IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 2074/2024

In the matter between:

LINQUENDA AQUA PROPRIETARY LIMITED	Applicant
and	
WINELANDS BOTTLING COMPANY PROPRIETARY LIMITED	Respondent

JUDGMENT

MAGARDIE AJ:

1. The parties to this application are in the water bottling business. The applicant ('Linquenda') applies for the provisional winding up of the respondent company ('Winelands'). Linquenda's application is brought on two grounds. Firstly, on the basis that Winelands is unable to pay its debts as contemplated by section 344(f) read with section 345 of the Companies Act 61 of 1973. Secondly, on just and equitable grounds as provided for in section 344(h) of that Act.The essential facts are either common cause or not seriously disputed on the papers. Given that provisional orders are being sought at this stage as opposed to final relief, the factual background below is set out in broad outline. The *bona fides* and reasonableness of the main defences advanced by Winelands, which I shall turn to later, must be considered against this contextual

background.

Factual Background

2. Linquenda and Winelands operate in the bottled water industry. During 2018 Linquenda established a water bottling plant on premises in Stellenbosch ('the property'). The company aimed to supply water to meet the burgeoning demand for water as result of ongoing droughts in the Western Cape. The business was initially successful but then ran into operational and financial difficulties. It was at this stage that Linquenda began a nascent business relationship with Winelands and its sole director, Mr. Johan Buys. Mr. Buys is from all accounts an experienced operator in the water industry and is the Chief Executive Officer of Oasis Holdings (Pty) Ltd ('Oasis'), the largest water refill and beverage franchise in South Africa. Mr. Buys deposed to the affidavits on behalf of Winelands opposing its provisional liquidation.

3. According to Linquenda, it was agreed that Mr. Buys, through Winelands, would take over Linquenda's water bottling plant and business for its own account. Winelands in general terms denies this but admits that there were negotiations as alleged. In my view nothing much turns on this denial. What is common cause is that from October 2022, Winelands conducted the water bottling plant operations in Stellenbosch without Linquenda's assistance and for its own account.

4. During October 2022, two main written agreements were concluded by Winelands to give effect to the agreement that Winelands would henceforth operate the water bottling plant formerly operated by Linquenda on the property. The first was an equipment rental agreement relating to the moveable assets and specialized equipment required to conduct the water bottling business on the property. The second was a lease agreement with Kumani Beleggings (Pty) Ltd ('Kumani'), the landlord of the premises. The equipment rental agreement was concluded between Winelands and Linquenda on 28 October 2022.

5. It is common cause that prior to concluding the equipment rental agreement, various discussions took place between Linquenda and Mr. Buys on behalf of Winelands, regarding a transaction which it was envisaged would result in Linquenda becoming a shareholder of Winelands. The discussions regarding the proposed transaction related to the financing of the proposed transaction from various third parties including financing through Oasis Water's facility with Sanlam, the registration of a general notarial bond over plant and equipment, cession of books debts and various board approvals. Email exchanges between the parties in this regard took place between 19 and 24 October 2022. The affidavits are somewhat unclear as to the details of any further discussions which ensued between the parties but what is evident is that the discussions which commenced in October 2022 resulted in the distribution of a draft shareholders agreement. The draft shareholders agreement was attached to Linquenda's founding affidavit and is marked as an 'execution version' dated 19 July 2023. Linquenda however emphasizes that the draft shareholders agreement was for discussion purposes only. This is not disputed.

6. Irrespective of the lack of clarity on the papers for the apparent hiatus in discussions between 24 October 2022 and July 2023, one central fact is undisputed on the papers. It is that the draft shareholders agreement distributed following the October 2022 discussions, was ultimately never signed by the parties, there was no consensus between the parties on its terms and no shares were transferred to Linquenda in consequence of the draft agreement. This aspect has a significant bearing on the *bona fides* and reasonableness of the main defence advanced by Winelands, which is that the monthly rentals due to Linquenda in terms of the equipment rental agreement were credited by Winelands to what it described as Linquenda's 'loan account' and therefore are not due and payable.

7. There is no serious dispute that Linquenda is therefore legally and factually not a shareholder of Winelands and that no shareholders account was ever established in its favour. Linquenda goes further and states that Mr. Buys is in fact aware of the true extent of the inability of the parties to reach any consensus on the purported

shareholders agreement. This is admitted by Winelands in its answering affidavit.

8. Reverting to the chronology of events, on 27 October 2023, almost a year after the conclusion of the equipment rental agreement, Linquenda's attorney directed a letter of demand to Winelands alleging that Winelands had breached the equipment rental agreement by failing to make any payment to Linquenda as required by the agreement. The letter of demand required Winelands to make payment to Linquenda in the amount of R1 211 293, 85 being outstanding rental for the period of October 2022 to 1 October 2023. The letter informed Winelands that should it fail to make payment of the sum demanded within 3 weeks of the letter of demand, Winelands would be deemed to be unable to pay its debts as provided for in section 345(1)(a)(i) of the 1973 Act and liable to be wound up as provided for in section 344(f) alternatively section 344(h) of that Act.

9. Notably, the letter from Linquenda's attorneys referred to clause 7.2 of the equipment rental agreement which provides that in the event that Winelands does not have sufficient cash flow to cover the rental fees, the rental fees can be capitalized against Linquenda's loan account. In this regard, the letter stated that "…*this clause cross references to an envisaged transaction in which our client would acquire shares in Winelands Bottling, which transaction was neither concluded nor implemented. No such shareholders credit loan accounts could therefore be created*."

10. Winelands' attorneys responded to the letter of demand just under a month later, on 23 November 2023. They began by stating that "…*your letter is aimed at throwing everything but the kitchen sink at our client and can only be described as confusing. Your client must choose a proverbial chair to sit on*." The letter from Linquenda's attorneys was a serious letter claiming a serious amount of money. It served as a statutory notice in terms of section 345 of the 1973 Companies Act. This response thereto by Winelands strikes a somewhat discordant note in the circumstances.

11. The response from Winelands' attorneys then alleged inter-alia that since the inception of the equipment rental agreement, Winelands had "…*punctually complied*

with its obligations. The monthly rental has been credited to your client's loan account on a monthly basis." In this regard, an annexure was attached purporting to reflect an amount of R 1 118 117.49 reflected in what was described as "…*your client's loan account…in our client's books*." The letter denied that any amounts were due and payable to Linquenda and denied that there were any grounds for the liquidation of Winelands to be sought on just and equitable grounds. The letter went on to conclude that "…*the parties clearly envisaged a larger business relationship and you unfortunately cannot read the agreement in isolation as you have done*." No further details were provided.

12. The letter did not address or dispute the pertinent reference in Linquenda's letter of demand to the failure of the parties to have concluded or implemented the proposed shareholders agreement. Although it referred fleetingly to clause 7.2 of the agreement, the letter notably did not allege that Winelands did not possess sufficient cash flow to pay rental or the reasons why, if in fact it did have sufficient cash flow and was solvent, it had not paid the rentals due to Linquenda. And contrary to the approach urged on behalf of Winelands in oral argument at the hearing of the application, no detailed tender of alternative dispute resolution or indeed any express reference was made to clause 18.1 of the equipment rental agreement, in terms of which disputes arising from the agreement were to be submitted to arbitration. The letter merely referred to the fact that the parties had agreed to disputes being resolved "…*in an amicable fashion*" and that Winelands "…*tenders its co- operation in this regard*."

13. The looming litigation threatened in the letter from Linquenda's attorneys in October 2023 began to become a reality in January 2024. On 15 January 2024 Linquenda received information that Winelands was intending to remove certain of the rental equipment from the premises and operations being conducted in Stellenbosch. That same day, Mr. Gunter Henke, a director of Kumani, the landlord of the premises, deposed to an affidavit in support of an *ex parte* application in the Stellenbosch Magistrates Court for the attachment of the movable property on the premises in terms of section 32 of the Magistrates Courts Act in respect of unpaid rental by Winelands in

the amount of at least R170 293.32 and unpaid electricity and municipal charges. In his affidavit, Mr. Henke alleged that he had been informed by Mr. Buys that Winelands was intending to remove certain of the equipment on the premises, which equipment was subject to the landlord's hypothec, and that Winelands intended vacating the premises after removal of such equipment.

14. The intended removal of the equipment was confirmed on 22 January 2024 by way of an emailed letter dated 12 January 2024 from Mr. Buys in which Linquenda was informed of Winelands' intention to remove certain rental equipment from the leased premises in Stellenbosch to a Plot 9[…] in D[…] E[…], I[…], Pretoria. Winelands admits that the said address is the address of Oasis Bottling Company (Pty) Ltd, of which Mr. Buys is the CEO as well as the address of another company, Clover Waters (Pty) Ltd. The total value of the assets which are owned by Linquenda and which it was notified were to be moved by Winelands to the plot in Pretoria, amounts to R4 398 066.85. Linquenda contends that Winelands 'cherry picked' certain of the most valuable assets, intending to leave others behind on the property. The letter informing Linquenda of Winelands' intention to move these assets to Pretoria, purported to rely on clause 9.4 of the equipment rental agreement, which provides for the lessee to transfer the equipment being the subject of the agreement, to a transferred address specified in writing at least 5 business days prior to the transfer.

15. Following receipt of this letter on 22 January 2024, counsel was briefed and engaged by Linquenda to prepare the present application as a matter of urgency.

16. On 25 January 2024 Kumani obtained an order in the Stellenbosch Magistrates Court in terms of which the Sheriff was instructed to attach Winelands' moveable property inside the premises. The return date of the order, which was obtained ex parte and by way of a rule *nisi*, was 7 March 2024. While Winelands raised a number of grounds in its answering affidavit dated 5 February 2024 as to why it maintained that the Kumani application was '*fatally defective'* and that it intended to have the matter '*disposed of*', nothing much appears to have come of this. In a further supplementary

affidavit deposed to on behalf of Linquenda on 20 May 2024 shortly before the hearing of this application, the court's attention was drawn to the fact that the rule *nis*i granted against Winelands in favour of Kumani, was in fact confirmed on 16 May 2024.

17. The present application was thereafter instituted by Linquenda on 30 January 2024 and enrolled for hearing as an urgent application on Wednesday 7 February 2024. Winelands deposed to its answering affidavit on 5 February 2024. What emerged now for the first time in the answering affidavit, is that three days before and on 2 February 2024 and more than two months after the section 345(1)(a) demand had been sent, it had "…*out of an abundance of caution*", paid the full amount claimed by Linquenda ie the sum of R 1 490 823.20, to its attorneys trust account "…*as security until such time as the dispute between the parties has been resolved*." Winelands on this basis contended that it was clearly not insolvent as alleged. It was not explained why this amount was not paid when the demand from Linquenda's attorneys was received in October 2023 or for that matter, a tender to pay the amount to its attorneys as security was not made in the response from Winelands' attorneys on 23 November 2023.

18. On 7 February 2024, the date that the application came before Francis J, it was struck from the roll due to lack of urgency. The application was thereafter by agreement and pursuant to an order granted by Goliath AJP on 22 February 2024, set down for hearing on 23 May 2024.

Evaluation

19. This being an application for provisional liquidation as opposed to proceedings for a final winding up order, it is trite that where the applicant establishes on the affidavits a *prima facie* case (ie a balance of probabilities) in its favour, a provisional winding up order should normally be granted.[1]

20. In circumstances where it is common cause that a respondent has not paid an

[1] Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 979B ('*Kali*l').

admitted debt, the discretion of the court to refuse a court to refuse a winding up order, is not a broad discretion but a narrow one.[2]

21. To this must be added a further well-established principle. It is that it is impermissible for winding up procedures to be utilized for the purposes of enforcing payment of a debt which is disputed on *bona fide* and reasonable grounds. The '*Badenhorst*' principle, described by the Constitutional Court as '…*a sensible rule of practice'*[3], holds that an application for provisional liquidation will normally be dismissed where there is a genuine and good faith factual dispute concerning an alleged insolvent debtor's indebtedness to a creditor.[4] At the provisional stage, the onus is on the respondent to show that a debt which is *prima facie* shown to exist, is *bona fide* disputed on reasonable grounds.[5]

22. Where a respondent in liquidation proceedings contents itself in its answering affidavit with vague and bald averments lacking in particularity, it can hardly be said that its *bona fides* have been demonstrated. In *Gap Merchant*, Rogers J (as he then was) put it thus:

> "*Bona fides relates to the respondent's subjective state of mind while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless inter-related because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts.As Hülse-Reutter makes clear, the objective requirement of reasonable grounds for a defence is not met by bald allegations lacking in*

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[2] Afgri Operations Limited v Hamba Fleet (Pty) Limited (542/2016) [2017] ZASCA 24; 2022 (1) SA 91 (SCA) (24 March 2017) at para 13.

[3] Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited (2018 (1) SA 94 (CC) (5 September 2017) at para 86.

[4] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347-9.

[5] Gap Merchant Recycling CC v Goal Reach Trading 55 CC (2480/2014) [2014] ZAWCHC 53; 2016 (1) SA 261 (WCC) (15 April 2014) ('*Gap Merchant'*) at para 20.

> *particularity; and, as appears from Breitenbach and El- Naddaf, bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is bona fide*."[6]

23. Before applying these principles to the main grounds on which Winelands opposes its provisional winding up, I address a point *in limine* which was advanced in Winelands' answering affidavit.

Winelands' point *in limine*

Non-compliance with section 345 of the 1973 Companies Act

24. It was contended by Winelands that the section 345(1) demand by Linquenda emailed on 23 October 2023 was not served by the Sheriff on Winelands' registered address and that the application was consequently fatally defective. The point was made in the answering affidavit and while not abandoned, it was not strenuously urged, in my view advisedly, by Mr. *Van Der Merwe* in oral argument.

25. It is not disputed that Winelands received the section 345(1)(a) demand and responded to it in detail in the terms outlined earlier. Directing the notice to Winelands by email in circumstances where it is undisputed that the demand came to the notice of Winelands, constituted in my view compliance with the statutory provision in the light of its purpose.[7] In my view the point has no merit.

Winelands' main defence

26. Turning then to the main defence raised by Winelands, I agree with Mr. *Manca* that shorn of verbiage and its professed complexity, the only defence raised by Winelands to its provisional winding up, is that although the sum claimed by Linquenda

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[6] *Gap Merchant* at para 26.
[7] Stokes v Cancape (Pty) Ltd (2023) 44 ILJ 431 (WCC).

is due and owing, it has not yet become payable. Related to this is the contention by Winelands that the pursuance by Linquenda of liquidation proceedings in these circumstances, amounts to an abuse of process as such proceedings may not be utilized for the purposes of recovering disputed debts.

27. The issue then is whether the debt claimed by Linquenda is disputed by Winelands genuinely and on *bona fide* and reasonable grounds. For the following reasons, I am of the view that Winelands has not shown on cogent and plausible grounds that Linquenda's claim is genuinely disputed. I am therefore not persuaded that the institution of winding up proceedings in these circumstances amounts to an abuse of process.

28. To begin, it is not disputed on the affidavits that the quantum of Linquenda's claim is at least R1 490 823.60 at the date of issuing of the application, that the claim is against Winelands and that it is to be paid. Winelands disputes that the claim is due and payable and relies in this regard entirely on clause 7.2 of the equipment rental agreement. The clause provides that in the event that Winelands <u>does not have sufficient cash flow</u> (emphasis added) to cover the rental fees, the rental fees can be capitalized against Linquenda's loan account. In this regard, it will be recalled that Mr. Buys admitted that he was indeed aware that the parties had never reached consensus or agreement on any shareholding of Linquenda in Winelands and that consequently no shareholders loan account exists. This then begs the question as to what, according to Winelands, are the precise nature of the terms and details of the loan account in respect of which the equipment rentals due to Linquenda have purportedly been credited.

29. In my view, at the very least, an explanation setting forth in detail the terms of repayment of the monies so credited to the purported loan account, was called for. The absence of such an explanation must of course have a bearing on the *bona fides* of a defence which is advanced, bereft of further detail, that the monies claimed by Linquenda are owed but are not due and payable because they have been credited to a loan account. If so, when exactly are these monies payable? Winelands does not take

the court into its confidence and directly answer this question.

30. There is in my view a further difficulty with the *bona fides* of Winelands' reliance on clause 7.2 of the equipment rental agreement to justify its non- payment. Winelands on the one hand relies on clause 7.2 of the equipment rental agreement to justify non-payment of the monthly rental and in doing is constrained to attach the mast of its defence to the insufficient cash flow requirement postulated by clause 7.2 of the agreement. On its own version, Winelands had sought for the past year, when the rentals were due, to allocate the rental amounts to Linquenda's alleged loan account on the alleged basis that it had insufficient cash flow.

31. Yet on the other hand, Winelands was plainly possessed of sufficient cash flow to pay to its attorneys as security, the very amount claimed by Linquenda, this being a sum in excess of R1 million. If Winelands is able to pay the entire outstanding balance claimed to its attorneys in trust, this must mean that it in fact has the necessary cash flow to pay the rentals due to Linquenda and its reliance on clause 7.2 to avoid the monthly rental payments was misplaced to say the least. It is not open to Winelands to plead inconsistent and mutually exclusive facts. In my view, Linquenda's submission that Winelands is vacillating between contradictory versions of events and thereby undermining its *bona fides* in disputing liability to Linquenda, is well-founded.

32. A further argument advanced on behalf of Winelands was that Linquenda was precluded from obtaining a provisional winding up order by virtue of clause 18.1 of the equipment rental agreement, which provides for any dispute or difference arising out of or in connection with the agreement, to be submitted to arbitration. It was contended in the answering affidavit that by virtue of this clause, the court had no jurisdiction to entertain the application. In the course of oral argument, it was urged by Mr. *Van Der Merwe*, that it would be open to the court in the exercise of its discretion to stay the winding up proceedings pending the outcome of arbitration proceedings, which Winelands tendered to institute forthwith. Linquenda submitted that an arbitrator does not have the necessary jurisdiction to determine a liquidation.

33. Arbitration proceedings as contemplated by the equipment rental agreement and liquidation proceedings serve conceptually separate purposes. To the extent that the court does have any discretion to stay the winding up proceedings pending arbitration proceedings, a matter on which I reach no firm conclusion, the failure of Winelands to provide information regarding the alleged loan account, its terms such as when it is repayable, the unsubstantiated denials replete in Wineland's answering affidavit and the contradictory defences it has advanced, in my view militate against the exercise of such a discretion in its favour. Winelands in any event does not dispute the quantum of Linquenda's claim or that the rental amounts are due. It is thus unclear on what basis a dispute exists which engages the arbitration clause in these circumstances.

34. It was furthermore undisputed on the papers that in its business operations, Winelands had been incurring significant losses to a net tune of approximately R 7 539 000, that it had as at June 2023 significant overdue creditors who in some cases were unpaid by more than 90 days, that it had retrenched staff and that various movable assets had been attached pursuant to an order obtained by Kumani perfecting its tacit hypothec in respect of unpaid rentals owed by Winelands.

35. Winelands' failure to pay its indebtedness to Linquenda, which for the reasons set out above I conclude has not been disputed genuinely and on *bona fide* and reasonable grounds, is in my view *prima facie* proof of its inability to pay its debts.

36. On a conspectus of the evidence disclosed by the application papers, I am satisfied that Winelands cannot pay its debts as contemplated by section 345 of the Act. A *prima facie* case has in my view been made out for the provisional liquidation of Winelands on the basis that it is commercially insolvent.

Just and equitable grounds

37. The conclusion which I have reached that a *prima facie* case has been

established for the provisional liquidation of Winelands on the basis that it is unable to pay its debts as contemplated by section 344(f) read with section 345 of the 1973 Companies Act, makes it strictly speaking unnecessary for me to decide whether the just and equitable grounds as provided for in section 344(h) of that Act have been established. Having regard to the admitted loss-making operations of Winelands, its non-payment of other creditors, the evidence relating to its relocation of the business from the property and 'cherry picking' of assets owned by Linquenda and to be removed in that process, its retrenchment of staff and in particular, the unmeritorious and contradictory bases on which it has sought to contend that its admitted indebtedness for the rental amounts is not due and payable, I would nonetheless conclude that a proper case has been made out by Linquenda for the provisional winding up of Winelands on just and equitable grounds as well.

Conclusion

38. In my judgment Linquenda has made out a proper case for the provisional winding up of Winelands on the basis that it is unable to pay its debts as contemplated by section 344(f) read with section 345 of the 1973 Companies Act. I am not persuaded that Winelands has demonstrated that the amount claimed by Linquenda is genuinely disputed on *bona fide* and reasonable grounds or that the proceedings for its provisional winding up constitute an abuse of process.

39. In the result, a provisional winding up order shall issue in respect of Winelands in accordance with the order which I have signed and mark "**X**'.

S G MAGARDIE

Acting Judge of the High Court

APPEARANCES:

For Applicant B J Manca SC (with him M M Van Staden) Instructed by:Riaan Nabal Attorneys

For Respondent: M P van der Merwe SC Instructed by:
Delberg Attorneys

Date of hearing: 23 May 2024
Date of judgment: 21 June 2024 (revised: 24 June 2024)