

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-045208

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>22 /05/2024</u>	_____
DATE	SIGNATURE

In the matter between:

Van Veluw Beheer BV

Applicant

Maxxliving (Pty) Ltd,

1st Respondent

The Registrar of Deeds, Johannesburg

2nd Respondent

JUDGMENT

BOKAKO AJ

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 22 May 2024.

INTRODUCTION

1. The Applicant has brought an application seeking an order to wind up the Respondent in terms of section 346, read with section 344(f) and section 345 of the Companies Act 71 of 1973 ("the old Act"). The basis of the Applicant's Application is that the Respondent cannot pay its debts. The Respondent is opposing the Applicant's Application because the Applicant has failed to establish a *prima facie* case for winding up the first Respondent; there is a *bona fide* and reasonable dispute regarding the alleged indebtedness of the first Respondent to the Applicant; the Applicant's demand in terms of section 345(1)(a) of the Companies Act 61 of 1973 ("the Act") is defective. The court lacks jurisdiction due to the choice of law clause in the agreement between the Applicant and the first Respondent.
2. The Essence of Section 345 as a Deeming Provision. It serves as a legal mechanism that can deem a company unable to pay its debts, potentially triggering liquidation proceedings. This occurs when a company fails to satisfy a letter of demand for a due and payable debt.

BACKGROUND FACTS

3. On 24 September 2021, the Applicant and the First Respondent entered into a written agreement to supply solar panels, batteries, and inverters for the First Respondent's energy-self-sufficient residential development.
4. In terms of Appendix A to the agreement, the first Respondent was required to pay the Applicant €375,000 as a down payment for 50 houses. This payment was due within four weeks of signing the agreement, which meant that payment was due by 22 October 2021.
5. Both parties agreed that the purchase price would be paid by the dates specified in Appendix A (clause 5). The down payment of €375,000 was not conditional on the Applicant's delivery of any goods. Instead, it was payable upon land transfer for the development several months later.
6. The application is resisted because the Applicant knows that the goods underlying the dispute were materially defective and have caused the Respondent significant damage.
7. On 17 April 2023, the Applicant's attorney addressed a letter to the Respondent in terms of section 345(1) (a) of the old Act demanding payment of the total amount within 21 calendar days of receipt of the said letter. According to the Applicant, the period of 21 calendar days has lapsed without the Respondent paying the total amount or a portion of it. Based on that, the Applicant believes the Respondent cannot pay its debt as contemplated in section 345(1) of the old Act. The Applicant submits that winding up the 1st Respondent would be just and equitable.
8. The Applicant relies on section 345 of the letter to allege that the Respondent cannot pay its debt. This court must determine whether the

Respondent cannot pay its debts and whether the Respondent's denial of the Applicant's claim is based on bona fide grounds.

9. The Applicant contends that the 1st Respondent has been and remains indebted to the Applicant concerning the sale price since October 2021. Despite the 1st Respondent's numerous admissions of liability and undertakings to effect payment, no payment has been forthcoming.
10. The 1st Respondent disputes its alleged indebtedness to the Applicant because the batteries supplied were defective. The batteries were discovered to be defective shortly after delivery to the first Respondent; given the technical nature of the batteries, latent defects could not have been observed on the initial receipt.
11. The Respondent has filed its answering affidavit. In it, the Respondent alleges that the Applicant's liquidation application constitutes an abuse of court processes, stating that the Applicant is fully aware that the goods underlying the dispute were materially defective and caused significant damage to the Respondent.
12. The 1st Respondent further alleges that on 5 January 2023, it asserted that defects in the batteries delivered by the Applicant were discovered. Subsequently, on 4 May 2023, the first Respondent canceled the agreement because the batteries were defective and tendered to return the batteries to the Applicant.
13. The Respondent contends that it has replied to the Applicant's section 345 notice and vehemently contested the validity of the Applicant's claim in its reply. The Respondent denies that it is insolvent and commercially insolvent. The Respondent contends that the reason for not paying the

Applicant's invoice is not its inability to pay but the dispute it is having with the Applicant. The Respondent further alleges that it is contemplating having a counterclaim over the Applicant's claim.

14. The sale agreement explicitly provides that the first Respondent is entitled to inspect the goods upon delivery and makes provision for giving notice of any defects. After discovering the defects around January 2023, the first Respondent took steps consistent with the agreement by canceling the contract and tendering the return of the defective batteries.

15. 1st Respondent contends there is a bona fide and reasonable dispute regarding the indebtedness, which precludes reliance on winding up proceedings. Further, the Applicant needed to demonstrate that the dispute was not reasonable.

16. The Respondent also argued that the letter of demand served by the Applicant in terms of section 345(1) (a) of the Act is defective and, therefore, cannot trigger the deeming provision that a company cannot pay its debts. The defects in the letter of demand include: The letter needs to be updated, which makes it impossible to calculate the 21 days required under the Act. The letter only allows 14 days for payment instead of the 21 days prescribed by section 345(1) (a). The letter fails to provide that the debt can be secured or compounded to the reasonable satisfaction of the Applicant, as required by the Act. The letter does not state that the amount claimed is due and owing, which does not comply with the formalities for a valid demand.

LEGAL PRINCIPLES AND ANALYSIS

17. Section 344 of the Companies Act is the source of authority that vests a court with the power to liquidate a company in certain circumstances. Subsection 344 (1), read with section 345 (1)(a)(i) of the Companies Act, provides that a court may wind up a company if it is unable to pay its debts and that the company will be deemed to be unable to pay its debts if a creditor who is owed not less than R100 serves on the company a demand requiring the company to pay the sum due and the company fails to comply.
18. In this matter, the Respondent has disputed the debt allegedly due to the Applicant.
19. In *Imobrite (Pty) Ltd v DTL Boerdery CC*, the Supreme Court of Appeal summarized the principles to be applied in cases where a debt is disputed as follows:

"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes about the existence or non-existence of a debt. Thus, winding-up proceedings should not be resorted to to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused".

20. A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt that is bona fide disputed or where the motive is to oppress or defraud the company or frustrate its rights."

21. Part G of Chapter 2 of the Companies Act 71 of 2008 ("the new Companies Act") and Chapter XIV of the old Act regulates the winding up of a company, read with the applicable laws relating to insolvency. The old Act continues to apply by the provisions of item 9 of Schedule 5 notwithstanding its repeal, which was effective from 1 May 2008. The provisions of Chapter XIV of the old Act will continue to apply until the Minister, by notice in the Government Gazette, determines a date on which it shall cease to have effect. However, in terms of item 9(2) of Schedule 5 ss 343, 344, 346, and 348 to 353 of the old Act does not apply to the winding up of a solvent company except to the extent necessary to give effect to the provisions of Part G of Chapter 2 of the new Act. The winding up of solvent companies is dealt with in ss 79 to 81 of the new Act.

22. In this case, the application has been initiated in sections 344(f) and 345 of the old Act. It is settled law that our law recognizes two forms of insolvency: factual insolvency, where a company's liabilities exceed its assets, and commercial insolvency. In this state of illiquidity, a company is unable to pay its debts even though its assets may exceed its liabilities (See *Ex Parte de Villiers & Another NNO: In Re Carbon Developments 1993 (3) SA 493 (A)* and *Johnson v Hirotect (PTY) Ltd 2000 (4) SA 930 (SCA)*).

23. In *Standard Bank of SA v R-Bay Logistics 2013 (2) SA 295 (KZD)* at para 24, the court said:

“Nothing in the new Companies Act has changed any of the provisions of chapter 14 of the old Companies Act. Accordingly, to wind up an insolvent company, s344 must still regulate the basis upon which it can be wound up. Of particular relevance in this case is s 344(f), which

requires an applicant to prove that the respondent company cannot pay its debts, as contemplated in s 345 of the Companies Act."

24.The key is that winding up requires an existing debt obligation that is due and payable. This prevents winding up procedurally where the debt is disputed or yet to be enforceable against the company.

25.The court has discretion in deciding whether to grant the order for the liquidation of the company and of equal importance to the application and enforcement of the creditor's entitlement about its rights in the old Companies Act, as referred to above, is that the debt owed to the creditor cannot be disputed on bona fide and reasonable grounds by the company. Once the creditor establishes the existence of the debt, the onus will be on the company to show that the debt is disputed on bona fide and reasonable grounds.

26.An issue during this hearing, albeit tangentially, was whether the Badenhorst rule applies at the final stage of liquidation proceedings. In *Orestisolve (Pty) Limited t/a Essa Investments v NDFT Investment Holdings (Pty) Limited and Another*, Rogers J expressed the view that the Badenhorst rule only applied at the provisional stage of liquidation proceedings where there was a factual dispute relating to the Respondent's liability to the Applicant. The test to be used for a final liquidation order where material facts are in dispute is the Plascon-Evans test as expressed in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*. Thus when an applicant seeks final relief in liquidation proceedings. There are conflicting versions of fact, and the court must accept the version of the Respondent and any facts admitted in the Applicant's papers unless the Respondent's version is far-fetched and untenable.

27. With respect, I am of the view that both the Badenhorst rule and Plascon-Evans test must be applied where there is a factual dispute in respect of a respondent's indebtedness in an application for a final liquidation order: quite simply, the Badenhorst rule and Plascon-Evans test serve different purposes. As Movshovich AJ commented in *Voltex (Pty) Limited t/a Atlas Group v Resilient Rock (Pty) Limited*, the Plascon-Evans test is mainly concerned with rules of procedure and evidence and not the substantive requirements for an application to succeed. In contrast, the Badenhorst rule is not a rule of the procedure but relates to substantive requirements as to what a party must establish to make out a claim or establish a defense.

28. In this matter, the Respondent does not dispute how the alleged debt claimed by the Applicant arose. Whether the debt is due or payable, and the amount thereof, is in dispute. The Respondent avers that it is not only a bona fide dispute on reasonable grounds but relates to the supply of defective goods, "the batteries," and there is no evidence that the Respondent admitted that it was not able to pay its debts in the ordinary course of its business,

29. In deciding such cases, the Supreme Court of Appeal (SCA) reaffirmed that 'the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies is a "very narrow one" that is rarely exercised' and exercised in unique or unusual circumstances. Further, it affirmed that generally, after creditors' indebtedness has prima facie been established, the burden of proof where a company debtor seeks to resist an order being made against it then shifts to the company debtor, which must show that the indebtedness established is disputed on bona fide and reasonable grounds.

30. The court confirmed that the test for establishing the existence of bona fide and reasonable grounds to refuse an order sought by the creditor where a company debtor alleged the existence of a counterclaim the debtor company has against the creditor is found in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A). The court noted that for the company debtor to succeed in its attempts to resist the order based on the existence of a counterclaim, the pleadings of the debtor company must demonstrate a prima facie case in favor of the debtor company, specifically in respect of the counterclaim.

31. In *casu*, the Respondent has attached a copy of a letter to its answering affidavit, alleging that it is a reply to the Applicant's section 345(1) notice. In that letter, the Respondent denies being indebted to the Applicant for any amount of whatever nature. In that letter, the Respondent states explicitly the reasons for disputing the Applicant's claim. In essence, the Respondent also warned the Applicant that any application for their liquidation would be mala fide and would be opposed, and it would seek a cost order against the Applicant. The Respondent further argued that the Applicant was advised that should they wish to institute legal action against them, they are invited to proceed through arbitration.

32. Further, in its answering affidavit, the Respondent purports that before the launch of the winding-up application, a bona fide dispute existed between the Applicant and the Respondent, which Annexure AA1 validates. In the letter dated 4 May 2023, the Respondent addressed pertinent issues regarding defects.

33. Paragraph 8 of Annexure AA1 read thus :

"All these batteries were received in wooden crates; when our client started installing the batteries, it discovered that they were faulty and were not working; our client brought these defects to your attention and did not open the remainder of the crates."

34. On 10 May 2023, the Applicant's attorney responded by asserting

"Should the 1st Respondent not make any effort to make a payment or at least a suitable payment arrangement, the winding up application would be launched, and if necessary, an urgent interdict would be sought in stopping payments to any service providers".

35. This does not change that the Applicant was aware of a dispute. After that, the notice of motion dated 15 May 2023 was launched.

36. Annexure AA11 contains screenshots of What's Up correspondence between the Applicant and the 1st Respondent discussing defects. Paragraph 35, pages 08-11 of the Respondent's answering affidavits stipulates that the 1st Respondent is in the process of issuing summons for repayment of the sum it expended on the freight and import costs for the batteries supplied by the Applicant.

37. When considering the issue as to whether the Respondent has discharged the onus of showing that the indebtedness is genuinely disputed on reasonable grounds, recourse must be had to the Respondent's answering affidavit. The Respondent's answering affidavit is highly detailed in support of its defense. The Respondent refers to the correspondence between the parties and the letter sent to the Applicant's attorney querying the defective batteries. Such documents referred to were annexed to the answering affidavit. The court is privy to the what's up communications

between the parties, reflecting challenges the Respondent encountered in installing the said batteries. All this information is within the Applicant's knowledge; such details were furnished and placed before this court.

38.The Respondent has offered supporting evidence to substantiate its position, which reflects positively on the *bona fides* of its defense.

39.Despite being warned not to proceed through motion proceedings, the Applicant issued its notice of motion.

40.The Respondent has offered a convincing explanation for why it is a genuine dispute.

41.Accordingly, the Applicant has not established that the Respondent is commercially insolvent from the evidence placed before this court. The Respondent has shown that its indebtedness is genuinely disputed on reasonable grounds.

42.In the circumstances of this matter, the Applicant is not entitled to seek the liquidation of the Respondent. All the requirements for a liquidation order have yet to be met, including the formalities prescribed by section 346 of the Companies Act.

43.In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26, Harms DP said: "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are unique, they cannot be used to resolve the factual problems because they are not designed to determine probabilities.

44. It is well established under the Plascon Evans rule that where in motion proceedings, dispute of fact arises on the affidavit, a final order can be granted only if the facts arrived in the Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justify such order. It may be different if the Respondent's written version consists of bad or untrustworthy denials, raises fictitious disputes of fact, and is implausible, farfetched, or untenable that the court is justified in rejecting them entirely on the papers.

45. It is also trite that liquidation may not be used to enforce disputed debt payments. It is not suitable to resolve complex factual disputes. See *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd*¹ and *Badenhorst v Northern Construction Enterprises (Pty) Ltd*². Probabilities may only be the basis for factual findings if the court is satisfied that there is no real and genuine factual dispute. Where the court finds a real and genuine factual dispute incapable of resolution on paper, it can only dismiss the application if it considers that the Applicant should have realized when launching the application that there was a factual dispute. See *Adbro Investment Company Ltd v Minister of Interior*.³

46. In this case, it is evident that when the Applicant issued its notice of motion, it was aware or ought to have foreseen that a dispute of fact would arise based on the answer it received from the Respondent. In essence, the Respondent has advised the Applicant to proceed through arbitration given the dispute, but it has deliberately ignored that advice. I'm therefore

¹ *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) at para 154;

² *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T) at 347-348;

³ *Adbro Investment Company Ltd v Minister of Interior* 1956 (3) SA 345 (A) at 350A.

satisfied that the Respondent raised a bona fide defense on the papers and explained.

47. This matter will not be determined on paper only based on the real, genuine, and bona fide dispute of fact raised by the Respondent. I believe the Respondent's denial of the Applicant's claim is based on bona fide grounds. On that point alone, the Applicant's application stands to fail.

48. Rule 6(5)(g) states as follows:

"Where an application cannot correctly be decided on affidavit, the court may dismiss the application or make such order as it deems fit to ensure a just and expeditious decision. In particular, but without affecting the generality of the preceding, it may direct that oral evidence be heard on specified issues to resolve any dispute of fact and, to that end, may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

49. In application proceedings, where a genuine and far-reaching dispute of fact has emerged and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate. This court will not dwell on and determine this aspect as none of the parties called upon it.

50. This court concludes that the Applicant failed to establish a prima facie case for winding up the 1st Respondent. The Applicant did not provide

substantial evidence of the 1st Respondent's indebtedness to it and failed to provide proof of its inability to pay its debts.

51. I then conclude that there is a bona fide and reasonable dispute regarding the indebtedness, which prevents reliance on winding-up proceedings. A dispute existed prior to the launch of the winding-up process.

52. Correspondence dated 4 May 2023 was sent to the Applicant's attorney, "AA1." The essence of the correspondence alluded that batteries were received. Upon installation, the Respondent discovered that they were faulty and were not working, and this was brought to the attention of the Applicant. The Applicant has since failed to fix or replace the said batteries.

53. Annexure AA6 indicates the Respondent's predicament and complaints that the batteries were not functional. It also depicts photographs of the Respondent's screen displays.

54. Also, Annexure AA 11 depicts screenshots of Whats App correspondence between the Applicant and the Respondent, wherein issues relating to the batteries' non-functionality and defectiveness are raised.

55. This court finds that the liquidation process is not applicable at this stage, as such a process is intended for winding up the affairs of an insolvent business. The Applicant has failed to satisfy the court that the Respondent is insolvent.

56. The Applicant should have realized there was a factual dispute when launching the application.

57. There are more issues that I need to address, and they relate to the alleged non-compliance by the Applicant with the provisions of s 346(4A) of the Companies Act.⁴ .

Preliminary Issues:

58. I now turn to deal with the preliminary issues raised by the Respondent:

Execution of the Applicant's founding affidavit: The 1st Respondent raised preliminary issues and points *in limine*. The Respondent challenged the validity of the Applicant's Founding Affidavit and sought a ruling that they ought to be rejected by this court in their current form. A variety of submissions were made by the Respondents on whether or not the Applicant's Founding Affidavit deserved serious legal scrutiny by this court or whether they should be rejected. The Respondent submitted during the hearing for preliminary issues that the Applicant's Founding Affidavit was irregular and fatally defective because they did not comply with the provisions of the Justice Peace Commissioner of Oaths Act, 16 of 1963 ("the Act") and Regulation 4 in terms of section 10 of the Act.

59. In support of the Respondent's preliminary issues and point *in limine*, the Respondent argued that the Founding Affidavit is not appropriate before this court because of non-compliance and should not be accepted in its current form.

60. It was submitted that, based on the Regulations, the Founding Affidavit was fatally defective and irregular and should not be accepted by this court. The implications of this would have been the dismissal of the entire

⁴ Companies Act, Act 61 of 1973;

application because none of the founding affidavits were commissioned correctly.

61. The issues of whether the Regulations Governing the Administering of an Oath or Affirmation are peremptory or directory and whether there was compliance with the Regulations by the Applicant in commissioning its founding affidavit and replying to the affidavit will be dealt with at the same time. Regulation 4(2) of the Regulations Governing the Administering of an Oath or Affirmation provides that:

“(2) The Commissioner of oaths shall-

(a) Sign the declaration and print his full name and business address below his signature; and

(b) State his designation and the area where he holds his appointment or office if he has his appointment *ex officio*.”

62. Turning to the question of whether the Regulations Governing The Administering of Oath or Affirmation are peremptory or directory, it was held in *S v Msibi*⁵ the requirements in the Regulations are not peremptory but merely directory. The Court in *Msibi* further held that where the requirements of the Regulations have not been complied with, the court may refuse to accept the affidavit concerned as such or give effect to it, but the question should, in each case, be whether there has been substantial compliance with the requirements.

63. I align myself with that decision. *Msibi's* case has been correctly decided concerning whether the Regulations are peremptory or

⁵ 1974 (4) 821 (T)

direct. The Commissioner of Oath duly signed the Applicant's founding affidavit and replying affidavit. Regarding the Regulations, the details of the Commissioner of Oaths must appear strictly below the signature of the Commissioner of Oaths.

64.Regarding Regulation 3(1), the deponent must sign a declaration in the presence of the Commissioner of Oaths. Regulation 3(2) provides that if the deponent cannot write, he shall affix his mark at the foot of the declaration. Regulation 4(1) provides that the Commissioner of oaths shall certify the deponents' signature or mark below.

65.What must be looked at is whether the full names, designation, and business address of the Commissioner of oaths appear on the certificate. Even if there are certain deficiencies, like in the case at hand, the court must look at the information as a whole and determine whether the weaknesses are that material to render the whole affidavit defective, what prejudice will cause to the affected party, and the interest of justice. If the deficiencies are not that material, there is substantial compliance. In the case at hand, the presence of the Commissioner of oaths is different under the circumstances, and there was substantial compliance. The virtual presence of the deponent amounts to substantial compliance with Regulation 3(1).

66.If there is doubt as to whether the details and process followed during the commission of an affidavit are not regular and what appears on that certificate is not that of the Commissioner of Oaths, it is for the party who doubted to challenge and substantiate that. In this case, that was not the question; therefore, the point *in limine* has to fail.

67. The other preliminary point raised by the Respondent is that the Applicant has failed to demonstrate that Netherlands law makes provision for the winding up of companies on the grounds presented in this application, further contending that the Applicable Law: Clause 23 of the sale agreement between the parties provides that the agreement is governed by and must be construed by the laws of the Netherlands and that this constitutes a clear and express choice of law clause in favor of the laws of the Netherlands. Therefore, this court lacks jurisdiction to grant the winding up order in light of the choice of law clause.

68. This particular clause does not exclude the jurisdiction of the South African courts. This is important because the appropriate legal system governing the international contract under consideration must be identified as the "proper law of the contract." As was held in *Harnischfeger Corporation and Another v Appleton and Another*⁶, to a South African court, each aspect of foreign law is a factual question, and any evidence of that aspect must emanate from someone with the necessary expertise. It is assumed that on any relevant point, there is no difference between our law and the law in a foreign country. The result is that the party who wants the court to find that there is a difference, the party who in that sense relies upon foreign law to assist him to a point where South African Law would not bring him, must produce such evidence.

69. The Respondent failed to substantiate this aspect. Clause 23 does not exclude the jurisdiction of South African courts. Therefore, the point *in limine* has to fail.

⁶ 1993 (4) SA 479 WLD at para 485 H

70. I now turn to the issue of costs. A punitive costs order is an extraordinary one that should not be quickly resorted to and can only be applicable on special considerations arising either from the circumstances that gave rise to the action or from the conduct of the party, should a court in a particular case deem it, to ensure that the other party is not out of pocket in respect of the expenses caused to it by the litigation. As such, the order should not be granted lightly, as Courts look upon such orders with unpopularity and are loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint such a party may have.

71. On receipt of the Respondent's reply to its section 345 notice, it was clear to the Applicant that a fact dispute would arise that could not be resolved on paper. The Respondent also gave the Applicant friendly advice on whether to institute legal proceedings against it should it decide. This was to inform the Applicant that motion proceedings will not be able to resolve this matter as a dispute of fact will arise.

72. The Respondent contended that they are in the process of issuing a summons for repayment of the sum it expended on the freight and import costs for what is said to be defective goods.

73. It is clear that the Applicant wanted to take a shortcut by using the liquidation application as a debt-collecting tool, which might scare the Respondent to pay immediately. It knew that should it proceed by way of action, litigation would take some time before the matter is finalized. However, in motion proceedings, it will be much quicker. Even though the Respondent believes this is a clear abuse of Court processes, I'm not convinced that punitive costs are justifiable.

74. In the result, I make the following order:

1. The Application is dismissed.

2. The Applicant is to pay the Respondent's costs.



T. BOKAKO

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

APPEARANCES

Counsel for the Applicant

ADV. HOLLANDER

Counsel for the 1st Respondent

ADV. GARVEY

Date of Hearing:

6 MARCH 2024

Date of Judgment:

22. MAY 2024

