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

Case No: **27959/2022**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE: 25 SEPTEMBER 2024

SIGNATURE

In the matter between:

JACOBUS JOHANNES GERHARDUS OUDTSHOORN Applicant

and

SALTUS HOLDINGS AFRICA (PTY) LTD Respondent
t/a CARBON FIBRE DESIGNS

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 25 September 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant, J.J.G Oudtshoorn, brings an application for the provisional winding up of the respondent, Saltus Holdings (Pty) Ltd t/a Carbon Fibre Designs on the grounds that the respondent is unable to pay its debts in terms of section 345 of the Companies Act, 61 of 1973 [the Act] and that, it is just and equitable to do so.

[2] The nub of the dispute is whether the applicant possess *locus standi* as a creditor to bring the application and whether the debt claimed is indeed due and payable. The bulk of the dispute is capable of being disposed of having regard to the number of agreements which regulate the position, in particular the provisions of a distribution and share-cession agreement entered into between the parties in 2019.

[3] Procedurally, the respondent after the applicant had filed his reply and heads of argument, filed its first supplementary answering affidavit in which it sought to amplify its defence and to correct inaccuracies in its evidence filed in its answering affidavit. This was met by the applicant filing a supplementary reply thereto. The respondent then again, filed a second supplementary affidavit in which it raised prescription as a defence. The applicant confirmed in argument that the respondent's second supplementary affidavit was 'withdrawn' for want of requesting leave, but out of abundance of caution dealt with it. At the hearing of the application, the respondent moved an application for leave to file its first supplementary affidavit only. The application was not opposed, fully traversed and leave was granted. The matter proceeded on this basis. The defence of prescription not argued by the respondent's counsel.

[4] To commence, a closer look at the facts giving rise to the conclusion of the distribution and share-cession agreement is required.

BACKGROUND FACTS

[5] In January 2019, the respondent, previously trading as Setecure Trading (Pty) Ltd, entered into an exclusive distribution agreement with an entity known as Dipale (Pty) Ltd [Dipale]. The respondent's intention was to grant Dipale the

exclusive right to distribute Saltus poles to the mining industry in South Africa. For this right, Dipale agreed to pay the respondent R1 000 000,00 [the debt]. The applicant assisted Dipale by paying the respondent the debt. This agreement was soon thereafter cancelled and, in effect as appears, a new deal restructured. The restructuring, *inter alia*, included recording an agreement between the applicant, the respondent and certain representatives of Dipale, a Mr Du Plessis and Mr Van Den Heever. In short, the respondent offered shares to the applicant, Mr Du Plessis and Mr Van Den Heever in a company it had called Saltus Mining Africa (Pty) Ltd [Saltus Mining]. Such shares were offered to the applicant by the respondent as recognition for his support in Dipale and to Mr Du Plessis and Mr Van Den Heever for the work they did for Dipale. The applicant acquired 32% in Saltus Mining and the respondent retained 26%, Both Mr Du Plessis and Mr Van Den Heever acquiring the remaining 42% in equal shares [shareholder-cession agreement].

[6] Simultaneously Saltus Mining now, entered into a distribution agreement with the respondent acquiring the exclusive right to market and distribute the respondent's main and ancillary products in Africa against the payment of the debt. The distribution agreement formed part of the shareholder-cession agreement by reference and was attached as Appendix 2. As the respondent had not repaid the applicant the debt, as at date of cancellation of the Dipale agreement, paragraph 4.9 of the shareholder-cession agreement stated that: “ *In order to repay Oudtshoorn the amount of R1, 000,000.00 (one million rand) referred to in clause 4.4 above, Setecure (the respondent-own emphasis) shall cede its right title and interest in and to the R1, 000,000.00 (one million rand) due and payable to it by Saltus Mining, to Oudtshoorn.*” [the cession]. It is common cause that paragraph 4.9 of the shareholder-cession agreement was subsequently amended, to be read with paragraph 6 and included the provision of interest accruing until date of the final payment of the debt and an to insert an additional sub paragraph 4.9.1 stating:

“Accumulated interest will be calculated at prime rate from 01 May 2020 and will be payable until the full amount is paid back in full to Mr Oudtshoorn (own emphasis)”.

The Dipale agreement was incorporated by reference to the shareholder-cession agreement as Appendix 1.

[7] The cession, was recorded at paragraph 5 of the share-cession agreement as being in full and final settlement of the respondent's liability to Oudtshoorn but subject to the provisions of clause 6. Paragraph 6 is headed "*Repayment in the event of Setecure's failure to produce a saleable product*". It is common cause that the respondent did fail to produce a saleable product by the agreed date (30 April 2020). This failure triggered the necessity for the amendment to share-cession agreement. Paragraph 4¹ and 6 duly amended. The interpretation of the amended paragraph 6 lies at the heart of the dispute.

[8] According to the amended paragraph 6, which is to be read with the amended paragraph 4²:

"Replacement of 6.1 and 6.2 with the following

6.1 *In the event Setecure fails to produce a saleable underground mining support pole in compliance with the mining industry standards by the 31st of October 2020, Oudtshoorn shall have the right to terminate this agreement upon 30 (thirty) days' written notice to Setecure, Du Plessis and Van Den Heever, to be calculated from the 1st of November 2020.*

6.2 *The consequences of Oudtshoorn filing the notice of terminate referred to in clause 6.1 above, shall be that this agreement and its consequences shall be unwind and the parties shall be placed in their respective positions ante, and that Setecure shall refund Oudtshoorn R1,000,000.00 (one million Rand) he advanced to Setecure PLUS accumulated interest at prime rate calculated from the 01st of May 2020 on behalf of Dipale by no later than the 30th of November) 2020 (own emphasis) against:*

¹ See para.[6].

² Ibid.

- 6.3 *cancellation of the cession of claim referred to in clause 5 above;
and*
- 6.4 *Oudtshoorn transferring his shares to Saltus Mining to Setecure at
the subscription price thereof; and*
- 6.5 *Du Plessis transferring his shares in Saltus Mining to Setecure at
the subscription price thereof; and*
- 6.6 *Van Der Heever transferring his shares in Saltus Mining to
Setecure at the subscription price thereof.”*

[9] In essence the applicant's claim for the repayment of the debt directly from the respondent, instead from Saltus Mining as a result of the cession, is regulated by the amended paragraph 4 read with paragraph 6.

APPLICATION OF PARAGRAPH 6 TO THE FACTS AND THE RESPONDENT'S DEFENCES

[10] The respondent contends that it has delivered a saleable product, that the applicant is not a creditor and that the debt is not due and payable.

[11] To commence, what is meant by a saleable product? Clause 6 specifically refers to the saleable pole as an “-underground mining support pole in compliance with the mining industry standards.” The shareholder-cession agreement does not define an underground mining support pole, but the distribution agreement which forms part of ‘whole agreement’ defined in the shareholder-cession agreement does.

[12] According to the distribution agreement refers to two types of products, main and ancillary products. The ‘Main products’ are specifically defined as “*The Saltus underground mine support pole/poles developed by the company (the respondent – own emphasis), as further described in Appendix 1 hereto*”.

[13] Appendix 1 lists the Main product by reference. Three products are listed namely: the Saltus yielding composite mine roof support poles as protected by Patent U[...], the Saltus static composite mine roof support pole as protected by Patent W[...], and the Saltus low cost blast shield or sleeve for mine roof supports as protected by Patent Z[...]. The ancillary products are defined as those products listed on appendix 2 as at date of signature and future products as the case maybe. Appendix 2 listed Saltus fencing poles, as filed in South Africa under W[...]. The list of products in appendices 1 and 2 do not appear to be expanded in terms of the distribution agreement after the date of signature thereof. The 'variation' clause read with the 'whole agreement' clause of the distribution agreement caters for how such additions could be made and how to be applied.

[14] Against this understanding of the products, clause 5.8 of the distribution agreement becomes clearer. The main products are casually linked to the expectation of the parties, as at the conclusion of the distribution agreement in 2020. Clause 5.8 states that provided the 'main product', as defined, passes the technical requirements of the mines, Saltus Mining should be able to generate total sales to the value of R4,000,000.00 per month by the end of the initial period. The respondent undertook to supply the main products referred to in clause 5.8 during the term of the distribution agreement. There is no evidence that any of the main products in appendix 1, passed the technical requirements by the mines.

[15] The applicant contends that by the 30th of April 2020, albeit by the extended period, the 31st of October 2020, the respondent had failed to produce a saleable underground mining support pole in compliance with the mining industry standards as envisaged in terms of the distribution agreement [the product]. In consequence, the applicant's case is that it had the right to terminate the agreement any time from the 1st of November 2020 in terms of paragraph 6, on notice. That as a direct result thereof, his claim lies against the respondent and is due and payable.

[16] In support of its contention, the refers this Court to a letter dated the 27th of January 2021 addressed to the respondent. In this letter, the applicant was responding, *inter alia*, to a previous email correspondence sent to it by the

respondent in which the respondent alleges it has terminated the distribution agreement. The email referred to was not attached by the respondent to its papers and the veracity and consequence thereof not fully ventilated at the hearing. However, this alleged attempt was, *inter alia*, met with the applicant invoking clause 9.1 of the share-cession and stated:

“In terms of clause 9.1, our clients hereby give you written notice of your breach and afford you 14 (fourteen) days to remedy such breach to our clients’ satisfaction or make repayment of the outstanding balance in the amount of R770 000.00 to our clients nominated account. We confirm that to date hereof, Saltus Holdings (the respondent – own emphasis) has made one payment in partial repayment of the R1,000,000.00 in the amount of R230 000.00 on or about the 10th of April 2021.”

[17] The respondent did not respond to the demand. The applicant then on the 22nd of February 2020, authored yet another letter to the respondent. This letter now serving as the termination notice referred to in paragraph 6.1 of the share-cession agreement. In such notice the applicant, *inter alia*, claimed the amount of R 770,000.00, gave the respondent 30 days’ notice, claimed the R 770 000.00 and drew the respondent’s attention to section 345 of the Act. The respondent failed to react. In consequence, and on the 23rd of May 2022, the applicant launched the present application relying on the respondent’s failure to pay a debt as envisaged in terms of section 345 of the Act.

[18] The respondent’s case is that the moment it produced a saleable product the applicant was not a creditor. In its answering affidavit under oath the respondent stated at paragraph 6.1 thereof that it *“did indeed provide a saleable product, which is currently being utilised by the applicant; one product of which is patented”*. The saleable product was not clearly identified under oath, nor its patent number nor did the respondent allege that such product was indeed the product as defined in paragraph 6 which it was under an obligation to produce by the 31 October 2020. No particularity was provided at all by reference nor in terms of the distribution agreement.

[19] However, 8 (eight) months later and after the applicant had filed its reply and its heads of argument, the respondent filed its first supplementary affidavit in which it now made reference to the production of a saleable product referred to in its initial answer. It relied on the production of a “*composite rock bolt split set patent with patent number PCT/ZA2018/050060*”. This product as well as the patent number does not appear on appendices 1 nor 2 as a product. The respondent failed to provide evidence nor did it allege that the composite rock bolt split set was indeed the product referred to in paragraph 6 or allege that the distribution and/or share-cession agreement, in particular paragraph 6 had been amended by the parties to include the composite rock bolt split set to justify the reliance and veracity that it had produced not only a saleable product but that such product had undergone mining testing standards or for that matter, did not have to in order to comply.

[20] The respondent further relies on the development of the Nimrite sleeve as a new product, ostensibly an Ancillary product referred to in the distribution agreement. With reference to the compliance of paragraph 6, upon which the applicant relies, the reliance of the respondent on the Nimrite sleeve remains unclear for the same reasons discussed above relating to the composite rock bolt split set.

[21] Faced with a conundrum in respect of paragraph 6, the respondent then raised that the applicant has misinterpreted the provisions of paragraph 6, stating that even if they have not complied with providing the product, a saleable underground mining pole in accordance with the mining industry standards by the 31st of October 2020, the applicant is not entitled to terminate the agreement as envisaged in terms of clause 6 and claim the debt from it. In consequence, the cession not cancelled and the applicant’s right, title and interest to claim the debt remains as against Saltus Mining. The applicant is not a creditor and no debt claimable.

[22] In support of its interpretation the respondent states that a correct interpretation of clause 6 creates a time limit within which the applicant can terminate the shareholder-cession on non-compliance of paragraph 6. The time limit is by the 1st of November 2020. Applying the respondent's understanding of "by the 1st November 2020" was amplified by the respondent's counsel in heads of argument when he stated that: *"Either way, the applicant's right to terminate the share- and cession agreement if the saleable product was not produced lapsed on the 1st of November 2020 (own emphasis) without the applicant having ever exercised it"*. Applying the respondent's interpretation of paragraph 6, it would mean that on failure by the respondent to produce a saleable underground mining pole and compliance with the mining industry standards by the 31st of October 2020, the respondent would have to, within what appears to be 24 hours exercise his right and serve a termination notice. In other words, the applicant's termination right but a small window of opportunity. This interpretation is simply untenable on the facts and having regard to the agreements read and applied as a whole.

[23] Having regard to the distribution agreement as well as all the appendices' agreements attached thereto, it is clear that the respondent concedes and records that it is liable to the applicant and that it wishes to repay the applicant the debt. The cession it recorded if applicable, a full and final settlement of its debt it owes to the applicant.

[24] The genus and purpose of all the agreements³ is undeniably linked to the production of an underground Saltus pole which can pass the technical requirements of the mines. This is fortified by the purpose for Saltus mining in the first place. This was recorded by its shareholders in paragraph 3.3 of Appendix 3, the Shareholders' agreement, in which the shareholders, including the respondent, stated that the object of Saltus Mining is to distribute the Saltus poles in terms of the distribution agreement.

³ **Coopers & Lybrand and Others v Bryant** 1995 (3) SA 761 (A) at 767E; **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk** 2014 (2) SA 494 (SCA) at par 12 and as quoted in *Bothma-Batho supra*, **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 399 (SCA) at par 10.

[25] Against this backdrop, if one has regard to the wording of paragraph 6 beginning with sub clause 6.1, the introductory words “*In the event that Setecure fails to produce ...*” suggests that 6.1 deals with triggers event bringing about the existence of a termination right. Such right to be exercised by notice “*from*” and not “*by*” as suggested by the respondent, the 1st of November 2020. Flowing from those introductory words is sub clause 6.2. This sub clause sets out the “*The consequences ...*” which flow from the exercise of such termination and how the *status quo ante* is to be achieved on termination of the share-session agreement., including the date from which interest is to be calculate, namely 1 May 2020 or by no later than the 30 November 2020.

[26] The respondent contends that in paragraph 6.2 of its answering affidavit: “*The applicant further failed to exercise his rights to termination in the case where it alleged that there is no saleable product timeously and in accordance with clause 6.1 (own emphasis) of the amendment to the agreement.*” In other words, by the 1 November 2020. The respondent then expanded its complaint in its supplementary affidavit to non-compliance of paragraph 6.2 too, contending that the dates set out in paragraph 6 are prescribed dates so that all the parties knew what they had to do at a given time. In other words, applying the respondent’s contention in context, the respondent had from the signature date in October 2019 to the 31st of October 2020 to provide a saleable underground mining support pole in compliance with the mining industry standards, the applicant, who had made the investment by paying the debt, was only entitled to exercise a termination right in one day, “by the 1st of November 2020” and the respondent, who had failed to provide an underground mining support pole had then a further 30 (thirty) days, till the 30th of November 2020, to pay the debt.

[27] Not only is the interpretation by the respondent not in harmony with the purpose of the agreements but its interpretation is not in line with the actual words used. No reference to the word “by” is used in paragraph 6 and such interpretation does not cater for the word “AND” which clearly links the preceding amended paragraph 4 to paragraph 6. Paragraph 4 which caters for interest to be charged on the outstanding debt and in so doing, does not indicate that the respondent has until the 30 November 2020 to pay the debt as contended by the respondent. It

conversely states that interest will run from the 1 May 2020 up and until date of final payment and not from the 30 November 2020, the date the respondent alleges it has to pay the debt. The interpretation accords with paragraph 6.2 in which the 1 May 202 is repeated, a date from which interest is to be calculated but no later than from the 30 November 2020.

[28] The right to terminate in consequence does not appear, in context to terminate by the 1 November 2020 as contended by the respondent. The right exercised by applicants on the 22 February 2022.

[29] For the reasons described above including the written argument by the respondent's counsel, the interpretation of paragraph 6 is not reconcilable with all the agreements read and considered as a whole and does not support the good faith which the parties recorded they owed one another. In essence, as at date of the hearing it appears that the respondent received R1,000,000.00 and Saltus Mining did not receive the product.

[30] It is common cause that the respondent has not only failed to respond to the letter of the 22 February 2022 but has not made payment of the R 770 000,00 nor tendered the amount. From the above the applicant has set out a *prima facie* case that a debt exists and is owed to him in his personal capacity as against the respondent. In consequence he has *locus standi* to claim the debt relying on section 345 of the Act. The respondent, at this stage, has failed to discharge its *onus* of disputing its liability to the applicant on reasonable grounds.

[31] Other than disputing the applicant's *locus standi* and its liability the respondent, notwithstanding the deeming provision of section 345 of the Act, asserts that it is factually solvent requesting this Court to exercise its narrow discretion not to grant its provisional winding up. This Court now deals with this issue as raised and dealt with on the appears.

RESPONDENT'S SOLVENCY

[32] The respondent alleges under oath that it is factually solvent. This it did, by referring the Court to a solvency letter by Jabfin Incorporated. This latter was not accompanied by a confirmatory nor supporting affidavit in answer. A Mr Basson confirms that he in the letter does not express an audit opinion nor a review conclusion on the financial records. The records are not attached. The letter confirms that the respondent's 31st of March 2022 financial records were inspected, that it had a positive net cash flow and that its assets exceeded its liabilities and it was in a sound financial position. Without, at this stage commenting on the evidentiary value of the letter, the respondent at that time did not attempt to satisfy the test, being commercial liquidity.⁴ The applicant then invited the Court to consider what was then stated in the matter of ABSA Bank Limited v Rheboks Kloof (Pty) Ltd and Others,⁵ which stated:

“The primary question which a court is called upon the answer in deciding whether or not a company carrying on a business should be wound up as commercially insolvent is whether or not is had liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trade – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts withing the meaning of section 345(1)(c) as read with section 344(f) of the Companies Act, 61 of 1973 and is accordingly liable to be wound up”.

[33] The respondent later attached a portion of its unaudited financial statements for the year ending 28 February 2022 and a balance sheet for 28 February 2023 in support of an allegation that it is commercially solvent and able to pay its debts. This it states without illustrating under oath that it could meet its liabilities in the ordinary course and notwithstanding the fact that it, according to

⁴ See **Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC)** at par 53.

⁵ 1993 (4) SA 436 (C) at pg 440.

the financial documents, had accumulated losses in 2022 and 2023. The respondent relied heavily on the value of its liquid assets.⁶

[34] The applicant correctly raised concern of the veracity and weight of a mere solvency letter merely signed by one Jannis Basson [Mr Basson] of Jabfin Incorporated. Mr Basson's confirmation that the respondent was in a sound financial position was not qualified under oath nor made with reference to any particularity or empirical data. The confirmation was qualified in that it was based on an assumption that the shareholder loans would not accrue interest and that there were no fixed repayment terms. It was on the acceptance of such assumption that Mr Basson excluded the shareholder's loans from the determination of the respondent's solvency. Without evidence in support thereof that such assumption was supported by the shareholders, renders the confirmation of solvency meaningless.

[35] Furthermore, at the stage the respondent filed a portion of its financial records, dealt with above, no confirmatory affidavit was filed by Mr Basson, the respondent's accountant, this omission notwithstanding the respondent's undertaking that it would be confirmed under oath stated that such confirmatory affidavit would be filed before the hearing of this application. The incomplete, unaudited annual financial statements were met with an application in terms of rule 35(12) in July 2023. No confirmatory affidavit was uploaded or pointed out to this Court in argument, nor in the heads of argument and therefore no evidence from the respondent's accountant has been properly placed before this Court to confirm the latter. Having regard to all the evidence provided to support the respondent's contention that it is commercially solvent, no factual basis nor support thereof with any form of particularity has been provided to suggest that the respondent is commercially solvent warranting the exercise of this Court's discretion in its favour. Nor, for that matter, that the deeming provision under section 345 of the Act, upon which the applicant relies, should not prevail.

⁶ **Murray N.O and Others v African Global Holdings (Pty) Ltd and Others** 2020 (2) SA 93 (SCA) at par 29; **Maverick Trading 1581 CC v Oasys Innovations (Pty) Ltd** 2016 JDR 0898 (WCC) at par 54.

[36] Having regard to the evidence this Court is unable to determine whether the respondent on the version it has presented is commercially solvent and as such does not consider it as a factor⁷ for consideration in favour of the respondent.

JUST AND EQUITABLE GROUNDS

[37] The applicant although raising just and equitable has not specifically dealt with the grounds upon which a court should put any weight. It neither was advanced in argument and as such the invitation by the respondent's counsel of the matter of Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd,⁸ that the purpose of the insertion of just and equitable as appears in the Act has not quite been appreciated and dealt with adequately and properly in this application by the applicant.

[38] Accepting that the applicant is a creditor and applying the Badenhorst principle, the respondent's indebtedness has been *prima facie* established by the applicant, the respondent not discharging its onus to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds. The remaining requirements at the provisions stage are established on a balance of probabilities with reference to the affidavits filed.

[39] No dispute lies as to the award for costs if this Court should find in favour of the applicant and as such costs to be costs in the liquidation.

[40] The following order:

1. The respondent is placed under provisional liquidation in the hands of the Master of the above Honourable Court.
2. A rule *nisi* is hereby issued, returnable on 24 February 2025, calling upon the respondent and all interested parties, if any, to show cause

⁷ Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Limited), 2014 (2) SA 518 (SCA).

⁸ 1985 (2) SA 345 (W) at 349E-F.

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Date of judgment:

25 September 2024