



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: D8414/2020

In the matter between:

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD

APPLICANT

and

HULK HAULERS (PTY) LIMITED

RESPONDENT

This judgment was handed down electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be 9h30 on 30 August 2024.

ORDER

The following order is issued:

1. The rule nisi issued on 28 October 2021 is confirmed.
2. The respondent is placed under final liquidation.
3. The costs of the application and the interlocutory application are to be costs in the liquidation.

JUDGMENT

MOODLEY J:

[1] In this application which served before me on the opposed motion roll, the applicant, Scania Finance Southern Africa (Pty) Ltd, seeks an order placing the respondent, Hulk Haulers (Pty) Limited, under final liquidation. The order placing the respondent under a provisional liquidation order was granted by Shapiro AJ on 28 October 2021. The applicant has complied with the terms of the provisional order. The respondent opposes this application, as it did the application to place it under provisional liquidation, on several grounds. The main grounds of its opposition are that the applicant's claim against the respondent is not a liquid claim and is disputed on bona fide and reasonable grounds.

Factual matrix

[2] It is common cause that the parties concluded a financial lease agreement on 22 June 2017, which together with the transaction schedule, the standard general terms and conditions and other addendums thereto are referred to as 'the agreement'. In terms of the agreement, the respondent leased from the applicant a vehicle described as 'SCANIA 2017 Scania R460 LA 6x4 MSZ' ('the vehicle'). Under the general terms and conditions upon which the vehicle was leased ('GTC'), specifically clause 18 thereof, the ownership of the vehicle remained with the applicant and the respondent acquired the right to possess the vehicle while the agreement was in force. Clause 17 of the GTC provided that the right to retain the vehicle 'is limited on a month to month basis and subject thereto that the Lessee pays its monthly rentals'. Clause 19 of the GTC provided that in the event of termination of the agreement (even if disputed) the respondent no longer had a right to possession of the vehicle. The respondent further undertook to pay punctually to the applicant the amounts specified in the contract schedule for the use of the vehicle, in consecutive monthly payments for a period of 48 months, and agreed that it would not be entitled to withhold any payment if the vehicle was defective, damaged or could not be used or operated (clauses 29 and 31 of the GTC). In the event of a material breach of the agreement by the respondent, the respondent accepted liability inter alia, for "an amount equal to the amounts that would be payable for the unexpired term of the lease as liquidated damages" (clause 99(c) of the GTC).

[3] It is further common cause that the vehicle was supplied by Scania South Africa (Pty) Ltd as recorded on the transaction schedule and tax invoice signed by the

respondent's sole director Kiranchand Sivraj, on 19 June 2017. In this document (annexure "FA2" to the founding affidavit) the respondent confirmed as follows:

'...that it understands that repair and maintenance will be the obligation of Scania South Africa (Pty) Ltd (registration number 1995/001275/07) ...and that it shall not be entitled to withhold any payments due to Scania as a consequence of any dispute with Scania South Africa (Pty) Ltd.'

The respondent received delivery of the vehicle on 21 June 2017 and proceeded to trade with the vehicle.

[4] It is also common cause that the respondent failed to effect payments timeously and in terms of the agreement, specifically the instalments for December 2018 and January 2019. On the instructions of the applicant, its attorneys dispatched an email dated 11 January 2019, requesting the respondent to pay the arrear amount of R52 679.46 and to furnish its bank details and certain other financial information. The applicant's attorney dispatched a further email on 28 January 2019 requesting payment of the arrear amount of R99 444.94 and the financial information it had requested, which the respondent had failed to furnish. The respondent responded to the aforesaid email by an email dated 30 January 2019, in which it admitted that it was unable to pay the arrears for those two months and requested a reduction in the monthly payments as set out in the agreement. It also complained that the vehicle was beset with poor performance and defects which affected its ability to comply with its payment obligations. At that date, the respondent was in default of its obligations under the agreement and had failed to remedy its breaches by failing to pay the arrear amounts and to furnish the financial information reflecting the current financial status of the respondent, as it was obliged to under clause 24 of the GTC.

[5] Relying on this default and the respondent's email dated 30 January 2019, the applicant issued a notice of termination of the agreement dated 30 January 2019, in which it demanded return of the vehicle. The amount owing was reflected on the termination notice as R1 474 735.62. The applicant's credit risk manager subsequently issued a certificate of balance dated 10 May 2019, certifying that the respondent was indebted to the applicant in the sum of R1 474 735.62 together with interest thereon to date of final payment.

[6] Subsequently, the statutory demand in terms of s 345(1)(a) of the Companies Act¹ (“the Act”) dated 7 October 2020 was served by the Sheriff on the respondent at its registered address by being placed in the post box on the property. The notice recorded the respondent’s indebtedness as being the sum of R1 628 356.87, ‘being the outstanding amount in respect of the unexpired term of the now terminated financial lease agreement...’. Relying on s 344(f) read with ss 345(1)(a) and (c) of the Act, on 20 November 2020 the applicant launched the application to place the respondent under provisional liquidation, averring that the respondent is unable to pay its debts as when such debts fall due and that the respondent is insolvent. The application was served on the respondent at its registered address on 3 December 2020.

Litigation history

[7] The respondent opposed the application. In its answering affidavit, it averred firstly that the service of the s 345(1)(a) notice was non-compliant with the rules for service of the notice and secondly that the applicant had failed to comply with the provisions of ss 129(1) and 131 of the National Credit Act (“the NCA”).² The third ground of opposition was that the creditor’s claim must be a liquidated debt viz that the amount must be fixed and determined. The respondent pointed out that differing amounts had been claimed as owing by the respondent in the certificate of balance dated 10 May 2019, the s 345(1)(a) notice dated 7 October 2020, the letter dated 28 January 2019 from the applicant’s attorneys recording the arrears, and the statement dated 31 January 2019. Relying on these ‘discrepancies’, the respondent asserted that it had established that the debt was not a liquidated debt and not due and payable, and that the application for liquidation must fail.

[8] In its replying affidavit, the applicant submitted that the service had been properly effected by the Sheriff as provided for in the Uniform rules, that the registered address was not disputed by the respondent, and that the NCA was not applicable to the agreement. The applicant furnished an updated certificate of balance dated 27 July 2021, which recorded the indebtedness of the respondent as being the amount

¹ Companies Act 61 of 1973.

² National Credit Act 34 of 2005.

R783 440.40. The applicant submitted that the respondent had admitted in writing that it is indebted to the applicant in a sum not less than R100, that the balance due has not been paid and that the respondent had presented no credible evidence that it was able to pay its debts as and when they arise or the amount that had become payable upon the lawful termination of the agreement.

[9] On 28 October 2021 Shapiro AJ issued the order placing the respondent under provisional liquidation, with a return date of 4 February 2022. On 4 February 2022 the rule nisi was extended to 14 March 2022, with the respondent directed to deliver a further answering affidavit by 11 February 2022 and to pay the wasted costs occasioned by the adjournment. The respondent however only delivered its answering affidavit on 2 March 2022, which resulted in the matter being adjourned to 26 April 2022 with the rule extended to that date.

[10] The respondent only delivered its further answering affidavit ("FAA") deposited on 2 March 2022, in which it raised new grounds of opposition to a final liquidation order, although it alleged that it was still disputing the applicant's claim on bona fide and reasonable grounds. The applicant filed a replying affidavit in which it responded to the issues raised by the respondent.

[11] The matter was then argued on 14 March 2023 before me by Mr *Pitman* who appeared for the applicant, and Mr *Aboobaker SC*, assisted by Mr *Houston*, who appeared for the respondent, whereafter I reserved judgment. Before the judgment could be delivered, on 17 May 2023, the respondent delivered an application to file a further affidavit. This led to a flurry of correspondence which delayed the finalisation of the matter. Eventually pursuant to my directions, the applicant filed an opposing affidavit, and the respondent delivered its reply. The application to file a further affidavit was argued on 22 September 2023, and judgment reserved.

Application to file a further affidavit

[12] It appears appropriate to deal at this stage with the application to file a further affidavit on 17 May 2023 by the respondent, approximately two months after the matter

was argued and judgment reserved. The application was opposed by the applicant. The parties are referred to as they are in the main application. It is also appropriate to note that the respondent had filed a FAA after the granting of the provisional order without the leave of the court. It merely submitted that the provisional order, which called upon it to show cause on the return date as to why a final order should not be granted, entitled it as a matter of right to deliver a FAA. Leave was requested from the court to deliver the affidavit in the interests of justice, in the event that the respondent was wrong.

[13] On receipt of the FAA, the applicant filed a further replying affidavit (“FRA”) in which it took issue not with the filing of the FAA per se but with the late filing thereof without an application for condonation. The applicant thereafter responded to the issues raised in the FAA. When the matter served before me on 14 March 2023, I deemed it expedient to allow the further affidavits, despite the lack of an application for condonation, especially as there was no material prejudice to the applicant who had already delivered a FRA, and it appeared to be in the interests of justice to allow the parties to ventilate the issues more fully. The matter was thereafter argued at some length by Mr *Aboobaker* in particular.

[14] As already noted the application to file a FAA arrived some two months later, and was eventually heard on 22 September 2023, by which stage I had already retired from active service. Both parties contributed to the delay before the papers were complete and a date for the application to be heard could be arranged.

[15] The salient reasons offered by the respondent as to why it should be permitted to file a third affidavit at this stage were prefaced by the following somewhat surprising statements:

‘8.

At the hearing of the 24th February 2023, it became apparent for the first time during the course of argument that the possibility of the court granting a final liquidation order against the Respondent could not be ruled out...

...

10.

However, the Respondent wishes to take no chances and is not prepared to take the risk, however small, that a liquidation order may be granted...

...

12.

Given this dilemma, I have been advised by my legal advisors that a liquidation order can be avoided if the Respondent tenders payment to the Applicant on a without prejudice basis and subject to the Respondent's right to reclaim return of the monies paid if the liquidation order is refused on the merits whether in this court or an appeal.

13.

...The tender of payment as described in paragraph 12 hereof ...has the effect of precluding the court from granting an order of liquidation.

14.

I am advised that once provision has been made for the payment of the debt claimed by the Applicant in this way, there is very little room for a liquidation order to be granted.

15.

Clearly, what the Applicant is trying to do is enforce payment of the debt which it alleges is due to it. Once the debt is discharged, the liquidation order, I respectfully submit, cannot be granted.'

[16] These convoluted submissions are arrogant and, in my view, undermine the assertion by the respondent that it is bona fide disputing its indebtedness to the applicant. I am further compelled to note my displeasure at the following statements by the respondent in its affidavit:

'43.

Furthermore, the fact that the court even entertained the possibility of liquidating the Respondent in the course of argument compelled the Respondent to take the most cautious approach available. Prior to that hearing, the legal representatives of the Respondent were of the view, for various reasons advanced in the Heads of Argument submitted on behalf of the Respondent and in the affidavits before the court that a proper case had not been made out for a liquidation order against the Respondent.'

[17] During argument I engaged with both counsel, and more specifically on submissions advanced by them which required clarification and the weight of authority, as is incumbent on a presiding judge. To this end, I engaged at some length with Mr *Aboobaker* on his contention that the applicant's claim was not a liquid claim as contemplated by the deeming provisions of s 345(1)(a) of the Act, and that as the

applicant had therefore not established a debt due thereby discharging the onus on it, there was no onus on the respondent to show that it disputed the applicant's claim on bona fide and reasonable grounds. To criticize the court for having 'even entertained the possibility of liquidating the respondent' is not merely unwarranted but arrogant, disrespectful and reprehensible verging on contempt for the court. In my view an apology for such disrespect ought to have been made to the court, prior to the commencement of address on the merits.

[18] The respondent asserts further that the loan advanced by applicant is void and unenforceable as it contravenes "s 83 of the Credit Agreements Act 25 of 2004".³ The respondent also invokes the defence of reckless credit as contemplated in s 80(1)(a) or (b) of the NCA.

[19] In its answering affidavit, the applicant contends that the respondent is attempting to change its earlier versions and that it does not explain why the application will not be prejudicial to the applicant, particularly as it has delayed the finalisation of the liquidation proceedings. The applicant also points out that the information the respondent declares is new evidence existed prior to the matter being argued on 14 March 2023. The applicant thereafter proceeds to respond to the issues raised by the respondent.

Legal principles

[20] In *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another*⁴ the Supreme Court of Appeal ('the SCA') held:

'[10] ... Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent in application proceedings, even if opposed, is that it can lead to a speedy and efficient adjudication and resolution of the disputes between parties. Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets. It follows thus that great care must be taken to fully set

³ Act 25 of 2004 is actually the Public Audit Act.

⁴ *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA).

out the case of a party on whose behalf an affidavit is filed. It is therefore not surprising that rule 6(5)(e) provides that further affidavits may only be allowed at the discretion of the court.

[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.

[12] This court stated in *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A)* at 660D – H that:

“It is in the interests of the administration of justice that the well known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. ... the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.”
(Footnotes and further citations omitted.)

[21] In *Afric Oil (Pty) Ltd v Ramadaan Investments CC*,⁵ Moleko J stated:

‘Normally in motion proceedings three sets of affidavits are allowed and no further affidavits may be filed without leave of Court. Such leave is in the discretion of the Court and such discretion is to be exercised judicially upon consideration of the facts in each case.

In Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* at 359 it is stated that leave of Court will only be granted in special circumstances or if the Court considers such a course advisable. Special circumstances exist where something unexpected or something new emerges from applicant's replying affidavit. There must be a satisfactory explanation which negatives *mala fide* as to the reason why the information was not placed before the court at an earlier stage.’

⁵ *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38H-39A.

[22] In *Dawood v Mahomed*⁶ the court held:

‘Whilst in no way seeking to detract from the necessity for rules and the proper observance thereof it remains the fundamental task of the Court to attempt to adjudicate upon the real issues between the parties rather than to allow itself to be diverted from that course by technicalities which would have the effect of precluding a full ascertainment of all facts relevant to the issues in dispute.’

Discussion

[23] It is necessary to note that there was no objection by the parties or their counsel to the court ruling on this application and delivering judgment in the main application at the same time, because there would be no prejudice to the applicant even if the application were to be granted and the further (third) affidavit be allowed, as the applicant had responded in detail to issues raised therein. I also remained mindful that the respondent already had been afforded the indulgence of the FAA being allowed, and that the respondent could have requested the information pertaining to the alleged remaining indebtedness long before it allegedly became conscious of the ‘possibility’ that the final liquidation order may be granted.

[24] Nevertheless, having perused the application papers and considered the arguments advanced by counsel, and exercising my discretion judicially in the light of the comments in *Dawood v Mohamed* quoted above, I have determined that it is in the interests of both parties and in the interests of justice that the third set of affidavits be allowed. In my view, the explanation offered by the applicant as to how the amount of R783 440.40 was computed and content of the documents annexed to the respondent’s affidavit which support the explanation, are pertinent to the onus that the applicant has to discharge, and also to the argument advanced on behalf of the respondent that the debt was illiquid and not easily ascertainable. I shall revert to the significance of the contents of these affidavits in due course.

The law and legal principles relevant to an application for a final winding-up

[25] The applicant relies on s 344(f) of the Act read with s 345(1)(a) and (c) thereof. Section 344(f) of the Act states that a company may be wound up by the court if ‘the

⁶ *Dawood v Mahomed* 1979 (2) SA 361 (D) at 365G-H.

company is unable to pay its debts as described in section 345'. Section 345(1) sets out three circumstances in which a company 'shall be deemed to be unable to pay its debts'. The applicant relies on the respondent's non-payment in response to a statutory demand and actual or proven inability to pay debts. The relevant portions of s 345(1) of the Act read:

'(1) a company or body shall be deemed to be unable to pay its debts if-

(a) a creditor, be cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due;

(ii) ...

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

...

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

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

[26] For the purposes of s 344(f) of the Act, it is not necessary to prove actual insolvency. In *Standard Bank of South Africa v R-Bay Logistics CC*,⁷ the court held:

'[27] ...if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a court to find that the required case under s 344(f) has been proved...'

Section 345(1)(a) provides that the claim must be 'then due', which means it must be 'due and payable'.⁸

⁷ *Standard Bank of South Africa v R-Bay Logistics CC* 2013 (2) SA 295 (KZD).

⁸ *GATX-Fuller v Shepherd and Shepherd Inc* 1984 (3) SA 48 (W) at 52H-I.

[27] Section 345(1) of the Act is referred to as ‘the deeming provision’ because it provides that a company shall be deemed to be unable to pay its debts on non-payment in response to the statutory demand. However, the deeming provision is rebuttable.⁹ A company should not be deemed to be unable to pay its debts merely because a proven claim has not been paid or secured. As stated by Rogers J in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another*:¹⁰

‘[15] ...As to statutory demand, a company is not deemed to be unable to pay its debts merely because an established claim has not been paid or secured; what must be shown is that the company has “neglected” to pay or secure the claim. The English cases hold that the word “neglected” is not apt to describe a refusal to pay where the claim is bona fide disputed on some substantial ground.’

[28] A company which is commercially deemed to be insolvent is not barred from raising a defence if it is bona fide and based on reasonable grounds. Therefore, despite the deeming provision, evidence that the company is commercially solvent may sustain the argument that the company’s failure to pay is attributable to a bona fide and genuine dispute of the claim, even though the court may find that the grounds of dispute are ill-founded. In *Orestisolve*¹¹ Rogers J held that the deeming effect may be neutralised by the company’s refusal to make payment in response to statutory demand, particularly in conjunction with other circumstances, providing a basis for the court to exercise its discretion against liquidation.

[29] Whether a company is able or not to pay its debts, the liquidation proceedings are not meant for the enforcement of a debt that the company disputes on bona fide and reasonable grounds (‘the *Badenhorst* rule’).¹² When a provisional order is sought, if the applicant establishes the indebtedness of the company prima facie, the onus is on the company to show that it is bona fide disputed on reasonable grounds.¹³

⁹ *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) at 330H-331F.

¹⁰ *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC).

¹¹ *Ibid* paras 16 and 21.

¹² *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348C.

¹³ *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D-219C.

However when a final order is sought, the same test cannot be applied. As Rogers J held in *Orestisolve*:

[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the *Plascon-Evans* rule...

[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the *Badenhorst* rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the applicant...

[11] If, on the other hand, and with due regard to the application of the *Plascon-Evans* rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's claim, there seems to be limited scope for finding that the debt is nevertheless bona fide disputed on reasonable grounds...'

[30] Rogers J stated further:

[67] ...Bona fides is a question of fact. At the stage of a final order, it must be assessed in accordance with the *Plascon-Evans* rule. Even though the onus on a particular issue in motion proceedings might rest on the respondent, this does not reverse the operation of the *Plascon-Evans* rule...And bona fides, in the context of the *Badenhorst* rule, does not in my view require that the company should hold a belief that at trial its defence to the claim would definitely succeed or even be more likely than not to succeed. It would be sufficient, I think, that the company genuinely wishes to contest the claim and believes it has reasonable prospects of success.'

[31] The *Plascon-Evans* rule states:¹⁴

'where an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.'

¹⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12

[32] In *African Congress for Transformation v Electoral Commission of South Africa and related matters*¹⁵ the Constitutional Court per Majiedt J writing for the majority, confirmed that:

‘[93] The approach to resolve disputes of fact on the papers is well-established. Elaborating on the well-known *Plascon-Evans* approach, the Supreme Court of Appeal in *Wightman* stated-

“A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the [*Plascon-Evans*] test is satisfied.”

...

[95] Motion proceedings are unsuitable to decide probabilities. In instances where final relief is sought, motion proceedings are aimed at resolving issues of law based on common cause facts. And where disputes of fact arise, absent a referral for oral evidence, the *Plascon-Evans* approach, as amplified in *Wightman*, must be employed.’ (Footnotes omitted.)

[33] Therefore if the court finds that a genuine dispute of fact exists regarding the existence of the applicant's claim at a final liquidation stage, and that the respondent disputes liability on *bona fide* and reasonable grounds, a final winding-up order should be refused.¹⁶ Finally, irrespective of the ground upon which an application for winding-up is brought, the court has a discretion whether or not to grant a winding-up order. The court's discretion has to be exercised judicially mindful of its inherent jurisdiction to prevent abuse of its processes.

¹⁵ *African Congress for Transformation v Electoral Commission of South Africa and related matters* 2024 (8) BCLR 987 (CC).

¹⁶ *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) at 329.

[34] A final winding-up order may be refused if special circumstances exist; such special circumstances include the solvency of the company. Where a company has not discharged its debts, the court exercises a narrow discretion when determining a liquidation application. In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*¹⁷ the SCA held:

‘[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money - and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets...’ (Footnote omitted.)

[35] Similarly in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd*,¹⁸ the SCA reiterated the principle that, ‘generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt’¹⁹ and that ‘in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a “very narrow one” that is rarely exercised and then in special or unusual circumstances only’.²⁰ The court held further that ‘...the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one’.²¹

Discussion

[36] Deriving from the legal principles as set out above, the main issues for determination by this court are whether the applicant's claim is for a liquidated sum and whether the respondent has raised genuine disputes of fact that undermine the applicant's claim of its indebtedness.

¹⁷ *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA).

¹⁸ *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA).

¹⁹ *Ibid* para 12.

²⁰ *Ibid*.

²¹ *Ibid* para 13.

Is the applicant's claim a liquidated debt?

[37] Mr *Aboobaker* contended that the applicant cannot rely on the provisions of s 345(1)(a) of the Act as its claim is not for a liquidated sum. It is not in dispute that 'then due' as contemplated in s 345(1)(a) and 'due and payable' can only be in respect of a liquid claim or a liquidated amount of money. The respondent has raised and developed the same contention in all three of its affidavits. The applicant has responded in each of its affidavits to the respondent's contentions and persisted that the claim is not only a liquidated debt, but it is a creditor of the respondent in an amount in excess of R100 and therefore has the *locus standi* to bring liquidation proceedings.

[38] The relevant legal principles and test to be applied in the determination of whether a claim is for a liquidated debt are as follows:

(a) In *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*²² Boshoff J held that:

'A debt must be liquid in the sense that it is based on a liquid document or is admitted or its money value has been ascertained, or in the sense that it is capable of prompt ascertainment. The decision as to whether a debt is capable of speedy ascertainment is a matter left to the discretion of the individual Judge in each particular case.'

(b) In *Botha v W Swanson and Company (Pty) Ltd*²³ Corbett J describes the test for liquidity of a claim as follows:

'only claims which are so expressed that the ascertainment of the amount is a mere matter of calculation. To this should, naturally, be added claims based upon an obligation to pay an agreed sum of money.'

(c) In determining the issue of liquidity, the court must consider the submissions in the affidavits of both parties.²⁴ If, from the defence disclosed, it appears to the court that proof of the claim may be protracted and difficult rather than prompt, this is a factor which may be taken into account in deciding whether or not a claim is liquidated.²⁵

²² *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) at 738E-F.

²³ *Botha v W Swanson and Company (Pty) Ltd* 1968 (2) PH F85 (CPD).

²⁴ [2012] ZANWHC 52 at para 26 "The Court must not look only at the summons in deciding whether a claim is for a liquidated amount of money but the opposing affidavit must be taken into account."

²⁵ *Ibid* at 544F-G.

[39] In its founding affidavit, the applicant stated that the respondent was indebted to it in the amount of R1 474 735.62 as at 30 January 2019 in respect of the unexpired term of the terminated agreement. It is not in dispute that at that date the vehicle had not yet been recovered by the applicant nor had it been sold to mitigate the respondent's indebtedness. The respondent contended that when the vehicle was recovered in June 2019, its value was R1 230 940.26. It alleged that the applicant had retained possession of the vehicle and had not leased or sold it and credited any income or proceeds to the respondent's account. It alleged further that the vehicle has been used by 'unknown third parties' which would have generated an income, and there had been no accounting by the applicant in respect thereof. The respondent did not provide a valuation of the vehicle, nor did it provide any admissible evidence or corroboration for its allegations of unauthorised use, or any calculations in an endeavour to demonstrate that the applicant's claim was inflated. Further it alleged that there was no provision for the calculation of damages in the agreement and therefore the claim was not a liquidated amount.

[40] In its replying affidavit, the applicant responded that it was only upon the finalisation of the proceedings in the Verulam Magistrates' Court, pending which the vehicle was in storage, that the vehicle was sold and the proceeds applied to the amount owing by the respondent. The updated certificate of balance dated 27 July 2021, recorded the indebtedness of the respondent as being the amount R783 440.40. The applicant pertinently submitted that the respondent had admitted in writing that it is indebted to the applicant in a sum not less than R100, that the balance due has not been paid and that the respondent had presented no credible evidence, such as bank or financial statements or management accounts, that it was able to pay its debts as and when they arise or the amount that had become payable upon the lawful termination of the agreement. At this stage the applicant did not provide any calculations or breakdown as to how the reduced claim had been calculated. However, clause 81 of the GTC provides for the market valuation of the goods by a person appointed at the discretion of the applicant. The clause also provides that the applicant may 'sell or lease the Goods on such terms and conditions as the Lessor deems fit and the net amount realised on such sale shall be deemed to be the market value of the Goods at the date of such sale'.

[41] In its FAA deposed to on 2 March 2022, the respondent states that the true nature of the applicant's claim is 'contractual damages' and the reliance on a certificate of balance to assess the applicant's claim is inappropriate. Clause 80 of the GTC provides that a certificate of indebtedness by a duly authorised representative of the applicant, shall be prima facie evidence of the respondent's indebtedness to the applicant for the purpose of any legal proceedings that may be instituted against the respondent. The respondent repeats its allegations about the sale of the vehicle and the use of the vehicle, and again fails to provide any corroboration therefor.

[42] In its reply the applicant elucidates on how the indebtedness of the respondent was calculated, which included both the arrears at date of cancellation as well the amount due for the unexpired term of the agreement. It states that the details of the sale of the vehicle on 3 June 2019 for an amount of R1 230 940.29 to Scania South Africa are reflected on the VAT invoice which is annexed to the respondent's affidavit as annexure "RA7". The proceeds of the sale were credited to the respondent's account, leaving a balance of R783 440.40 (as recorded in the certificate of balance dated 27 July 2021). The applicant contends that the respondent remains indebted to it despite the mitigation through the application of the proceeds of the sale.

[43] In its third affidavit, the respondent states that it deemed it necessary to deliver a further affidavit in order to place evidence before the court which establishes that the debt claimed by the applicant is illiquid and not capable of ascertainment. It alleges that consequently it is unable to discharge the debt as claimed by the applicant as the amount claimed has been exaggerated and incorrectly calculated. The respondent relies on the correspondence between the respective attorneys of the parties annexed to its affidavit to assert that the claim is illiquid.

[44] As noted above, the applicant in its opposing affidavit, points out that the information the respondent declares is new evidence, existed prior to the matter being argued on 14 March 2023. In response to the allegations about the applicant's inability to determine the amount still owed by the respondent, the applicant sets out in detail how the amount of R783 440.40 is arrived at. The applicant admits that it had erred in stating that the vehicle had been sold for R1 230 940.29 as reflected in annexure "RA7" in its second replying affidavit. The vehicle had been sold for R720 000

(excluding VAT) and the correct selling price was in fact credited to the respondent's account. This was reflected in the reconciliation provided to the respondent's attorneys under cover of the letter dated 5 April 2023 from the applicant's attorneys, which also provided the statements and calculations which established that the indebtedness of the respondent was the sum of R783 440.40, as reflected in the certificate of balance dated 27 July 2021 (annexure "RA1").

[45] The applicant explains that annexure "RA7" was a document that the applicant was obliged to prepare in terms of s 20(3) of the Value-Added Tax Act ("VAT Act"),²⁶ which reflects the value of the outstanding balance plus VAT on the date of repossession. In terms of the VAT Act this document is deemed to be a tax invoice supplied by the respondent, and because the agreement was terminated, the applicant was obliged to prepare the document to account to the Receiver of Revenue for the VAT due in respect of the unexpired term of the terminated lease.

[46] In *Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial*²⁷ Mr Aboobaker successfully advanced a similar argument before Ndlovu J, who found that the claim in that matter was not "easily determinable" and "therefore not a claim for a liquidated amount sounding in money".²⁸ The facts in this matter are however clearly distinguishable. Having considered the documents which the respondent attached to its third affidavit, the founding documents, and the applicant's error in respect of the selling price of the vehicle, which did not alter the amount in which the respondent remains indebted to the applicant per the amended certificate of balance, I am satisfied that the amount of claim is properly vouched and substantiated.

[47] I have little doubt that the claim is a liquidated debt sounding in money – the agreement sets out all the costs to be included in the calculation of the claim, including insurance, recovery costs, the value of the unexpired term of the lease as well as the arrears and interest to date of payment. Therefore, the prompt ascertainment of the debt cannot be difficult to achieve. In the event that the respondent required the details of how the amount of R783 440.40 was computed it had ample opportunity to query

²⁶ Value-Added Tax Act 89 of 1991.

²⁷ *Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial* 2007 (6) SA 154 (D).

²⁸ *Ibid* para 33.

and clarify any discrepancies, alleged or real, with the applicant through its attorneys much earlier than it did.

[48] In my view, it is apparent that when the respondent became concerned about the possibility that the court may not agree with its counsel that the claim was not a liquidated claim, it called for the balance and then set about disputing the calculations despite the documents that the applicant supplied and relied on to substantiate its claim. This was clearly intended to sustain its contention that the debt was not capable of prompt ascertainment and therefore the applicant's claim was illiquid. In my view the respondent deliberately disputes the calculations without providing a sound basis therefor or providing sound and credible calculations of its own to also sustain its argument that the claim is not capable of easy ascertainment. I am satisfied that the ascertainment of the applicant's debt is merely a matter of calculation.

[49] The respondent's allegation that the plaintiff is trying to recover 'contractual damages' also seems intended to persuade the court that the claim is not liquidated as the term 'damages' does not usually denote a liquidated sum of money. However, I am unable to find any genuine disputes of fact on the issue of whether the claim is liquid in the aforesaid affidavits. I am unmoved by the respondent's strategy and am satisfied that the applicant has shown clearly that the debt is liquid and due and payable. Even if the legal costs component of the claim reflected in the letter dated 5 April 2023 from the applicant's attorneys is susceptible to taxation, the remaining amount is vastly in excess of R100. In my view the liquidity of the claim is disputed *mala fide*, and the allegations made by the respondent must be rejected as they are spurious and undermine its assertion that it is disputing the claim on bona fide and reasonable grounds. I am therefore satisfied that the applicant's claim is for a liquidated sum of money and that the applicant properly relies on s 345(1)(a) of the Act to assert its claim.

Is the claim disputed bona fide and on reasonable grounds?

[50] I turn now to the further disputes in the three sets of affidavits. The applicant has annexed to the founding affidavit the contractual documents which constituted the agreement which the parties concluded, describing it as 'a lease agreement in terms of which the respondent leased a vehicle from the applicant'. The respondent does not

dispute the nature of the agreement until his third answering affidavit when he describes the agreement as a loan agreement. The deponent to the respondent's affidavit and its sole shareholder, Mr Sivraj, is on his own version, an experienced businessman who in the course of his business utilises vehicles similar to that which he received from the applicant. The Windeed Company Report ("FA1") indicates he commenced business in 2011. Although Mr Sivraj does not state what the nature of the agreements were with the suppliers and/or financiers of the other vehicles, he must nevertheless be alive to the obligations he undertook when he entered into the agreement with the applicant. He signed all the transactional documents which set out clearly that the agreement is a financial lease. In fact, at the top of the first document, which is the transaction schedule and tax invoice, the nature of the agreement is reflected as 'Financial lease'.

[51] The respondent's further assertion that the loan advanced by applicant is void and unenforceable as it contravenes s 83 of the Credit Agreements Act, is properly countered by the applicant when it points out that the allegations in respect of the 'Credit Agreements Act' appear to be unfounded and unsupported and therefore should be disregarded. In fact there is no proper reliance on legislation that may be considered relevant to the respondent's defence.

[52] The respondent's allegation in its first affidavit that the applicant failed to comply with the NCA which was clearly ill-founded. The NCA only comes up again in its third affidavit when it invokes the defence of reckless credit as contemplated in s 80(1)(a) or (b) of the NCA. Despite Mr *Aboobaker's* argument that even if the NCA is not applicable to the agreement, the applicant can still be held accountable for reckless lending, I remain unpersuaded. The respondent, through Mr Sivraj, was fully apprised of its obligations, including its payment obligations and the consequences of default and material breach of the agreement. In signing the agreement voluntarily and without coercion (none is alleged), he accepted liability for compliance with the respondent's obligations.

[53] It is common cause that the respondent breached the agreement when it failed to pay the December 2028 and January 2019 instalments, and subsequently informed the applicant that it could not pay the monthly instalments. Although the respondent

seemed to suggest that it had the resources and liquidity to pay its debts but was unwilling to pay because of the disputes it had raised, the respondent did not resist the termination or return the vehicle or provide the financial information the applicant had requested and was entitled to. Such information may have sustained the respondent's claim that it was able to pay its debts and/or was solvent. The respondent also did not return the vehicle as it was obliged to, and the vehicle was repossessed almost six months later after the applicant resorted to litigation for its recovery.

[54] The respondent also alleged that the vehicle had been 'fraught with problems', and it was not fit for the purposes for which it was intended, thereby entitling the respondent to claim damages. It complained further that when the problems had been reported to the applicant, the applicant stated that Scania South Africa is a different entity. The applicant responded that it finances the transactions through which Scania vehicles are leased by its clients. It purchases the vehicles from Scania South Africa and leases them to the clients. It also pointed out pertinently and correctly that under the GTC, the respondent had waived any claim against the applicant in connection with the vehicle and Scania South Africa had provided the respondent with warranties for the vehicle. Not only did Mr Sivraj acknowledge by his signatures to the agreement that the repairs would be effected by Scania South Africa, the vehicle was in fact taken to Scania South Africa for repairs. Further with his acquired knowledge of financing vehicles Mr Sivraj must know the difference between an institution which leases a vehicle and that which effects repairs, and ought not to conflate the two, especially in the light of the waiver he signed.

[55] In the FAA deposed to on 2 March 2022, Mr Sivraj alleges that he was inveigled into purchasing the vehicle through representations made by employees of 'Scania Trucking', (that is Scania South Africa) and the applicant. He claims that at the time he had not drawn any distinction between the two entities, and that he was not aware when he signed the contract that the applicant was excluded from liability for any defects in the vehicle although it had 'purchased' the vehicle from Scania South Africa. He states that as the respondent was not the 'original purchaser of the vehicle', the warranty was not available to it or applicable to the vehicle which had been purchased in turn from the applicant. However, Mr Sivraj, confirms that the vehicle was left for repairs with Scania South Africa. He therefore made use of the warranty which he

denies was available to him. In my view Mr Sivraj relies on a disingenuous and opportunistic interpretation of the transactions and the terms of the warranty, which he accepted.

[56] The respondent asserts that as the applicant failed to comply with its contractual obligations, there was no obligation on it to pay the instalments due to the applicant. Further it has a substantial claim for damages suffered as a result of its inability to use the vehicle, as well as from the impact of the provisional liquidation order. The respondent claims further that the agreement is effectively nullified by a lack of consensus between the parties as it intended to enter into an instalment sale agreement and not a lease agreement. It claims that it has a substantial defence under the provisions of s 61 of the Consumer Protection Act,²⁹ as the vehicle was defective and unsafe. Again, there is nothing to sustain these bare allegations, or to controvert the applicant's assertion of a valid financial lease agreement concluded with the respondent.

[57] The respondent finally avers that it has never had a problem paying its debts and will produce "information of its ability to pay the amount outstanding to the applicant once the debt has been determined". This averment is contradictory to its own letter dated 30 January 2019 confirming that it was unable to pay the arrears or the instalments as they fell due. Further the respondent could have made a formal tender to show its bona fides and solvency, neither of which has materialised.

[58] In its reply the applicant points out correctly that the respondent has failed to provide documents supporting its averments in respect of its financial status or the other vehicles it allegedly purchased or the 'inherent' defects in the vehicle. The applicant explains that it is a registered credit provider and an in-house finance provider, and that it acquired the vehicle from Scania South Africa which is in the business of importation and the manufacture of Scania vehicles. The applicant and Scania South Africa are therefore separate and distinct entities with different directors although they have the same international shareholders. The applicant purchased the vehicle from Scania South Africa and then leased it to the respondent, who was fully

²⁹ Consumer Protection Act 68 of 2008.

apprised of and understood the nature of the agreement viz that it was a lease agreement. The applicant states that it has an agreement with Scania South Africa that vehicles which are returned to it are sold to Scania South Africa which mitigates damages, and the proceeds of the sale are credited to the respondent.

[59] I am unable to find any merit in the respondent's urging that the court should pierce the corporate veil as the two entities have an incestuous relationship as the respondent has failed to provide anything more than allegations of prejudice in support of its argument. I am in agreement with Mr *Pitman* that the agreement is a consensual one and the allegations of unconstitutionality and *contra bonos mores* are unfounded.

[60] Finally, the admission of the third affidavit has in fact redounded to the benefit of the applicant as it provided the documents to sustain the applicant's claim of a liquidated debt which is due and payable by the respondent. The respondent on the other hand has failed to secure or to tender the amount claimed and has failed to provide any documents to establish its commercial or factual solvency even on a prima facie level.

[61] In the premises I am satisfied that there is no genuine dispute of fact and that the respondent is not *bona fides* in its resistance to the application. Its conduct is merely dilatory and has prejudiced the rights of the applicant as a proven, bona fide creditor to apply for the final liquidation of the respondent.

Order

[62] The following order is issued:

1. The rule nisi issued on 28 October 2021 is confirmed.
2. The respondent is placed under final liquidation.
3. The costs of the application and the interlocutory application are to be costs in the liquidation.

MOODLEY J

Case information:

Dates of hearing: 14 March 2023 and 22 September 2023

Appearances

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