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

CASE NO: 2022-029115

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

/ /2024

DATE

SIGNATURE

In the matter between:

SINOSA TECH (PTY) LTD

Applicant

and

MACLA MINING (PTY) LTD

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 12h00 on 9 July 2024.

Order: Para [43] of this judgment.

JUDGMENT

TODD, AJ:

Introduction

[1] This is an application for the winding up of the Respondent.

[2] The grounds on which the application are brought are that the Respondent is indebted to the Applicant in an amount of R11,498,831. The Respondent has not paid that amount despite demand. The Applicant contends that the Respondent is unable to pay its debts and should be wound up by reason of the provisions of section 345(1)(c) read with section 344(f) of the Companies' Act 61 of 1973 read with section 224(3) and paragraph 9 of schedule 5 to the Companies Act 71 of 2008.

[3] In the pleadings the primary ground on which the Respondent resisted the application was its contention that it had a substantial counter claim against the Applicant, significantly exceeding the amount of its indebtedness to the Applicant. When the matter was argued, Mr Redman, who appeared for the Respondent but had not prepared its heads of argument, submitted that on a proper construction of the pleadings the Respondent's case was that there was a dispute over the Respondent's indebtedness, and that it did not rely solely on an unliquidated counterclaim.

[4] Before assessing the merits of the parties' competing contentions I summarise the main facts relevant to a decision in the matter.

Summary of material facts

[5] The parties are commodity traders and the contract giving rise to the underlying claim in this matter concern the sale and purchase of chrome ore.

[6] In April 2022, the parties concluded a sale and purchase agreement. The essential terms of the agreement, which was partly written and partly oral, were that the Respondent would sell to the Applicant 10,000 metric tonnes of chrome ore at a

price of R2,200 per metric tonnes. The parties also agreed on a certain quality threshold for the chrome.

[7] The total purchase price agreed, including VAT, was R25,300,000. The Applicant was to required to pay a deposit in the sum of R16,000,000, prior to the Respondent being required to deliver the agreed quantity of chrome.

[8] The Applicant duly paid the amount of the deposit in three instalments, on 1 April, 7 May and 9 May 2022, totalling R16,000,000.

[9] On 6 May 2022 the Respondent delivered 1957.03 metric tonnes of chrome ore to the Applicant. The Applicant contended that the chrome did not meet the quality threshold agreed between the parties.

[10] The parties met on 27 May 2022 to discuss their agreement. They agreed to amend it. The terms on which the agreement was amended, on 27 May 2022, were that the Applicant would accept the 1957.03 metric tonnes of chrome already delivered, at a reduced price of R2,000 per metric tonne. The total amount of chrome to be delivered would be reduced from 10,000 metric tonnes to 5,000 metric tonnes. This left a balance of just over 3,000 metric tonnes to be delivered by the Respondent. The purchase price for the remaining delivery would be the balance of the amount of R16,000,000 already paid by the Applicant. The outstanding chrome ore would be delivered by the Respondent by 3 June 2022.

[11] The Respondent failed to deliver the outstanding chrome ore due by 3 June 2022, and it ultimately delivered no further chrome to the Applicant under the terms of the agreement as amended.

[12] The Applicant made various attempts to reach further agreements with the Respondent, which included the possibility of the Respondent delivering coal to the value of the balance of the deposit instead, but no further agreement was reached. None is alleged by the Respondent in its answering papers.

[13] As a result, and by letter dated 24 October 2022, the Applicant through its then attorneys gave notice of cancellation of the agreement insofar as the balance of the sale of chrome was concerned, and demanded repayment of the balance of the deposit after deducting the amount due in respect of the 1957.03 metric tonnes of chrome actually delivered under the agreement. The balance of the deposit then due to be repaid was the amount of R11,498,831.

[14] In response, and by way of a letter from its attorneys dated 25 October 2022, the Respondent confirmed the terms of the agreement alleged, and did not dispute that it had been paid the amount of R16,000,000 and had delivered only 1957.02 metric tonnes of chrome ore. It alleged, however, that under an additional term of the agreement the applicant had *“specifically agreed and undertook not to contact, in [any] manner whatsoever, or do any business with [the Respondent’s] supplier”*.

[15] The Respondent alleged that the Applicant had breached that term of the agreement by contacting and conducting business with the Respondent’s erstwhile supplier. This, it asserted, had caused the Respondent to suffer damages, for which the Applicant was liable, in the sum of R34,1 million. The Respondent, through its attorneys, demanded payment of that amount failing which the Respondent would *“have no option but to institute the necessary legal proceedings”* against the Applicant to recover that amount.

[16] The background to the counterclaim asserted by the Respondent concerns a supplier known as Mamatho Mining Construction and Projects (Pty) Limited. Mamatho was a supplier of chrome ore with whom, at least prior to January 2022, both the Applicant and Respondent had had dealings.

[17] The Respondent asserts, in its answering papers, that it was expressly agreed between the parties in January 2022, when they commenced their relationship, that the Applicant would no longer purchase chrome ore directly from Mamatho. This, the Respondent’s deponent explains, was agreed to because the Respondent had been purchasing chrome ore from Mamatho for a period in excess of five years, and the Respondent had invested substantial sums in Mamatho with a view to establishing its supplier relationship.

[18] The relationship between the Applicant and Respondent commenced, the Respondent contends, after the Applicant had sought the Respondent's assistance to secure delivery of chrome for which it had paid Mamatho but which had not been delivered by Mamatho. After that delivery was resolved, the Applicant had thereafter sought, in January 2022, to procure chrome ore from the Respondent instead, because of what the Respondent characterises as its "preferential supply agreement" with Mamatho.

[19] In other words, while conceding that the Applicant had, prior to January 2022, purchased chrome ore from Mamatho directly, the Respondent contends that the Applicant's entitlement to deal directly with Mamatho ceased following the conclusion of its own contractual arrangements with the Applicant in January 2022.

[20] The Respondent alleges that the Applicant's breach of the term of the oral agreement between the parties, by seeking thereafter to procure chrome directly from Mamatho, caused the Respondent's failure to deliver the required chrome to the Applicant; and further, that as a consequence of that breach, Mamatho "*no longer supplied the Respondent and the Respondent has desisted from trading chrome commodities*".

[21] The Respondent's counter-claim, it asserts, arises from the loss of profit that it would have generated from sales to the Applicant "*for at least four purchase orders of 10 000 tonnes of chrome*".

[22] Although the precise contractual arrangements are not easily determinable on the papers, this is at least in part a consequence of the fact that the parties concluded their contractual arrangements relatively informally and primarily orally. Indeed, the Respondent's deponent asserts that "*the Respondent always worked on trust and did business by handshake, and never entered into written agreements.*"

[23] In certain respects the Applicant confirmed what had been discussed and agreed between the parties in emails to the Respondent. Where the Respondent failed to respond to email records of that kind, it seems to me, there are no good

grounds on which to conclude otherwise than that the Applicant accurately recorded what had been agreed. This includes the recordal by the Applicant of the variation of the terms of the agreement on 27 May 2022 in its email of that date.

[24] In summary, the essence of the Respondent's answer to the application is that it does not dispute the terms of the agreement averred by the Applicant or that it was paid R16,000,000 as a deposit against delivery of 10,000 metric tonnes of chrome. Nor does it dispute that it delivered only 1957.03 metric tonnes, as the Applicant asserts. It further does not dispute the terms of the variation asserted by the Applicant and recorded in the email from its representative dated 27 May 2022.

[25] Instead, the Respondent denies its indebtedness on grounds that it asserts the existence of an additional material term of the agreement between the parties, which it contends the Applicant breached or repudiated, giving rise to a genuine and serious counter-claim against the Applicant in an amount exceeding the balance of the deposit claimed by the Applicant.

[26] The factual basis for these contentions is an express oral, alternatively implied, alternatively tacit term of the agreement between the parties in terms of which the Applicant was alleged by the Respondent specifically to have agreed and to have undertaken not to contact in any manner whatsoever or to do any business with the Respondent's supplier.

[27] In its written heads of argument the Respondent's case is summarised as being that the Applicant had breached the terms of the agreement "*in that it sought to circumvent [the Respondent] by approaching [the Respondent's] supplier for the purpose of supplying [the Applicant] directly*". In the alternative, the Respondent contends that the Applicant committed a delict in the form of unfair competition.

[28] The Applicant's breach of the agreement and related unlawful and wrongful conduct caused, the Respondent alleges, serious damage to its business which in turn caused it "*to exit the portion of its business that constituted of the sale of chrome*" and this left the Applicant in a position where it could "*cannibalise that*

market". The Respondent alleges that this was the Applicants intention all along and that the liquidation application is a furtherance of that attempt.

Analysis

[29] When the matter was argued, Mr Redman submitted that the Respondent's case was in fact that it disputed its indebtedness, and that it did not rely solely on the contention that it had a counter-claim in excess of the amount claimed. Elaborating on this theme, Mr Redman submitted that in fact the Respondent disputed that any part of the deposit paid was refundable in the event that the Respondent failed to deliver under the terms of the agreement.

[30] I have carefully considered whether the pleadings support these submissions. In my view they do not.

[31] The only credible construction of the Respondent's case is that having failed to deliver the balance of the chrome due, and having received consideration in an amount of R11,498 831 in respect of which no chrome had been delivered, it was entitled on cancellation of the agreement to refuse to repay that amount on grounds that it had the counter-claim described by its attorneys in their letter of 25 October 2022 and as further elaborated upon in its answering papers.

[32] The Respondent does not dispute that, save for the 1957.03 metric tonnes referred to earlier, it failed to deliver chrome ore for which it was paid R16,000,000 under the terms of the agreement. The Respondent further alleges no term, express or implied, that the balance of the deposit should be forfeited in those circumstances. It also puts up no credible dispute about the variation to the agreement concluded on 27 May 2022.

[33] In my view the Applicant has discharged the onus on it to establish the Respondent's indebtedness to it, at least on a *prima facie* basis. Indeed, it seems to me that it has established the Respondent's indebtedness on the probabilities,

applying the test in *Plascon Evans*.¹ Since the Applicant seeks a provisional order at this stage, a *prima facie* case is in any event sufficient. In summary, no part of the Respondent's pleaded case points to a contractual right to retain the deposit, and the only basis on which it claims to be entitled to do so is the existence of its counterclaim.

[34] Mr Redman also submitted that because the dispute raised by the Respondent arose from an alleged breach of the contract giving rise to the indebtedness in the first place this meant that it was not truly a counterclaim in the sense contemplated in *Afgri Operations Limited v Hamba Fleet (Pty) Ltd*², on which the Applicant relies. But this does not assist the Respondent. First, the counterclaim is formulated as arising from the contract or alternatively from the common law of unfair competition. Second, *Afgri* was primarily concerned with how a court should exercise its discretion when it decides whether or not a debt is disputed on *bona fide* and reasonable grounds. That question that must be determined whether or not the basis for disputing the debt constitutes a counterclaim in the true sense or arises on an interpretation of the contract itself.

[35] The key question is simply whether the Respondent has satisfied the onus that rests on it of showing that its indebtedness is disputed on *bona fide* and reasonable grounds.

[36] On close scrutiny, in my view, the counter-claim relied upon by the Respondent simply does not get out of the starting blocks. There are a number of reasons for saying this.

[37] First, as pointed out by Mr Spiller, who appeared for the Applicant, the Respondent has taken no steps since the letter from its attorneys of 25 October 2022 to formulate or prosecute any such claim. This "*inertia ... in pursuing its right of action alleged in the counterclaim*", adopting the words used by the Supreme Court

¹ *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

² 2022 (1) SA 91 (SCA)

of Appeal in *Afgri*³, “*generates a considerable unease about the genuineness of its contestation*”.

[38] Second, the alleged oral contractual undertaking on which the counter-claim is based is differently described by the Respondent’s attorneys in their letter dated 25 October 2022 (where they assert that the Applicant “*specifically agreed and undertook not to contact, in any manner whatsoever, or to do business with our client’s supplier*”) and in the answering papers, where the deponent for the Respondent asserts that the Applicant “*undertook and agreed that it would not purchase any chrome from Mamatho after the conclusion of the oral agreement and during the relationship between the Applicant and the Respondent*”.

[39] Third, the counter-claim is illiquid, and there are considerable difficulties with even its broad outline foreshadowed in the answering papers. The Respondent alleges loss of profit for four successive orders of 10,000 metric tonnes without pleading any agreement to deliver four such orders and there is no reference to this in the letter from its attorneys dated 25 October 2022. The Respondent in fact failed successfully to deliver even one such order. It asserts in the answering papers that Mamatho was capable of producing only 13,000 metric tonnes of chrome ore. It also asserts, on grounds only of the Applicant’s alleged interference with its relationship with Mamatho (with which, as indicated earlier, the Applicant also enjoyed a pre-existing business relationship), that it has now ceased trading in chrome commodities altogether. The facts set out in the answering papers cast considerable doubt on the *bona fides* of the alleged counterclaim and suggest that it does not provide reasonable grounds for disputing the indebtedness.

[40] Fourth, I agree with Mr Spiller’s submission that even on the Respondent’s version there is no credible evidence to suggest, if the contractual term relied upon had indeed been agreed between the parties, that the Applicant had breached it or conducted itself in a manner inconsistently with it before the Respondent failed to comply with its own obligation under the terms of the agreement to deliver 10,000 metric tonnes of chrome ore for which it had been paid R16,000,000 as a deposit.

³ *supra* at para [18]

The evidence, such as it is, in fact points instead to the Applicant becoming increasingly desperate following the Respondent's failure to deliver what it had promised, and thereafter engaging directly with Mamatho in an effort to procure the desired chrome from it directly. There is no rational explanation offered as to why the Applicant would seek to drive up Mamatho's price for the ore, as the Respondent alleges, in a manner that would effectively preclude the Applicant from securing the chrome ore for which it had contracted. The alternative thesis, that it sought to "cannabalise" the Respondent's business, is speculative and improbable on the evidence presented.

[41] In summary, the evidence relied upon by the Respondent is tenuous and improbable as a basis for establishing either a breach of contract by the Applicant or unfair competition by it. It also does not establish any reasonable basis for contending that the Respondent in fact suffered the damages alleged.

[42] It follows that I agree with Mr Spiller that the Respondent has raised no *bona fide* dispute that it is indebted to the Applicant in the amount of R11 498 831.00, and the Respondent's alleged counter claim fails to establish *bona fide* or reasonable grounds on which to dispute that indebtedness.

Order

[43] In the circumstances I am satisfied that a proper case has been made out for the order sought by the Applicant, and I make the following order:

1. The Respondent is hereby placed under provisional winding up.
2. All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding up of the Respondent on **4 November 2024** at 10h00 or so soon thereafter as the matter may be heard.
3. A copy of this order must be published forthwith once in the Government Gazette.
4. A copy of this order must be served on –
 - a. The employees of the Respondent by affixing a copy of the application to any notice board to which the employees have

access inside the Respondent's premises, or if there is no access to the premises, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises, namely: [...] L[...] Road, D[...], E[...]

- b. The Master of the High Court ;
- c. The South African Revenue Services; and
- d. The Respondent at its registered address.

C TODD

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing: 21 May 2024

Date of Judgment: 9 July 2024

APPEARANCES

Counsel for the Applicant: Adv L Spiller

Instructed by: Pinsent Masons South Africa Incorporated

Counsel for the Respondent: Adv N Redman SC

Instructed by: Andraos Hatchet Incorporated