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REPUBLIC OF SOUTH AFRICA



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

CASE NR: 053561/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 13 FEBRUARY 2025

SIGNATURE:

In the matter between:

GERTRUIDA HENDRIKA COETZEE N.O

APPLICANT

and

SOLAR AFRICA ENERGY (PTY) LTD

RESPONDENT

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected 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 of the judgment is deemed to be 27 August 2025

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

1. This is an application wherein the Applicant seeks the compulsory winding-up of the Respondent on the basis that the Respondent is unable to pay its debts and that it is just and equitable to grant such an order. The Respondent is opposing the application. The court is required to determine whether there is a *prima facie* case for the winding up of the Respondent or whether the Respondent successfully raised a *bona fide* and reasonable dispute regarding the alleged indebtedness of the Respondent to the Trust, which the Applicant represents.
2. The following subsidiary issue also requires determination:
 - 2.1. Should condonation be granted for the late filing of the Applicant's Replying Affidavit and heads of argument?

B BACKGROUND FACTS

i) Common Cause Facts

3. The Applicant is Gertruida Hendrika Coetzee, the sole trustee of the Blue Horison Investment 63 Trust t/a Blue Horison Power (I[...]) (hereafter 'the Trust'). The Respondent is Solar Africa Energy (Pty) Ltd, a private company duly incorporated in terms of the South African company laws. On 27 March 2023, the Trust, represented by the Applicant, concluded several written Engineer, Procure, Construct Agreements with the Respondent. In terms of these agreements, the Respondent appointed the Trust to supply, construct, install, test, commission,

and maintain, where so appointed, solar facilities with specifications agreed to between the parties at different sites.

4. Among others, the material terms of the parties' agreements were that:

- 4.1. the Trust is appointed as an independent contractor and will provide all personnel, goods, consumables, services, facilities, supervision and administration, and other things, whether of a temporary or permanent nature, required by the design, execution, construction, completion of the works and remedying of defects, necessary for the property and complete performance and acceptance of the works;
- 4.2. the Trust was responsible for obtaining all approvals for connection of the facilities to the grid and to ensure that all works were carried out in terms of the planning permission, building permits, and relevant approvals;
- 4.3. the Trust was required to submit applications for payment to the Respondent's representative in line with the milestones set out in the payment schedules, wherein the works to which the application relates are specified and the sum that the Trust considers to be due and the basis upon which the sum is calculated are provided;
- 4.4. the due date for payment shall be the date on which an application for payment is received by the Respondent in respect of it, along with all supporting documentation, and the final date for payment shall be 30 working days thereafter;
- 4.5. the Trust is responsible for the design of the facilities. If errors, omissions, ambiguities, inconsistencies, inadequacies, or other defects are found in the facilities' design or the contractors' documents, they shall be corrected at the Trust's costs;

- 4.6. if any of the work or workmanship is found to be defective or otherwise not in accordance with the agreement, the Respondent may issue a written instruction to have the work remedied;
 - 4.7. if the works are shown to be incomplete or fail to meet the standard for completion, the Respondent shall issue a list for practical completion to the Trust, specifying the defects to be rectified and further works to be completed to reach practical completion;
 - 4.8. the Trust warranted that the facilities will be free from defects for a period stated in specific conditions following practical completion day;
 - 4.9. the Trust shall complete all works outstanding and listed in the list for completion within 14 days from the Respondent's instruction, unless the Trust can reasonably show that an extended period is required;
 - 4.10. if the Trust fails to remedy a defect or damage caused by the Trust within 14 days or such other extended period agreed with the Respondent, the Respondent may notify the Trust that it shall carry out the work, and the Respondent shall be entitled to recover all costs reasonably incurred by it in remedying the defect or damage from the Trust;
 - 4.11. the parties agreed that they will attempt to settle disputes amicably, failing which disputes shall be considered expert disputes and may be referred to an expert for determination;
 - 4.12. if an expert fails to assist the parties in resolving their dispute, such a dispute may be referred to arbitration.
5. The parties agreed that the contract sum payable to the Trust will be payable in interval milestone payments. Payment will be made in line with the work carried out by the Respondent as an independent contractor at the sites known as: C & R Boerdery situated at Farm Gibraltar in Mokopane Limpopo; Willie Becker situated at Farm Kraaifontein in Molemole Limpopo; Nooitgedacht situated at

Nooitgedacht Farm in Vredenburg Western Cape and LC Spitskop situated at Parklane.

ii) Applicant's Case

6. According to the Applicant, she has the authority to institute this application on behalf of the Trust through a resolution 'by the Trust'. The Respondent is the sole trustee of the Trust. The Trust and the Respondent entered into the Engineer, Procure, Construct Agreements during the so-called 'kick-off' meetings for the construction of the various structures and solar power plants in several sites referred to above in accordance with the designs and quotations as approved by the parties.
7. The Applicant alleges that the Trust completed the works at the abovementioned sites between August and November 2023. Thereafter, the Trust received a countersigned quality, testing, and inspection report in respect of Willie Bekker Boerdery, where the Respondent acknowledged and accepted the control of monitoring and measuring devices; civil, mechanical, electrical, and grounding works; control cable testing; installation resistance test; energy meter installations; as well as certificates of compliance.
8. However, the Trust did not receive the counter-signed reports in respect of C & R Boerdery, Nooitgedacht and LC Spitskopp. The Applicants contend that these projects ran concurrently, and the Respondent agreed to the reports, *albeit* not in writing. However, in terms of the Society of Automotive Engineers Standards ('SAES'), the signature of the Construction Manager in the employ of the Trust is sufficient confirmation that the sites adhered to these standards.
9. The Applicant contends that the Respondent failed to comply with its obligations in terms of the Engineer, Procure, Construct Agreements concluded by the parties. The Respondent failed to effect payments to the Trust for the work done at various sites where the Trust constructed solar plants and reached practical completion. In particular, the Respondent failed to pay: R 167 635.50 in respect of Willie Becker site; R 927 141.50 in respect of Nooitgedacht site; R 1 341

661.25 in respect of C & R Boerdery site; and R 357 006.00 in respect of LC Spitskop site. The Respondent owes the Trust an amount that exceeds R 100.00, which entitles the Applicant to apply to court for the Respondent's liquidation. It was argued on behalf of the Applicant that, despite the Respondent claiming to have paid all milestones except the final payment in respect to the C & R Boerdery site, no proof of payment was provided to this effect.

10. The Trust demanded payment of these amounts, which were due and owing, and the Respondent neglected to make payment. The Respondent also failed to secure or compound the amount to the Applicant's reasonable satisfaction. According to the Applicant, the Respondent raised unfounded disputes to avoid its obligation and liability to make payment to the Trust. The Respondent and its attorneys raised a fabricated and *mala fide* dispute. The Applicant alleges that even if a debt has been partially paid or disputed, a creditor retains the legal standing to bring a Liquidation application if the unpaid part of the liquidated debt exceeds R 100.00.
11. The dispute raised by the Respondent is not made in good faith and upon reasonable grounds. The Respondent must show that the entire indebtedness is disputed in good faith and on reasonable grounds. It was argued on behalf of the Applicant that if the Respondent genuinely and on bona fide and reasonable grounds disputed the indebtedness towards the Trust, the Respondent should have secured the outstanding amount by paying it into the Trust Account of its Attorneys, pending any arbitration proceedings to demonstrate its ability to pay.
12. On 26 October 2023, the Trust received a notice from the Respondent regarding the C & R Boerdery site, where it was stated that the Respondent identified certain design defects. This notice was followed by the Respondent's attorneys' letter, which alleged that the Trust was in contractual default because various design defects existed at the facility. In this notice, it was further alleged that the Trust failed to reach the practical completion deadline for the C & R Boerdery site. The Trust was informed that the Respondent invoked its step-in rights to assume and complete the work of the Trust at the site. There was a demand that the Trust should immediately end all works and transfer control thereof to the

Respondent. The Applicant disputes these allegations and claims that Respondent's sites are all fully operational and functioning. It was argued on behalf of the Applicant that the Respondent continues to draw income from these sites. Further, if there were defects as alleged, the Respondent would not be able to draw income from these sites.

13. The Applicant alleged that there were no defects in any of the works that the Trust did. The so-called 'defects' constitute additional work which were never part of any design specifications. These are the additional bracing that fell outside the Applicant's approved design specifications. All the Applicant's installations of the panels were done in accordance with the user manual. It was argued on behalf of the Applicant that while the Respondent claimed there were defects that it identified, it failed to demonstrate the nature of the defects and the cost of repairing the alleged damage. Even though the Respondent asserts that the works are defective, it continued to receive monthly payments from the clients for the completed solar power stations that the Trust constructed.
14. Had the works been defective as alleged, the Applicant would have remedied the works. The Respondent failed to provide proof that quotations were obtained for repairing or finalising the work undertaken by the Trust. This illustrates the lack of good faith in the dispute raised by the Respondent. There is no dispute about the indebtedness, and the allegation of defective works is a clear fabrication to attempt to create a dispute that does not exist.
15. The Respondent sent further notices of defects to the Trust concerning the Willie Bekker, LC Spitskop, and Nooitgedacht sites, followed by letters from the Respondent's attorneys alleging that the Trust was in contractual default due to various defects that existed in these sites and that the Trust failed to reach the practical completion deadlines. Concerning all these sites, it was alleged that a 1.6mm thick steel was used as opposed to a 3mm thick steel, which ought to have been used on these sites, and that the solar panel was not installed in accordance with the Original Equipment Manufacturer Installation Manual. Concerning the LC Spitskop, it was also alleged that the installed plant controller

was a deviation from the original submitted engineer pack. The Applicant disputes these allegations.

16.Regarding the Respondent's allegations, the Applicant contended that the intentions of the parties were at all material times to make use of 1.6mm thick bracing. The Respondent cannot use the fact that the Trust used a 1.6mm thick steel to show that the Trust breached its contractual obligations. Further, the Respondent's allegation that the monitoring system deviated from the original engineering pack is not relevant. This is because the monitoring system materially complies with the agreed-upon terms between the parties. The Respondent appointed a person to change the format in which information was displayed on the monitoring system to its satisfaction. Further, there is no merit in the allegation that the solar panels were installed in a manner that is inconsistent with the user manual.

17.It is further contended by the Applicant that the parties did not agree to the installation of the cross-bracing during any of the kick-off meetings. The designs of various projects, as agreed to by the parties, did not indicate that cross-bracing should be used as part of any structure to be erected by the Trust. The Trust is willing to install cross-bracing at the various sites upon acceptance of a quotation, which will be provided to the Respondent upon request. The solar panels installed were constructed in accordance with the specifications and relevant engineering standards. The Respondent requested a change in the format of the date produced by the system, which is for the Respondent's account.

18.On 19 January 2024, the Trust attorneys sent a 'section 345' demand to the Respondent's attorneys, where it was stated that despite the work having been completed and final certificates of completion having been issued, the Respondent failed or refused to make payments to the Trust. It was pointed out that the Respondent is indebted to the Trust for R 2 793 444.25 and that there could be no dispute over the amounts because they were agreed to in writing. It was argued on behalf of the Applicant that the court is not asked to make a finding that the Respondent is indebted to the Trust in this amount but to make a finding that the Respondent is unable to pay its debts. According to the Applicant,

the Respondent's grievance about the mounting structure does not hold water because the work done by the Trust was done in accordance with the design agreed to by the parties before the Trust undertook the building work.

19. The Applicant contended that the Respondent's allegations and threats do not detract from the fact that the amount demanded by the Trust remains due, owing, and payable. The allegations constitute nothing but an effort to create a dispute of fact to avoid payment of monies due to the Trust. The Respondent failed to set out the alleged dispute in full terms and did not identify payments that are specifically disputed. The Trust informed the Respondent's attorneys that there is no dispute regarding Willie Becker, C & R Boerdery, Nooitgedacht Safaris, and LC Spitskop CONTRACTS. As such, the Respondent is indebted to the Trust. The persistent failure to pay the amounts claimed constitutes a confirmation of the Respondent's insolvency. According to the Applicant, the Respondent is commercially and factually insolvent.
20. The Applicant contends that the Trust is entitled to investigate how the Respondent continues to trade while it is unable to pay its creditors. Liquidation proceedings will enable a liquidator to investigate the Respondent's affairs and collect any of the Respondent's outstanding debts. The liquidator will also locate assets belonging to the Respondent, which must be liquidated for the benefit of creditors. A bond of security will be given to the Master of this court, and notice will be given to the employees and unions operating within the Respondent's workplace (if any).
21. The Applicant denies that the Trust committed fraud and made fraudulent misrepresentations concerning the solar panels installed at the LC Spitskop and Boerdery sites as alleged by the Respondent. According to the Applicant, these allegations are unfounded, speculative, and amount to conjecture at best. The Applicant alleges that there has never been any form of fraudulent rebranding. Most importantly, there was no attempt by the Applicant to conceal the serial number of Longi Solar, which at all times remained clearly visible.

22. It was argued on behalf of the Applicant that the Respondent submitted financial statements which were outdated by more than two years. No efforts have been made to provide the court with updated statements for the years ending 2024 and 2025. If the latest financial statements are not available, it is not clear why management statements were not provided to the court.
23. The Applicant argued further that, on the Respondent's version, the Respondent is indebted to the Applicant for R 42 368.25 in respect of the C & R Boerdery site. In terms of the invoice dated 19 June 2023, the amount due on milestone 2.2 is R 324 823.25. The Respondent failed to pay the full amount in respect to this invoice. Only R 282 455.00 was paid. The difference between what was invoiced and paid remains unpaid and owing. On this version, the Respondent is the Trust's creditor in an amount exceeding R 100.00. It was argued that on this basis alone, the Applicant is entitled to a winding-up order as a matter of right. Once a milestone was achieved, payment became due. The Applicant alleged that failure to pay is demonstrative of the fact that the Respondent is unable to pay its debts timeously or at all. It is argued further that this demonstrates commercial insolvency.
24. With respect to factual insolvency, the Applicant alleged that the Respondent does not have a financially strong position. Although the Respondent states that its liabilities amount to R 242 886 276.00, this narrative fails to consider the non-current liabilities, which include asset appreciation right units, instalment sale agreements, and loan accounts. If these are considered, the actual liabilities of the Respondent amount to R 499 121 468.00. The Respondent suffered actual loss of R 8 211 578.00 for the financial year and the further net loss from its actual operating activities of R 110 458 181.00. The Respondent attempts to rely on factual insolvency while the financial statements actually portray a company operating at a severe loss. It was argued that the Respondent survives through loans from its shareholders.
25. According to the Applicant, the Court's discretion to refuse a winding-up order is very narrow where an unpaid creditor is seeking a winding-up order. It would cause commercial chaos to allow a Respondent to continue trading, where it

operates at a loss and has an unpaid creditor, solely because it has employees and future projects.

26. Finally, the Applicant sought condonation for the late filing of the Replying Affidavit. The basis of this application is that, despite being served with the answering affidavit on 1 July 2024, the Applicant was outside the country at the time the answering affidavit was served, attending to the education-related obligations of her daughter in the United States of America. She only consulted with her attorneys on 1 August 2024 after her return on 30 July 2024. Given the extensive documentation that had to be considered, the Replying Affidavit could only be finalized on 16 August 2024. The delay has been explained, and the Respondent has suffered no prejudice. It is in the interest of justice to grant condonation and for the Applicant's Replying Affidavit to be admitted. The Applicant also requested the court to condone her late filing of the Heads of Argument.

27. It was argued on behalf of the Applicant that the Respondent's contention that the arbitration clause in the underlying agreements precludes the Court's jurisdiction over the liquidation application is ill-founded. An arbitration agreement does not deprive a Court of its ordinary jurisdiction over the disputes which it encompasses. If the Respondent desires to utilise or to insist upon the usage of arbitration proceedings instead of Court proceedings, it should have lodged a substantive application for the requisite stay, or file a special plea asking for a stay in terms of the common law. The Respondent has not filed a substantive application but has taken a further step in these proceedings by delivering its answering affidavit. The arbitration clause is not applicable.

iii) Respondent's Case

28. The Respondent denies that the Applicant has the authority to institute this liquidation application. The Respondent further alleges that the parties are mandated to first attempt to settle any dispute through amicable negotiations, failing which their dispute should be referred to expert determination. If the latter fails, the matter may be referred to arbitration. The parties were bound to refer

their dispute to arbitration unless all the parties mutually consented to an alternative cause of action. The parties did not agree to forgo the arbitration proceedings. Nonetheless, the Respondent conceded in its supplementary heads of argument that, notwithstanding the arbitration clause, the court has jurisdiction to entertain this matter.

29. According to the Respondent, the parties signed different agreements for each site outlining the scope of the work, contract sums, and project timelines. Central to the agreements was the requirement that the Trust adhere to stringent design and construction standards, ensuring the safety, functionality, and durability of the installations. In addition to the sites that the Applicant mentioned, the parties also signed a separate contract in respect of Nesmarien site worth R 20 850 031.90. The Respondent alleges that the Applicant abandoned this site, leading the Respondent to exercise its step-in right.

30. The Respondent alleged that throughout the contracted projects, several significant issues arose that led to the deterioration of the parties' working relationship. The Respondent consistently raised concerns regarding the Trust's quality of work, adherence to design specifications, and the use of appropriate materials. According to the Respondent, once the design plans were accepted and approved, the Trust was obliged to commence with the works on several sites in accordance with the design specifications submitted. However, the Trust failed to do so, and it was alerted to the defects in 2023.

31. The Respondent further alleged that the Trust was also engaged in fraudulent activities, particularly at the LC Spitskop site. The fraud involved the rebranding of solar modules, where the Trust falsely misrepresented the supplier for the solar modules. The investigation initiated by the Respondent established that the serial numbers on the modules had been tampered with. The serial numbers affixed on the modules differed from those that were engraved on the glass surface.

32. It was also alleged that the Trust used substandard materials that did not meet the specifications outlined in the various Engineer, Procure, Construct

Agreements concluded by the parties. This included using incorrect structural materials and significant deviations from the approved design, leading to safety and performance concerns. This compromised the structural integrity and performance of the installations, particularly at the Nooitgedacht site.

33. According to the Respondent, the workmanship quality on all the sites was substandard with improper installations and connections that did not comply with the agreed standards, which led to various defects that remained unaddressed despite the Respondent's repeated requests for remediation. The Trust failed to achieve practical completion on any of the sites, leaving many concerns raised by the Respondent unresolved. The Respondent informed the Trust of all these concerns, and the Trust failed to take corrective measures.

34. In particular, it is contended further that the Respondent's inspection highlighted concerns about the thickness of the Cold-Formed Lipped Channels and the need for bracing. It was further pointed out that the contractor ought to have adhered to the original design work unless any changes were approved by the engineer. The Trust was also informed of the need for further bracing to meet the necessary standards for professional sign-off and immediate discussion to address the required modifications. The Trust failed to address these concerns. This led to the Respondent informing the Trust that the structural sign-off could not be provided because the design specifications were not followed.

35. The Respondent alleged further that on 28 October 2023, it issued formal defect notices regarding the Trust's work on the four sites mentioned in the Trust's application. In these notices, the Trust was notified that although the design specifications required a 3mm structure to be installed, the Trust utilised a structure between 0.6 to 1.8mm on-site. The deviation compromised the structural integrity of the installation and could lead to performance issues and safety concerns over time.

36. Further, the Trust installed modules that did not comply with the specifications of the Original Equipment Manufacturer. The poor installation practice jeopardized the warranty of the modules and raised concerns about the reliability and

efficiency of the entire system. The plant controllers installed at the LC Spitskop, C & R Boedery, and Nooitgedacht sites did not match the specifications outlined in the accepted engineering pack.

37. At the Nooitgedacht site, the Respondent's inspection of the overhead line revealed the following concerns: skewed poles; absent pole compaction; inadequate line tensioning; lack of grounding on both the line and transformer structures; and an unbonded transformer. According to the Respondent, these deficiencies posed significant safety risks and necessitated immediate corrective action, including line rebuilding, stays to reinforce pole alignment and bonding wire installation to mitigate electric hazards.

38. Most significantly, the identified defects at all sites posed significant risks to the system infrastructure's functionality, safety, and longevity, which required extensive remedial actions to rectify the issues and ensure compliance with design specifications and industry standards. On 31 October 2023, the Respondent issued a formal delay damage notice for the LC Spitskop and C & R Boedery sites. The Respondent contends that the delay had financial repercussions and disrupted the overall project schedule, impacting the ultimate delivery to the customer.

39. According to the Respondent, the Trust's ongoing misconduct and its refusal to address the defects show a massive factual and genuine dispute between the parties on the amounts claimed by the Trust. The Trust was aware of the disputes and issues raised by the Respondent long before it instituted this liquidation application. The Trust has not performed in terms of the agreements between the parties and there are no payments due.

40. The Respondent denies that all the works were completed in accordance with the terms of the agreements. The Respondent did not acknowledge and accept any of the activities as complete. Due to these unfinished projects, the Trust is not entitled to demand payment; hence, it launched this liquidation application to avoid an action procedure. It was argued on behalf of the Respondent that the issue before the court is deeply rooted in the factual disputes between the

parties. Further, the Trust should have anticipated these factual disputes, and the matter should have been resolved through arbitration rather than liquidation proceedings.

41. The Respondent alleged that it does not know the Society of Automotive Engineers or its alleged standards. These standards are irrelevant to this matter. According to the Respondent, each component of the installation ought to have been inspected and signed off by a subject matter expert. The certificate of compliance relied upon by the Trust certifies that the electrical installations were carried out in accordance with the law. They do not offer proof of practical completion or verification of the whole project.
42. According to the Respondent, concerning the Willie Becker site, all milestones, except for the retention, were paid. The retention amount only becomes due and payable at the end of the Defects Liability Period, which is 12 months from commissioning. Concerning Nooitgedacht site, milestone four was not paid because the defects were brought to the Applicant's attention, which failed to remedy them. Concerning C & R Boerdery site, all milestones were paid except the final payment because of the unresolved defects like those identified at other sites. Further, the Applicant's misrepresentations concerning module quality, structural compliance, and project completion have significantly impacted the Respondent's operations. Instead of addressing the concerns identified by the Respondent, the Applicant decided to institute liquidation proceedings.
43. The Respondent provided the court with its Audited Annual Financial Statement for the year-end 2023. It was argued on behalf of the Respondent that these were statements that were available at the time the Application was brought. It contended that the 2024 Annual Financial Statement had not yet been finalised on the date of the filing of its answering affidavit. In terms of the 2023 statement, it reported its assets to be R 443 000 000.²⁸ while its liabilities at the time were R 242 000 000.⁸⁹ The Respondent contended that the resultant asset-to-debt ratio was approximately 1.82, which indicates a healthy liquidity position. It argued that this indicates that it can comfortably meet its short-term obligations

with its current assets. It also alleged that it had an operating profit of R 42 000 000.36.

44. It was contended that the Respondent's liabilities grew due to financing new projects and operational expansions, which is indicative of a thriving company that is expanding its business. It was further argued that the Respondent's shareholders have confidence in its business operation, and they continue to loan it money as part of their investment. According to the Respondent, the liabilities remain manageable within its current asset base, which indicates that it can handle its debt load without immediate financial distress. The Respondent has a positive cashflow of R 27 000 000.71 from investing activities. The financial year-end for 2024 will show a similar growth and a healthy asset-to-debt ratio. It was argued on behalf of the Respondent that the Applicant's predominant motive is not the bona fide liquidation of the Respondent, but rather an attempt to enforce payment of its claim and obtain an advantage by avoiding having to prove its claim by way of evidence.

45. According to the Respondent, this dispute should be resolved through arbitration or action proceedings. Liquidation proceedings are not suitable because the Respondent is factually solvent and has approximately 120 employees, whose salaries it continues to pay. It would not be just and equitable to liquidate a company that is poised for significant contribution to the renewable energy industry and is dedicated to its employees' well-being. Employees are integral to the success of the company, and continuous investment in their development and well-being is the Respondent's priority.

46. Finally, it was submitted on behalf of the Respondent that the Trust initially claimed an amount close to R 10 000 000.00. However, in its application, it only claimed an amount of R 2 793 444.25. The substantially revised amount was not explained, which shows a significant uncertainty in the amount claimed. It was argued on behalf of the Respondent that the revised amount indicates that the claimed amount was never due and payable, which demonstrates that the Respondent's non-payment was not a neglect but a principled rejection of an inflated and erroneous demand. The existence of a *bona fide* dispute precludes

the presumption of neglect. The Trust's demand for payment is inherently flawed, and any failure to make payment cannot be construed as the Respondent neglecting to make payment. Respondent alleges that the Applicant only becomes entitled to full payment upon receipt of certificates of completion.

C LEGAL FRAMEWORK AND EVALUATION

i) Late filing of Heads of Argument

47. Despite a joint practice note where the parties' respective legal teams agreed on the timelines for the submission of their heads of arguments, the Applicant's legal team failed to submit the same as agreed. In their application for condonation, blame is placed at the door of their erstwhile counsel, who, despite regular follow-ups, did not provide the heads of argument as instructed. In the affidavit supporting this application, it is submitted that the erstwhile counsel was instructed to draft the heads of argument on 4 November 2024. The last follow-up was made on 5 May 2025, and a new counsel was briefed to draft the heads on 6 May 2025.

48. The delay in the drafting and service of heads is difficult to understand. It is not clear why the attorneys, who should be well-versed with the matter, did not proceed to prepare the initial draft of the heads of argument when it became clear in the first or second month that the counsel on brief was 'struggling' to deliver these heads of argument, so that s/he could merely settle them. Failing which, to enable the 'new' counsel to settle. Unfortunately, the issue was not raised with the Applicant's legal representative, and it would be unfair to comment further on it because they were not granted an opportunity to respond to the court's concerns regarding the delays in submitting their heads of argument.

49. I am of the view that it is in the interest of justice to grant the Applicant condonation to file the heads of argument prepared on her behalf, simply because, at the very least, they were submitted before the matter was heard and the Respondent was able to file supplementary heads in response thereto. However, it is important to caution the Applicant's attorneys, and attorneys in

general, who decide to brief advocates who fail to deliver on their mandate, that they cannot hide behind what such advocates did or failed to do. The ultimate responsibility of ensuring that the court cases run smoothly without any hindrances rests with attorneys, who are also legally qualified. There is nothing that prevents attorneys from drafting heads of argument, and if need be, to request advocates to settle them. Court cases cannot be delayed merely because an advocate failed to deliver the heads of argument.

ii) Authority to Act

50. It is trite that the powers and duties of trustees are articulated in the trust deed. This is where the power to institute legal proceedings on behalf of the Trust should be located. In *Shepstone and Wylie Attorneys v Abraham Johannes de Witt N O and Others*, held that

*‘[t]rustees are legally bound to comply with the terms of the trust deed. In line with their fiduciary duties, trustees must be legally authorised to act through competent resolutions’.*¹

51. The Applicant provided what appears to be a resolution to institute these proceedings on behalf of the Trust. She is the sole Trustee of the Trust. She is legally entitled to make decisions on behalf of the Trust, including the decision to litigate. The Applicant clearly has authority by virtue of her office to litigate on behalf of the Trust. Any insinuation that she does not have such authority is without merit.

iii) Arbitration Clause

52. The Supreme Court of Appeal in *VJ v VJ and Another*, held that:

*‘... it is well established that arbitration does not oust the jurisdiction of courts’.*²

¹ 2023 (6) SA 419 (SCA) para 20.

53. In a persuasive judgment delivered by the Kwa Zulu Natal Division, Durban of *Aveng (Africa) Ltd formerly Grinaker-LTA Ltd t/a Grinaker-LTA Building East v Midros Investments (Pty) Ltd*, it was held that:

*‘... [i]t is now well-established that an arbitration agreement does not oust the jurisdiction of the courts. Where a party to an arbitration agreement commences legal proceedings against the other party to that agreement, the defendant is entitled either to apply for a stay of the proceedings pursuant to s 6 of the Arbitration Act 42 of 1965 or to deliver a special plea relying upon the arbitration clause’.*³

54. It is trite that a clause in an arbitration agreement where the parties agreed to refer their dispute to arbitration does not prevent the court from hearing such a dispute where one of the parties decided to approach the court instead of utilizing the arbitration proceedings. In other words, such a clause does not constitute an automatic bar to the institution of legal proceedings in the civil courts. After the institution of a civil case in a court concerning a dispute that the parties have agreed to refer to arbitration, the other party can do one of two things. First, a substantive application can be lodged in terms of section 6(1) of the Arbitration Act, which provides that

*‘[i]f any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings’.*⁴

55. The other party to the agreement retains its right to enforce the arbitration clause by applying to the court to stay civil court proceedings to allow the parties to

² 2024 (6) SA 400 (SCA) para 10.

³ 2011 (3) SA 631 (KZD); [2011] 3 All SA 204 (KZD) para 17.

⁴ 42 of 1962

arbitrate their dispute in terms of the arbitration clause of their agreement. Where such an application has not been made after service of the notice of intention to defend or oppose the case before the court, the court cannot entertain any argument relating to arbitration proceedings. The court must proceed to adjudicate the application before it.

56. Secondly, the other party to the contract that contains the arbitration clause can raise a special plea in terms of the common law for the stay of the instituted civil court proceedings. This was confirmed in *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading* 119, where the Supreme Court of Appeal held that:

'The mere fact that parties have agreed that disputes between them shall be decided by arbitration does not mean that court proceedings are incompetent. If a party institutes proceedings in a court despite such an agreement, the other party has two options: (i) It may apply for a stay of the proceedings in terms of section 6 of the Arbitration Act 42 of 1965 or (ii) it may in a special plea (which is in the nature of dilatory plea) pray for a stay of the proceedings pending the final determination of the dispute by arbitration'.⁵

57. The Respondent neither brought a substantive application nor raised a special plea (or at best a point *in limine* since these are motion proceedings) to stay these proceedings pending arbitration proceedings. In any event, the Applicant conceded that the jurisdiction of this court has not been ousted. There is nothing that prevents this court from adjudicating this matter.

iv) Demand and Delivery

58. It terms of section 345(1)(a)(i) of the (1973) Companies Act,⁶

⁵ 2009 (4) SA 68 (SCA) para 7.

⁶ 61 of 1973. Despite the 1973 Companies Act having been repealed by the 2008 Act, its Chapter 14 remain operational. See *Botha N O and Others v Jonker and Others* [2024] 3 All SA 365 (SCA); 2025 (1) SA 345 (SCA) para 20, where it was stated that 'Item 9 of Schedule 5 of the Companies Act 71 of

*'[a] company or body corporate shall be deemed to be unable to pay its debts if a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due has served on the company, **by leaving the same at its registered office**, a demand requiring the company to pay the sum so due'.*

59. There are two schools of thought on how the issue of delivery should be understood. The first school of thought was recently articulated in *Bank of Baroda v Annex Distribution (Pty) Ltd*, as follows:

'the view is held that the provisions of section 345(1)(a)(i) of the Companies Act are peremptory, requiring service of the demand by delivering at the registered office of the respondent. If the legislature intended other forms of service, it would have been provided for. Strict compliance with the provisions regarding service, are a prerequisite for the deeming of the respondent as being unable to pay its debts'.⁷

60. The second school of thought was captured in *Nathaniel & Efthymarkis Properties v Hartbeesspruit Landgoed CC*, where the court, in explaining the absurdity of the demand received but not delivered by being left at the registered office not being effective, held that

'the requirement that the demand must be served on the corporation is peremptory but that the requirement that it be done at the registered office is not and that substantial compliance will in that respect suffice. It is not unusual that a statutory provision is in part peremptory and in part directory'.⁸

2008 (the 2008 Companies Act) provides that Chapter 14 of the 1973 Companies Act shall apply to the liquidation of companies'.

⁷ (38591/2019) [2020] ZAGPPHC 158 (14 May 2020) para 13. In justifying this view, the court relied, among others, on the following cases: *BP and JP Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1977 (3) 753 (W) and *Phase Electric Co (Pty) Ltd v Zinman Electrical Sales [Pty] Ltd* 1973 (3) SA 914 (W).

⁸ 1996 (2) B All SA 317 (T)

61. It is concerning that the debate relating to the delivery of the demand in liquidation matters before the courts is usually entertained without regard to what the Supreme Court of Appeal stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, where it was made clear that when interpreting legislation:

'[w]here more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'.⁹

62. It appears to me that section 345(1)(a)(i) of the 1973 Companies Act cannot be interpreted in line with the material conditions that prevailed when this Act was promulgated, but rather how business is conducted in modern times. What the legislature said is not as important as what it desired to achieve. It is clear from the wording used in this section that a person who wishes to liquidate a company must demand payment from the company and take active measures to ensure that such a company is notified of the demand for payment. At the time this Act was promulgated, the most effective way of achieving this was attending at the premises of the debtor and submitting the demand directly to the persons found in the premises or at the very least, indicating through the messenger of the court that such people were not present at the time of service but service was effected nonetheless.

63. The times have changed, and this legislative intention can be achieved through other means. For instance, I doubt that where a creditor emails (or use any other electronic means) a demand to the entity sought to be liquidated and receives a reply from its relevant official confirming receipt and admitting or disputing the debt, the court should insist that the creditor ought to have gone to the entity's registered address to serve the demand physically. This will not only be absurd in that it would be placing form over substance, but it will lead to insensible or

⁹ [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

unbusinesslike results. This also amounts to a total disregard of how business is conducted in modern times. The 1973 legislators did not have the benefit of the experience of how business is conducted in 2025 and beyond.

64. It is even worse where the alleged debtors have received the demand and proceeded to actively participate in the litigation to demonstrate why they ought not to be liquidated. It is unsound to use the issue of non-compliance with the literal wording of the statute to create a technical objection where it is clear that the alleged debtor received the demand. In my view, in 2025 and beyond, there is little sense in strictly requiring that the notice where payment is demanded must be left at the alleged debtor's registered office, where it is clear that the alleged debtor received such notice by other means. In this case, the Respondent received the section 345 notice; it is irrelevant that this notice was not left at its registered office as stated in 345(1)(a)(i) of the 1973 Companies Act. In any event, the Applicant proved that there was service by the sheriff. Even if the Applicant did not prove this but illustrated that the Respondent received the notice by alternative means, that would have been sufficient.

v) Inability to pay

65. In terms of section 344(f) of the 1973 Companies Act,

'[a] company may be wound up by the Court if the company is unable to pay its debts as described in section 345'.

66. The Respondent will be deemed to be unable to pay its debts if it is indebted to the Applicant in a sum not less than one hundred rand and fails to make payment after being requested by the Applicant to do so.¹⁰ The Respondent must, for three weeks after being requested to make payment by the Applicant, neglected to pay the requested amount, or to secure or compound that amount to the reasonable satisfaction of the Applicant.¹¹ The evidence provided illustrates that on 19

¹⁰ Section 345(1) of the 1973 Companies Act.

¹¹ Section 345(1)(a)(i) of the 1973 Companies Act.

January 2024, the Applicant sent a letter of demand in terms of section 345 of the Companies Act requesting payment of R 9 883 062.54 from the Applicant. This means that the Respondent had about three weeks to make payment, failing which it ran a risk of being deemed unable to pay its debts.

67. The Applicant referred the court to the Western Cape Division's judgment of *Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd*, where it was held that the court exercises a narrow discretion in liquidation applications because:

'an unpaid creditor has a right, ex debito justitiae, to a winding-up order against a company that has not discharged its debts'.¹²

68. Based on this case, the Applicant's argument is simply that once it demonstrates that the Respondent owes it an amount above R 100.00, which it has claimed but the Respondent failed to pay, it is entitled as a matter of right to a liquidation order. In other words, the main ground upon which the Applicant is seeking a liquidation order is that the Respondent is commercially insolvent.

69. The test for commercial insolvency is relatively settled. The Supreme Court of Appeal in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others*, held that the test for commercial insolvency is:

'... whether the company "is able to meet its current liabilities, including contingent and prospective liabilities as they come due". Put slightly differently, it is whether the company "has 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 trading – in other words, can the company meet current demands on it and remain buoyant?" Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course

¹² 2023 (6) SA 452 (WCC) para 24.

to pay its debts, existing as well as contingent and prospective, and continue trading'.¹³

70. In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others*, it was held that:

'[t]he concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has 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 trading - 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 within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up'.¹⁴

71. In simple terms, the inquiry meant to assess commercial insolvency is based on the readily available financial means to make immediate payment when the creditor demands payment based on what the debtor owes. The debtor's failure to make payment creates a legal perception of the debtor's inability to pay in the mind of the creditor, which entitles the creditor to approach the court for a liquidation order. The creditor does not have to acquire or rely on any objective proof of the debtor's inability to pay. In other words, the debtor will be in a state of commercial insolvency when an impression is created based on its failure to settle the debt that is due upon demand, that it is unable to meet its day-to-day liabilities in the ordinary course of business.¹⁵

¹³ [2020] 1 All SA 64 (SCA); 2020 (2) SA 93 (SCA) para 31.

¹⁴ 1993 (4) SA 436 (C) at 440. See also *Pretoria seat of this division in Topfix (Pty) Ltd v Go Business (Pty) Ltd and Another* (020590/2024) [2025] ZAGPPHC 115 (30 January 2025) para 29.

¹⁵ See *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597.

72. In this case, it is not easy to establish whether the Applicant could formulate a view that the Respondent is unable to pay its debts because, before the section 345 demand was sent to the Respondent, the Respondent had already communicated its concerns with the Trust's work at its various sites. On 26 October and December 2023, the Respondent sent four notices relating to alleged defects that were identified in C & R Boerdery, Willie Becker, LC Spitskop, and Nooitgedacht Safaris sites. These notices were followed up by letters dated 7 December 2023, where the Respondent's attorneys not only detailed alleged defects but also claimed that the Trust was in contractual default. They demanded that the Trust cease working at the sites and transfer control of the sites to the Respondent.

73. The evidence illustrates that a contractual dispute between the parties arose as early as 26 October 2023. Instead of addressing the concerns raised in the Respondent's notices and letters, the Applicant decided to send a section 345 demand in January 2024. In this demand, the Applicant claimed that the works have been completed at various sites, and that the final certificates of completion have been issued, and that the Respondent has failed to make payment on the invoices sent to it. This demand was immediately followed by another letter on the same day, which sought to respond to the Respondent's notices and letters. In this letter, among others, the Applicant accused the Respondent of frustrating its efforts to complete its work and basically denied the existence of any defects on the sites.

74. These correspondences demonstrate the existence of serious factual disputes emanating from the parties' various contracts that cannot be resolved by a motion court on the papers. Since the cause of action is insolvency as opposed to contract, it will be improper for the insolvency court to attempt to resolve disputes that arise purely from contract by relying on the so-called Plascon-Evans Rule. This is because the issue before the court relates to liquidation and not whether any of the parties complied with the various terms of the contract.

75. Nonetheless, it is beneficial to assess some of the terms of the contract to evaluate whether the Applicant, after receipt of the Respondent's four notices and

letters in 2023, could legitimately formulate a view that the Respondent is unable to pay its debt after serving its section 345 demand in 2024. There are five different contracts for each site. During oral argument, it was clear that the legal representatives of both parties agreed that the substance of these agreements is the same. In each agreement, the parties agreed that payment of the contract sum by the Respondent will be made in accordance with different milestones. These contracts also provided that *'[t]he works will have met Practical Completion if found to be free of Defects and shown to have met the Standards for Completion'*.¹⁶

76. This raises an interesting question: was the Respondent obliged in terms of these agreements to make payment after the achievement of any milestone, or was the Respondent entitled to withhold payment where it identified defects on the works? This is a purely contractual matter that should not be resolved by this court sitting as an insolvency court faced with liquidation as a cause of action. The Respondent's notices and letters were served on the Applicant in 2023, where defects were identified. This means that the Respondent decided to withhold payments that would otherwise be due under the various contracts because of the identified defects. The inquiry of whether the Respondent is entitled to do so cannot be undertaken by this court. What is clear is that a contractual dispute arose before the Applicant could serve its section 345 demand.

77. In other words, at the time the Applicant formally demanded payment in terms of section 345, it was clear that the Respondent formulated a view that, based on the alleged defects, it was not obliged to make payment before those defects had been remedied. Its entitlement to do so requires a trial and cannot adequately be addressed by an Insolvency Court sitting as a motion court. In my view, there was no basis for the Applicant to serve a section 345 demand in light of disputes that were also articulated in its second 19 January 2024 letter. It was clear at that time that the Respondent 'possibly' had a *bona fide* defence on reasonable grounds to the Applicant's claim. At that time, the Applicant could not properly

¹⁶ Clause 5 contained in all the agreements.

formulate a view that the Respondent is unable to pay its debts when they become due. A reasonable view to formulate at the time should have been that the Respondent is refusing to make payment based on the alleged defects. This view ought to have been tested by way of contractual trial proceedings, or at the very least, arbitration proceedings provided for in the parties' various contracts. This would have allowed all the parties to deal with various material disputes of fact between them adequately.

78. It is not for this court to nitpick non-payments following various payments to establish whether the Respondent is indebted to the Applicant for an amount above R 100.00. To do so would be to disregard the fact that the Respondent's 2023 notices and letters generally identified the alleged defects to the Trust works at all the sites, and that was the basis for the non-payment. There was a clear refusal to pay in 2023 based on the alleged defects, followed by a section 345 demand in 2024. This does not demonstrate an inability to pay but a contractual dispute that must be adequately resolved before a proper forum.

79. In support of her case, the Applicant referred the court to the case of *Aerontec (Pty) Limited v South Harbour Tankfarm CC*.¹⁷ This case is totally distinguishable in that there was no dispute that the debtor was indebted to the liquidating creditor but sought to resist the liquidation based on the existence of an unliquidated counterclaim. Most importantly, the amount due was undisputed. In the current case, the Respondent clearly disputes the amount claimed and has not raised any counterclaim. This case does not assist the Applicant.

80. The Applicant also relied on *Francis and Others v Southern Sky Hotel and Leisure (Pty) Ltd trading as Hans Merensky Hotel & Spa*.¹⁸ In this case, upon receipt of a section 345 demand, the debtor did not deny that it was indebted to the liquidating creditors. It was common cause between the parties that the debtor was unable to pay its debts. The parties even had a formal discussion relating to the debt. Still, they failed to resolve their disputes, leading to the debtor

¹⁷ (18712/2019) [2021] ZAWCHC 21 (9 February 2021).

¹⁸ (2013/2016) [2020] ZALMPPHC 8 (21 January 2020).

placing itself under business rescue, which proceedings were later set aside. The debtor's case was not that it was able but unwilling to pay the creditors' debts. Most importantly, the debtor formulated its defence beyond the principle that winding-up proceedings should not be used to enforce payment of a debt the existence of which is *bona fide* disputed on reasonable grounds, but attacked the actual terms of the agreements on the basis that they were contrary to Constitutional values, the Bill of Rights and public policy.¹⁹ This case is distinguishable on the facts and does not take the Applicant's case any further.

81. Lastly, the Applicant relied on an unreported case of *Third Dimension Development (Pty) Ltd v Pacebene (Pty) Ltd*.²⁰ In this case, the creditor's section 345 letter demanded payment of R 475 665.69. The debtor denied owing R 36 882.61 of the demanded amount. The creditor argued that, to oppose the liquidation application successfully, the debtor must dispute the entire indebtedness and not only the portion of the debt.²¹ The court did not make any finding based on this argument. The court held that the debtor did not place any evidence of its solvency before the court. The fact that the debtor's shareholder placed security confirms that the debtor does not possess sufficient funds to pay its debts.²² This case is totally distinguishable because the Respondent in the current case has not admitted any part of the Applicant's case, be it the amount claimed in the section 345 demand or the revised amount in the founding affidavit.

82. In any event, the approach taken in *Third Dimension Development (Pty) Ltd v Pacebene (Pty) Ltd* calls for comment. I am not convinced that the court ought to have dismissed the so-called 'security' by the shareholder that was deposited into the debtor's attorney's trust account without ascertaining its true status. The inquiry should have been to establish the nature of this 'security'. Was it equity financing or a shareholder loan, notwithstanding being phrased as 'security for

¹⁹ *Francis and Others v Southern Sky Hotel and Leisure (Pty) Ltd trading as Hans Merensky Hotel & Spa* para 40.

²⁰ Case No: 073382/2023

²¹ *Ibid* para 9.

²² *Ibid* para 23.

any possible claim'. Why did the shareholder choose to pay the money into the attorney's trust account as opposed to the debtor's bank account? Was the 'security' a disguised transaction meant to prevent liquidation and later to be returned to the shareholder once the court has dismissed the liquidation application? If yes, then the court would have been justified in granting the liquidation order. But if this was a genuine shareholder loan meant to protect the shareholder's investment by saving the company, then more weight ought to have been accorded to this 'security'. It is not unheard of for shareholders in South Africa to capitalise their companies.²³ If this was a shareholder loan that made it possible for the debtor to pay its immediate debts, the source of the money was totally irrelevant. It appears from the judgment that once the disputed portion had been resolved, payment would have been effected. It is also not clear whether the debtor had employees, whose interests ought to have been considered. In my view, there was no basis for liquidating the debtor, having regard to the 'security' placed by the shareholder in this case.

83. In the current case, the Respondent sought to neutralize the Applicant's allegation of commercial insolvency by providing its 2023 Audited Financial Statements. This was an attempt to demonstrate the Respondent's financial strength and its prospects. It is clear from these statements that as at 28 February 2023, the Respondent had cash and cash equivalents of R 14 252 344.00 with the total assets of R 433 278 252.00. The liabilities were calculated at R 256 235 192.00. This was the statement that could have reasonably been obtained at the time the Applicant served its notice of motion on the Respondent for the preparation of the answering affidavit.

84. The Applicant argued that these statements do not assist the Respondent because they only demonstrate factual [in]solvency. The Respondent proceeded to nitpick certain entries in the statement by illustrating the alleged Respondent's actual loss and a further loss for its operating activities. It is worth noting that the Respondent did not rely on factual solvency to attempt to defeat the Applicant's

²³ *Richman v FRM Property Investments (Pty) Ltd and Others* (2022/972) [2024] ZAGPJHC 270 (14 March 2024) para 11.

claim. The Respondent was alive to the fact that should a court, in a case against it based on section 345(1)(a)(i) read with section 344(f) of the 1973 Companies Act, find that there is a *prima facie* claim against it which is due and owing and which remains unpaid, the onus would shift to it to show that its indebtedness to the Applicant is *bona fide* disputed and on reasonable grounds. These statements were provided to meet this onus, and not necessarily demonstrate the Respondent's factual solvency. It may well be that the net effect of producing them ultimately provides a case for its factual solvency.

85. I am not convinced that there is a *prima facie* case established against the Respondent. The Applicant's claim was disputed even before it served its section 345 demand. In other words, I am not convinced that the Applicant successfully demonstrated that the Respondent is unable to pay its debts when they become due. When the liquidation application was lodged, an amount just under three million was demanded. The statements that the Respondent provided to the court demonstrate that it had just over fourteen-million-rand cash. The cash assets reflected on the Respondent's Audited Financial Statements creates an impression that the Respondent had the capacity to pay its debts when they fell due.

86. This essentially means that the Respondent refused to make payment because it had the capacity to pay. There is no evidence that supports the contention that the Respondent was unable to pay the Trust's debt in particular. The basis for the refusal to pay was the alleged defects that were communicated through various notices and letters.

vi) Bona Fide Defence

87. If I am wrong, and indeed the Applicant managed to establish a *prima facie* claim for payment which is due and owing, but which remains unpaid, the onus will naturally shift to the Respondent. In *Topfix (Pty) Ltd v Go Business (Pty) Ltd and Another*, it was held that:

*‘[i]n order to successfully oppose a winding-up, the Respondent must dispute the existence of the debt’.*²⁴

88. The Supreme Court of Appeal in *Imobrite (Pty) Ltd v DTL Boerdery CC*, reminded us that:

*‘[i]t is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of debts. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court’s processes should not be abused.’*²⁵

89. The debt in the current case is clearly disputed. Counsel on behalf of the Applicant stated expressly during argument that there is no part of the debt that is conceded or admitted. While the notices and letters referred to above do not expressly dispute the debts *per se*, their wording demonstrates that the Respondent is not happy with the work done by the Trust at various sites, and thus is not prepared to make payment until the identified alleged defects are remedied. This is a dispute, which in my view is made in good faith.

90. The fact that the parties have the action and arbitration proceedings to utilise to determine whether the Respondent’s allegations, which are based on the contracts signed by the parties, have merit, makes the withholding of payment reasonable under the circumstances. These proceedings will also lead to the determination of whether the remedial actions that the Respondent seeks are additional works as argued on behalf of the Applicant. In my view, the Respondent has a valid defence to the Applicant’s liquidation application.

91. In *Imobrite (Pty) Ltd*, it was further held that

²⁴ (020590/2024) [2025] ZAGPPHC 115 (30 January 2025)

²⁵ (1007/2020) [2022] ZASCA 67 (13 May 2022) para 14. This is a principle that was crafted in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

*'[a] winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights.'*²⁶

92. The Applicant's approach in these proceedings makes it difficult not to conclude that it seeks to abuse liquidation proceedings. At the time the section 345 demand was served, the Applicant was already aware that the Respondent was refusing to pay based on the alleged defects that it claimed it had identified. This was already a contractual dispute that ought to have either been negotiated, arbitrated, or resolved through court proceedings, with both parties being able to lead their respective expert witnesses.

93. After receiving the Respondent's letter dated 7 December 2023, the Applicant formulated a view that the Respondent was attempting to 'create' a *bona fide* defence based on reasonable grounds. In other words, the Applicant was effectively accusing the Respondent of pre-empting liquidation proceedings, because at the time the Respondent served its letter, there was no section 345 demand. There were other effective contractual remedies at the Applicant's disposal, but she chose to pursue liquidation proceedings where the disputed contractual terms would not be thoroughly tested. The fact that there was already a dispute which had been articulated before the demand was made, and certainly when the liquidation application was brought, indicates that liquidation proceedings were not the most suitable proceedings under these circumstances.

94. Most importantly, the Applicant should have been more cautious because the Respondent has about 120 people under its employ. Employment of people is neither a defence nor a bar to liquidation proceedings. However, to blindly deal with liquidation applications without regard for the company's capacity to employ people and contribute meaningfully to the country's economy would be a judicially

²⁶ 1956 (2) SA 346 (T)

naïve approach, which is totally ignorant of the socio-economic conditions of South Africa. Judges are part of South Africa and should always take judicial notice of the socio-economic conditions of South Africa raised by companies sought to be liquidated, without unfairly prejudicing any of the parties before them. Courts should never unnecessarily contribute toward increasing unemployment in the Country, particularly where this can lawfully be avoided.

D CONCLUSION

95. It cannot be denied that this liquidation application was not a genuine attempt to liquidate the Respondent because it is either commercially or factually insolvent, and its continued existence will be disadvantageous to the creditors. This was an attempt to secure payment for the Applicant. I am of the view that even in terms of section 344(h) of the 1973 Companies Act, it is not just and equitable that the Respondent should be wound up.

ORDER

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

96.1. The late filing of the Applicant's Replying Affidavit and Heads of Argument is condoned.

96.2. The Applicant's application to liquidate the Respondent is dismissed with costs, including costs of counsel in scale B.

C MARUMOAGAE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Counsel for the applicants : Adv Hershensohn SC with Adv Stroebe

Instructed by : Roodt & Co Attorneys Inc

Counsel for the respondent : Adv C Richard

Instructed by : Weavind & Weavind Inc

Date of the hearing : 29 May 2025

Date of judgment : 27 August 2025