing, to call up or execute any security document, and to charge interest on the outstanding loan.

Implementation of the loan agreement and the difficulties that arose

[14] The applicant advanced to the respondent the loan amount of R9m. Some years into the term of the loan agreement, the respondent ran into difficulties.

[15] On 19 October 2021, the applicant wrote to the respondent, referring to clause 9.3.5 in appendix 1, which obliges the respondent to "*provide FNB with such other material information in relation to the Borrower's financial affairs as FNB may from time to time reasonably require on 5 Business Days notice to the Borrower*". It added that the respondent's failure to provide "*the necessary information*" was an event of default under clause 14.2.12 in appendix 1.

[16] In error, the letter suggests that by then the respondent was already in default ("*Should the above default not be remedied within 5 (five) days or in the event of any further defaults or breaches ...*"). Be that as it may, in the applicant's own words in the founding affidavit, the respondent was thus "*given until 26 October 2021 to furnish the Bank with the documents as requested*" (yet the letter does not specify that date). The applicant also observed: "*The Company [sc. SmartPurse] provided the Bank with the financial information on 21 October 2021.*" Logically, therefore, by

responding timeously the respondent was not in default as far as clause 9.3.5 in appendix 1 was concerned.

[17] Some months later, difficulties again arose. On 17 March 2022, the applicant sent another letter to the respondent. In the founding affidavit, that letter is called “a further breach letter”. Yet, as I read it, this was the first breach letter under the loan agreement. It included this passage:

“3. *The current outstanding balance in terms of the loan ... is R6,298,775.87 plus interest and fees.*

4. *In terms of clause 3.4 of the Loan Agreement you have committed to repay the loan plus interest thereon within the repayment period of 84 months by way of equal monthly instalments.*

5. *As per our records you are currently in arrears on the loan repayments for an amount of R46,116.27 which amounts to an event of default in terms of clause 14.2.2 of Appendix 1 of the Loan Agreement.*

6. *In terms of clause 9.3.10 of Appendix 1 of the Loan Agreement, the Borrower undertook to pay all rates and taxes in respect of the property, the Bank hereby requests a copy of the latest rates and taxes municipal statement reflecting evidence thereof, failure to provide this statement will amount to an event of default in terms of 14.2.6 of Appendix 1 of the Loan Agreement.*

7. *In terms of clause 13.1 of Appendix 1 of the Loan Agreement you have undertaken to insure the Property to the Bank for the entire period from disbursement date to termination date of the loan and as per our records the debit order for the insurance was returned unpaid. We require confirmation that the premiums for the insurance policy are up to date and Failure to provide confirmation that insurance policy has been renewed, will amount to an Event of Default in terms of clause 14.2.20 of Appendix 1 of the Loan Agreement.*

8. *In terms of clause 14.1.17 of Appendix 1 of the Loan Agreement an Event of default shall occur if the Borrower has fails to record a trading profit for one or more years. The financial information received on 21 October 2021 reflect losses for the financial year of 2020 and 2021.*

9. *Should all the above defaults not be remedied within 14 (fourteen) days or in the event of any further defaults on your loan repayments or breaches on*

the Loan Agreement, the Bank, in terms of clause 15.3 of Appendix 1 of the Loan Agreement, will have the right without further notice to the Borrower, to:

- 9.1 *Claim full repayment of the outstanding Loan Balance;*
- 9.2 *Charge interest on the outstanding Loan Balance at the default Penalty Rate of 5% from the date of default until the date on which the default is rectified; and*
- 9.3 *Levy execution against the mortgaged property.”*

[18] In response to that letter, on 7 April 2022, the respondent wrote to the applicant, *inter alia* as follows:

“This letter serves to respond to the requests made as follows:

- 1. *The required Financial Statements for the annual review were submitted on the 21st October 2021.*
- 2. *Our outstanding balance on the rates and taxes is R489,872.43. We have approached the City of Johannesburg in order to make a payment arrangement on the arrears and they agreed, with the following terms:*
 - *R100,000.00 immediately*
 - *R21,659.58 over 18 months*
- 3. *Our insurance is in place. We attach with this letter correspondence from our insurer in this regard.*
- 4. *It is common course that globally there has been no business taking place as a result of the Covid-19 pandemic. SmartPurse Solutions (Pty) Ltd has not been spared of this ...*

As such, I make the following request:

- 1. *R500,000.00 of our excess funds be withdrawn immediately in order to get our business operations back in order.*
- 2. *The remaining balance of approximately R6,700,000.00 be capitalized over 72 months, with equal monthly instalments.*
- 3. *Assistance with obtaining our TPPP Certificate in order for us to resume our operations.*

We have, as from the 1st April 2022, a total of R153,000.00 worth of rental income, which will be able to cover both the CPF facility as well as all other expenses relating to the building. In essence more than 75% of our rental income, which will be coming

from third party tenants, will cover the CPF whilst we also resume our normal business operations....

We are confident that the combination of the resumption of our core business, that of being a Third Party Payment Provider, as well as the projected (including actual) rental income, we will be able to service this facility accordingly.”

[19] This is an admission on the part of the respondent that it had fallen into breach of the loan agreement. Indeed, on 20 June 2022, the applicant dispatched yet another letter of demand, which in relevant part reads:

“4. *The current outstanding balance in terms of the loan referred to in 1. above is R6,357,195.96 plus interest and fees.*

5. *The defaults as described in our letter dated 17 March 2022 have not been remedied within 14 days.*

6. *We also refer to your request contained in the letter dated 7 April 2022.*

7. *The availability of prepaid funds is subject to clause 4.5 of Appendix 1 of the Loan Agreement. It is evident that there are events of default which have not been remedied. These have been highlighted in the paragraphs below.*

8. *In terms of request 2 and 3 in your letter, the account is not in good standing due to the events of defaults that have not been remedied.*

9. *In terms of clause 9.3.10 of Appendix 1 of the Loan Agreement, the Borrower undertook to pay all rates and taxes in respect of the property. The rates and taxes are currently in arrears, this amounts to an event of default in terms of clause 14.2.6.*

10. *In terms of clause 14.1.17 of Appendix 1 of the Loan Agreement and Event of Default shall occur if the Borrower fails to record a trading profit for one or more years. The financial information received on 21 October 2021 reflect losses for the financial year of 2020 and 2021 which amounts to an event of default.*

11. *In terms of clause 9.3.6 of Appendix 1 of the Loan Agreement, the Borrower if it becomes aware of the occurrence of any fact/circumstances which may result in a Material Adverse Effect or in the occurrence Event of Default or Potential Event of Default, forthwith in writing advise the Bank. In terms of the account statistics, and information available, the company has not been able to generate*

revenue for the past 24 months. This amounts to an event of default, in terms of clause 14.2.32.

12. *In the circumstances and in terms of clause 15.3 of Appendix 1 of the Loan Agreement, the Bank hereby call upon you to immediately repay the total outstanding balance in the amount of R6,357,195.96 plus interest and fees (from date hereof to date of payment, both days inclusive). Failing which we shall have no alternative but to take action as deemed fit to protect our interests. This may include handing the matter over to our attorneys for collection and realisation of all securities and credit balances held. The costs incurred in this process will be for your account and any amounts then received will also be utilised to cover these costs."*

[20] In response to that letter, on 12 August 2022 the respondent wrote to the applicant reiterating the substance of its settlement proposal of 7 April 2022. The applicant rejected it.

[21] On 19 August 2022, the applicant's attorneys sent to the e-mail address i[...] a letter of demand under section 345(1)(a)(i) of the Companies Act, 1973.

[22] On 13 September 2022, the sheriff served a copy of that letter of demand on one Ms GP Sika, a receptionist at the registered office of the respondent, at 12 Sunninghill Office Park, in Peltier Drive, in Sunninghill.

[23] In that letter, the applicant listed various events of default on the respondent's part. The letter ended in these words: *"Accordingly we are instructed to demand, as we hereby do, repayment by Smartpurse to FNB of the indebtedness owing by Smartpurse to FNB."*

[24] The respondent did not accede to that statutory demand, within three weeks or at all.

THE LAW

Sections 344–346

[25] Section 345 of the Companies Act, 1973, provides:

“(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 at 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 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*

(b) *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*

(c) *it is proved to the satisfaction of the Court that the company is unable to pay its debts.*

(2) *In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.”*

[26] Section 344 is headed “Circumstances in which company may be wound up”. For present purposes, only section 344(f) is applicable. It reads:

“A company may be wound up by the Court if ... the company is unable to pay its debts as described in section 345 ...”

[27] Section 346(1)(b) reads:

“An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made ... by one or more of its creditors (including contingent or prospective creditors) ...”

[28] Thus, in section 345(1), the legislature created four instances in which a respondent company “*shall be deemed to be unable to pay its debts*”, for purposes of section 344(f).

[29] While common in statutes, depending on their context deeming provisions can have a range of meanings.² Yet, as was observed in *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd*,³ section 345(1)(c) is “*rather curious*” and no true deeming provision, requiring as it does that the applicant prove to the court’s satisfaction that the company is unable to pay its debts so that it might be deemed that the company is unable to pay its debts.

[30] Yet, section 345(1)(a)(i) is a deeming provision properly so called. If the requirements of section 345(1)(a)(i) are met, there arises a conclusion of law for purposes of section 344(f) that the company is unable to pay its debts, even if the true position is otherwise. Naturally, a company might ignore a demand under section 345(1)(a)(i), while it is able to pay its debts. Compliance with section 345(1)(c) also activates section 344(f), except that for that actual proof of the respondent’s inability to pay its debts is required.

[31] For purposes of section 345(1)(a)(i), other provisions contained in the Companies Act relating to service are inapplicable.⁴ For an applicant to benefit from the deeming force of section 345(1)(a)(i) – the conclusion of law to which I refer above – it must bring itself within the purview of that section. It must show that a statutory demand was served at the registered office of the respondent. Indeed, for section 345(1)(a)(i), the real question is not whether the letter of demand came to the attention of the respondent. If it is proved to have been served at the respondent’s registered address, the requirements of section 345(1)(a)(i) are satisfied and the respondent is taken, or deemed, to have notice.

[32] The further requirement of section 345(1)(a)(i) is that, for three weeks after such service, the respondent company must have neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor, the applicant in this application.

[33] As far as the proof goes that is required under section 345(1)(c), the inability of a company to pay its debts might be proved in a variety of ways. The obvious way of showing it is through leading evidence that on demand the respondent failed to pay its debts. The well-known statement by Caney J in *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*⁵ is apposite:⁶ “[A] concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources.” Facts that do not conform strictly to the requirements of section 345(1)(a) or (b) might also provide sufficient proof for purposes of section 345(1)(c).

The court’s discretion and the burden of proof

[34] Under section 344(f), the respondent “*may be wound up*” by this court if there is compliance with one of the four instances set out in section 235(1). As the modal verb “*may*” indicates, this court’s power to grant a winding-up order is a discretionary one. That is so whatever the ground is upon which the winding up is sought. Naturally, this discretion must be exercised judicially.

[35] Yet, where a creditor seeks that a company be wound up and no other creditors oppose that application, the court’s discretion is very narrow. It is well-established that an unpaid creditor that cannot obtain payment and that claims under the Companies Act is, as against the company, entitled *ex debito justitiae* to a winding-up order.

[36] Over and above the discretion whether or not to wind up the respondent company, the court has an inherent discretion to prevent abuse of its process.⁷ Even if a ground for winding up is demonstrated, a court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* bringing about of the respondent company’s liquidation for its own sake. A central example of the latter is where the applicant seeks to enforce the payment of

a debt over which the respondent has raised a *bona fide* dispute. Another example is where the winding-up application is brought to harass, oppress or to defraud the respondent company.

[37] In *Estate Logie v Priest*,⁸ the erstwhile Appellate Division (*per* Solomon JA) held:⁹

“[I]t is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons, as a rule, are actuated in claiming sequestration orders. They are not influenced by altruistic considerations or regard for the benefit of other creditors, who are able to look after themselves. What they want is payment of their debt, or as much of it as they can get.”

[38] On the issue of an abuse of process, in *Mineral Sands Resources (Pty) Ltd and Others v Reddell*,¹⁰ recently the Constitutional Court glossed *Estate Logie*:¹¹

“[Estate Logie] must be understood in the context of the finding that the enforcement of a debt by utilising sequestration proceedings is unobjectionable and does not constitute an abuse of process.”

[39] As to *inter alia* the onus that rests upon an applicant in a winding-up application, in *Orestisolve (Pty) Ltd t/a Essa Investments v NFDT Investment Holdings (Pty) Ltd*,¹² the Western Cape High Court (*per* Rogers J) observed:

“[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a prima facie basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour (Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 975J–979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a prima facie case.)

[8] Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the court's

processes should not be abused. In the context of liquidation proceedings, the rule is generally known as the Badenhorst rule, from the leading eponymous case on the subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H–348C, and is generally now treated as an independent rule, not dependent on proof of actual abuse of process (Blackman et al Commentary on the Companies Act, Vol 3 at 14–82 to 14–83). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is bona fide disputed on reasonable grounds. A court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (Payslip Investment Holdings CC v Y2K Tec Ltd 2001 (4) SA 781 (C) at 783G–I). However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 218D–219C).

[9] *The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-Evans rule* (Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) para 4; Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd [2010] ZAWCHC 339 paras 8–10; Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another 2012 (2) SA 28 (GSJ) para 14)."

[emphasis added]

[40] The approach in *Plascon-Evans* requires that the court accept the facts presented on oath by the respondent, unless they are bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers.

THE DEFENCES

[41] As I say above, the respondent raises four defences.

[42] First, the respondent says that, since the loan agreement contains “*built-in remedies*” that enforce and protect the applicant’s rights in the loan agreement, this application is an abuse of process.

[43] Second, it argues that, since the applicant failed to comply with the remedial plan provided for in clause 14.2.7.1 in appendix 1 to the loan agreement, the application is premature.

[44] Third, the respondent argues that, since neither the applicant’s letter of demand under section 345(1)(a)(i), nor this application was served on its *domicilium* address, as required by clause 20.1.2 in appendix 1 of the loan agreement, those were irregular steps.

[45] Last, the respondent contends that, since the applicant did not reissue to the respondent a third-party payment processor (TPPP) certificate, which led to its inability to render services and derive an income, the applicant approaches this court with unclean (or “*dirty*”) hands.

[46] In the light of the applicable legal principles set out above, I turn to deal with the defences.

[47] It seems that one of the defences – namely the third one, that there was no proper service of the statutory demand – is a species of denial that there was proper compliance with the requirements of section 345(1)(a)(i). If this defence prevails, the winding-up order sought cannot be granted under that subsection, and the application would have to rely upon the alternative ground, namely section 345(1)(c).

[48] In various ways, the other three defences go to the question whether there has been compliance with section 345(1)(c) as well as to the court’s discretion to prevent abuse of its process.

[49] I deal first with the defence premised upon there not having been valid service.

This application is an irregular step

[50] Even though the respondent frames it in the singular, the third defence (which I address first) is that the applicant committed two irregular steps, as contemplated in rule 30 of the Uniform Rules of Court.

[51] The first of those irregular steps was that the applicant had refrained from serving the statutory demand at the *domicilium citandi et executandi* of the respondent, as identified in clause 20.1.2 in appendix 1 to the loan agreement (namely the applicant's standard terms and conditions), rather serving it at the respondent's registered address. The second irregular step is that the application itself was served not at the *domicilium* address but again at the respondent's registered address.

[52] Clause 20 of appendix 1 is headed "NOTICES". Clause 20.1 reads: "*The Parties choose as their domicilia citandi et executandi the physical addresses set out in this clause for all purposes arising out of or in connection with this Agreement, at which address all processes and notices arising out of or in connection with this Agreement, its breach or termination may validly be served upon or delivered to the Parties.*"

[emphasis added]

[53] Clause 20.1.2 in appendix 1 provides that the respondent's *domicilium* address is "*the contact details specified on page 1 of this Agreement*" [sc. 12 Neerlandia Road, Halway Gardens Extension 4, Midrand, Gauteng, 1685] or "*at such other address in South Africa of which the Party concerned may notify the other in writing provided that no street address mentioned in this sub clause shall be changed to a post office box or poste restante*".

[54] Importantly, the modal verb “*may*” in the underlined passage in clause 20.1, quoted above, indicates that the parties agreed that, even as between them, the use of the *domicilium* address would be permissive rather than peremptory. Accordingly, there is no factual basis for the respondent’s averment that clause 20.1.2 in appendix 1 “*requires that the parties address all process and notices*” to the *domicilium* address or that it is “*peremptory*”. The opposite is the case.

[55] But, more fundamentally, it is section 345(1)(a)(i) that is indeed peremptory. For an applicant to be entitled to the deeming force of that sub-section, there must be careful compliance with what it requires, and that is that the letter of demand be served upon the respondent company “*by leaving [it] at its registered office*”.

[56] It hardly needs to be said that, under rule 4(1)(a)(v), service upon a company at its registered office is valid service.

[57] There is no basis to this defence. Moreover, it has a perverse touch. Were the applicant to have done as the respondent now suggests, surely the respondent’s first – entirely valid – objection would have been that there had been no compliance with the service requirements of section 345(1)(a)(i).

[58] What is more, rule 30 has its own internal architecture and timetable. It little behoves a litigant to do as the respondent does in its answering affidavit: saying blithely, and belatedly, that it “*has instructed its attorneys of record to invoke the procedure set out Rule 30*”.

[59] The facts bear out that there was proper compliance with section 345(1)(a)(i).

This application is an abuse of process

[60] As I observe above, the court has an inherent discretion to prevent abuse of its process.

[61] The first respondent raises abuse of process as its first defence to the winding-up order sought. It contends that, in the loan agreement itself, there are

several remedies open to the applicant where events of default occur, by which the applicant might enforce and protect its rights. It relies upon the doctrine of *pacta sunt servanda* and the sanctity of contract. Accordingly, it says, this application is an abuse of process.

[62] In the answering affidavit, the respondent goes so far as to say, in the round and without reference to the wording of any specific remedy, that the applicant “*cannot deviate from the remedies provided by the agreement*”. To this, it adds that liquidation should be “*a measure of last resort and cannot be used in order to enforce payment*”.

[63] The respondent says that the applicant has security in the shape of the mortgage over the property as well as the two suretyships. It adds that, under clause 14.3 in appendix 1 to the loan agreement, in an event of default, the applicant might accelerate payment of all amounts owing to it or call up any security. It adds that the applicant could also charge interest and seize and sell the moveables of the respondent.

[64] While there may be other remedies available to the applicant – and indeed the factual summary above indicates that it has called up what is owing to it, to no avail – there can be no suggestion that a creditor in the position of the applicant abuses the process of this court by resorting to an application for the relief it seeks here.

[65] These facts are at a considerable remove from the case where an applicant for winding-up has other remedies available to it and unreasonably refrains from pursuing them. Indeed, together with this application, I am seized of an application for payment orders under the two suretyships. What is more, as I say above, the factual history of this matter shows that the applicant is not a creditor that has rushed precipitously to court for this relief.

[66] There is no basis to call this application an abuse.

The applicant ought to have exhausted the domestic remedy in clause 14.2.7.1

[67] The respondent's next defence is that this application is premature since the parties did not exhaust the domestic remedy in clause 14.2.7.1 in appendix 1 to the loan agreement. This defence has a dilatory character.

[68] To illustrate the context of clause 14.2.7.1, I quote the first part of clause 14, up to and including clause 14.7.2.2:

“14. EVENTS OF DEFAULT

14.1 *An Event of Default shall occur if any of the following events, each of which shall be severable and distinct from the others, occurs (whether or not caused by any reason whatsoever outside the control of the Borrower or any other person).*

14.2 *The Events of Default occur if the Borrower and/or Security Providers, as the case may be:*

14.2.1 *fails, for any reason whatsoever, to draw down the Loan within 6 months of the date of the conditions as set out in the Agreement being fulfilled or waived; or*

14.2.2 *fails to pay any amount due in terms of the Agreement; or*

14.2.3 *fails to repay the VAT Loan Outstandings, within the time period as contemplated in the Agreement, if applicable; or*

14.2.4 *fails to provide all information and/or documents and/or to sign all such documents as may be required by FNB for the purposes of providing additional security and/or to pay the costs of providing such security on request; or*

14.2.5 *fails to comply with its obligations in regards to the lease agreements concluded in respect of the Property (or any part thereof), as envisaged in the Disbursement Conditions, if applicable; or*

14.2.6 *fails to pay punctually municipal service fees and consumption charges, property rates and other municipal taxes, levies and duties and interest or surcharges on these amounts in respect of the Property and not remedying such breach within 7 days of notice having been given to it to do so; or*

14.2.7 *fails to comply with or maintain any of the Financial Covenants contemplated in the Loan Schedule, provided that –*

14.2.7.1 *subject to clause 14.2.7.2 (Remedial Plan) below, the Borrower shall have 30 days from the date of any written notice given by FNB to the Borrower notifying the Borrower of such breach, to either remedy the breach in respect of that Financial Covenant or to provide FNB with a written remedial plan detailing how it will remedy the financial covenant the terms and conditions of which (including but not limited to timing) shall be to the sole satisfaction of FNB (the ‘Remedial Plan’) if –*

14.2.7.1.1 *the Borrower fails to remedy the breach within the 30 day period; or*

14.2.7.1.2 *the Borrower fails to provide a Remedial Plan to the satisfaction of FNB within the 30 day period; or*

14.2.7.1.3 *FNB approves the Remedial Plan but the Borrower fails to comply with any of the provisions of the approved Remedial Plan,*

FNB shall be entitled to exercise its remedies as contemplated in clause 14.3 (Remedies) below immediately without further notice to the Borrower;

14.2.7.2 *if the Borrower breaches any Financial Covenant on more than 3 occasions during the Term, the provisions of clause 14.2.7 (Remedial Plan) above shall cease to apply and FNB shall be entitled to exercise its remedies contemplated in clause 14.3 (Remedies) below immediately without notice to the Borrower ...”*

[emphasis added]

[69] The notion of financial covenants, which is central to clause 14.2.7.1, is defined in appendix 1 as “*the conditions envisaged in the Financial Covenants clause of the Loan Schedule*”. Clause 10, albeit headed only “COVENANTS”, contains five conditions that are obviously financial covenants as that term is commonly used.

[70] It reads:

“10. **COVENANTS**

10.1 *The Loan as a ratio to the value of the mortgaged Property may not exceed the LTV for the Term of the Loan, and FNB may reduce the Loan accordingly.*

10.2 *The mortgaged Property must at FNB’s request and at the Borrower’s cost be re-valued (1) by way of informal desktop valuation upon every anniversary of the Disbursement Date, and (2) formally by FNB’s valuations department every 3rd year after the Disbursement Date to determine the LTV.*

10.3 *If the LTV is exceeded, the Borrower shall, within 20 Business Days of receipt of a notice from FNB to this effect offer additional properties to FNB as security, which properties must be acceptable to FNB.*

10.4 *Following acceptance, FNB shall immediately procure that a Bond be registered over such properties at the Borrower’s cost.*

10.5 *Should the Borrower fail to offer additional satisfactory properties to FNB as security within the aforementioned time limit, the Borrower shall be obliged to immediately repay to FNB such amount as is necessary to reduce the ratio to LTV stipulated in the Loan Schedule.*

10.6 *Any failure by the Borrower to comply with a demand or requirement in terms of this clause will constitute an Event of Default.”*

[71] Accordingly, the applicant’s submission is sound, namely that the breaches of which it had complained do not fall within the purview of the financial covenants in clause 10, nor indeed are they financial covenants properly or commonly so called. If one understands what a financial covenant is, the remedy fashioned in clauses 14.2.7.1 and 14.2.7.2 in appendix 1 make considerable sense.

[72] The respondent’s reliance on this defence is unsound. Clause 14.2.7.2 does not apply here.

Unclean hands and the TPPP certificate

[73] The last defence is that the applicant approaches court with unclean hands. Accordingly, the respondent says, it cannot permissibly benefit from its own wrongdoing.

[74] The doctrine of unclean hands, derived originally from equity, the body of law in England and Wales that arose under the Chancellor's foot, has also been received in various pockets of our common law (which did not inherit English equity holus-bolus). In the process of domestication, it has often been prised through Roman-Dutch ideas, like for instance the *par delictum* rule. Be that as it may and without trying to discern exactly what the contours of a defence of unclean hands is in our law, I assume for present purposes in favour of the respondent that it is applicable on facts like these.

[75] The basis for the respondent's contention that the applicant's hands are unclean is that it failed or refused to issue to the respondent a TPPP certificate for the year starting 1 March 2022, without which the respondent cannot render any services. The respondent characterises this conduct on the applicant's part as impermissible "*self-help*".

[76] In the answering affidavit, the first respondent goes on to say this:

"The reason provided by the Applicant for its refusal or failure to issue the TPPP Certificate is that the Company has committed various Events of Default and failed to keep up with its payments. This is clearly expressed in paragraph 5 of the letter dated 19 August 2022 delivered by the Applicant's attorneys, ENSAfrica, to the Company. It is disingenuous for the Applicant to demand payments from the Company when the former's conduct has led to the demise of the Company's income due to its inability to render services and derive income."

[77] The respondent proceeds to explain the respondent's function in the market, namely to provide "*integrated payment solutions*" to entities, including state-owned

ones. Yet, it says, that its income “*subsided*” in 2020 and 2021 due to the effects of Covid-19 “*and also due to the conduct of the Applicant in failing to issue the Company with the TPPP Certificate for the year commencing 1 March 2022*”. The respondent adds: “*I submit that the Applicant’s unlawful conduct in refusing to issue the Certificate was the main cause of the financial difficulties suffered by the Company.*”

[78] Yet, as the applicant pointed out, if one considers the chronology of events, as narrated by the respondent, when the TPPP certificate came up for renewal, on the respondent’s own version, it was already in distress. Indeed, this was so two years before March 2022 already.

[79] The applicant’s position is that the renewal of the respondent’s TPPP certificate was conditional upon its account being in good standing. By the time of the contemplated reissue, the respondent was already in financial distress.

[80] Accordingly, the applicant is correct in maintaining that it cannot fairly be said that the applicant was responsible for the respondent’s financial distress.

[81] Whatever the precise nature of the defence of unclean hands, there is no factual basis here for its application.

ANALYSIS

[82] Carefully considered, each of the respondent’s four defences lacks substance. None is borne out by the facts or the law upon which the respondent seeks to rely. None discloses a defence to the relief that the applicant seeks.

[83] It is clear that there has been compliance with both sections 345(1)(a)(i) and (c).

[84] As far as its inability to pay goes, over and above the four baseless defences, it is common cause that the respondent is indeed unable to pay what it owes the applicant, as and when those liabilities fall due.

[85] Upon an application of the test in *Plascon-Evans*, the facts put up in the decidedly thin answering affidavit either bear out the version of the applicant or seek to advance unsustainable defences, which I must reject.

[86] The applicant has established the case for the relief it seeks on a balance of probabilities.

[87] I might add that there had been compliance with the other statutory requirements.

COSTS

[88] Naturally, the costs will be costs in the winding up.

ORDER

1. The respondent is placed under final winding-up.
2. The costs of this application are costs in the winding-up of the respondent.

J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 14 November 2023

Date of judgment: 26 April 2024

APPEARANCES

For the applicant:	Advocate K Mashishi
Instructed by:	Edward Nathan Sonnenberg Inc.
For the respondent:	Mr SM Ndobe

Instructed by:

Ndobe Inc.

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- ¹ *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC), at 43G–44A.
² *S v Rosenthal* 1980 (1) SA 65 (AD), see 75G–81A; *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* 2018 (4) SA 206 (SCA).
³ 1978 (1) SA 70 (D), at 71.
⁴ *Phase Electric Co (Pty) Ltd v Ziman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W), at 917.
⁵ 1962 (4) SA 593 (D).
⁶ At p 597.
⁷ *Western Assurance Co v Caldwell's Trustee* 1918 AD 262, at 271.
⁸ 1926 AD 312.
⁹ At p 319.
¹⁰ 2023 (2) SA 68 (CC), para 68.
¹¹ At para 68.
¹² 2015 (4) SA 449 (WCC).