



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
JUDGMENT**

Case Number: 2025-065914

In the matter between:

THORNTREE PAPER BV

Applicant

and

SUNDAYS RIVER PRINT AND PACK CC

Respondent

Coram: HOLDERNESS J

Heard: 16 March 2026

Delivered: 24 March 2026

JUDGMENT

Holderness J

[1] The applicant, Thorntree BV, a company situated at Rijkswijk, the Netherlands, seeks an order for the provisional winding up of the respondent, Sundays River Print and Pack CC. The respondent opposes the application based on an alleged counterclaim for an amount of approximately R4,500,000.

[2] The application is founded upon the respondent's admitted indebtedness arising from the sale and delivery of goods pursuant to Order TTP23.153 (the first invoice) (the debt).

[3] Despite demand, including a statutory demand in terms of section 69(1)(a) of the Close Corporations Act 69 of 1984 ("the Act") delivered to the respondent on 25 July 2024, the respondent neglected to pay, secure or compound for the debt within the prescribed 21-day period. The statutory presumption of inability to pay is accordingly engaged.¹

Issue to be determined

[4] The issue for adjudication is a narrow one, namely, has the respondent demonstrated that the admitted indebtedness is disputed on bona fide and

¹ The statutory demand could not be delivered by the Sheirff to the respondent's registered office at 3[...] Midas Oakglen, Bellville as the address does not exist. The demand was therefore delivered to the respondent's principal place of business, 4[...] Megapark, cnr P[...] B[...] and R[...] S[...] Road, Bellville South.

reasonable grounds, or that its alleged counterclaim is sufficiently genuine and serious for this court to exercise its discretion to refuse the granting of a provisional order of liquidation.

The origin of the debt

[5] The applicant conducts a paper supply business. The respondent's business is printing, with a focus on supplying the food market with paper products.

[6] The debt arose from the sale and delivery of paper products, including citrus wrapping paper, by the applicant to the respondent during the period 7 December 2023 to 20 January 2024.

[7] The goods were sold subject to the applicant's general terms and conditions of sale, which provide *inter alia* that:

- (a) Payment is due within 30 days of the invoice date.
- (b) Late payments incur interest at the agreed rate.
- (c) The goods remain the property of the applicant until paid in full.

[8] The applicant complied with orders placed by the respondent and delivered the goods described in the first invoice dated 14 December 2023, in an amount of EUR 91 185, which accordingly became due and payable by the respondent on 14 January 2024.

[9] The respondent paid the amount of EUR 45 000 on 4 June 2024.

[10] Despite numerous demands, the respondent failed to pay the balance of EUR 46 185, or any part thereof, to the applicant.

[11] On 16 August 2024, the last day of the period stipulated in the statutory demand, the respondent sent an email to the applicant alleging that it had caused the respondent to suffer a loss arising from a future order. This is the basis of the alleged counterclaim.

[12] On 27 February 2025, the respondent's attorneys addressed correspondence to the applicant alleging losses suffered as a result of an order not arriving on time. The respondent's attorneys failed to meaningfully respond to the outstanding admitted debt nor to the statutory demand.

Condonation

[13] The respondent's heads of argument were filed two days out of time, as was its affidavit opposing the applicant's application for leave to file a supplementary affidavit.

[14] The respondent filed a detailed affidavit setting out the reasons for the late filing. The application for condonation, brought at the request of the court after the hearing of the matter, was not opposed by the applicant.

[15] I am satisfied that the explanation is adequate, and the delay was not unreasonable in the circumstances. Condonation is accordingly granted.

Grounds of opposition

[16] The respondent submits that the applicant's breach of its contractual obligation to supply paper to the respondent lies at the heart of the dispute.

[17] According to the respondent 'it was an express contractual requirement recorded in the applicant's own pro forma invoice dated 15 May 2024...which specifically recorded the loading date as "*loading mid-June.*"'

[18] The respondent describes the applicant's alleged breach as devastating, as the respondent had secured orders from its clients which it could not deliver, causing the clients to cancel their orders, representing a 'loss of business' of R4,555,441.

[19] The difficulty which the respondent faces in this regard is that the alleged cancelled orders have not been properly quantified and the correspondence relied upon in this regard does not disclose that these were orders which were cancelled arising from non-delivery in terms of the pro forma invoice.

[20] The respondent does not state nor provide any detail regarding the value of these allegedly cancelled orders. It does not specify the gross contract value of those orders, nor does it disclose the profit margin applicable from which the alleged loss would arise.

[21] Moreover, the respondent's grounds of opposition must be assessed against the backdrop of its prior written admissions and undertakings.

[22] On 14 February 2024, the respondent executed an acknowledgement of debt in favour of the applicant (the AoD), acknowledging its indebtedness to the

applicant and recording and undertaking to discharge the arrears by the end of March. Contextually, it is clear that this refers to March 2024.

[23] The respondent does not deny signing the AoD, nor does it allege that it was induced by misrepresentation, duress or mistake or that the indebtedness recorded therein was incorrect.

[24] Notably, the respondent's defence, founded on the alleged counterclaim, is not directed at the indebtedness by the applicant in these winding up proceedings, but rather on a pro forma invoice dated 15 May 2024, relating to order TTP24.165 (the pro forma invoice).

[25] As emphasised by Adv Bester, who appeared on behalf of the applicant, the alleged complaint concerning a pro forma invoice therefore relates to a separate and subsequent transaction, which post-dates the OD, the accrual of the arrears and the respondent's undertaking to pay.

[26] Moreover, it is apparent from a supplementary affidavit which was filed by the applicant after the court granted leave for it to do so, (as the contents thereof are clearly germane to the determination of the issues in these proceedings), that the applicant was entitled to withhold further shipment pending payment of the outstanding indebtedness under TTP23.153.

[27] It appears from this affidavit that the pro forma invoice did not proceed to shipment, and no goods were delivered under it, and that it was at all material times, subject to the respondent first settling its outstanding indebtedness arising from prior delivered orders, including the indebtedness under the first invoice.

[28] The supplementary affidavit further records that the true issue between the parties was never whether the applicant was unconditionally obliged to continue shipping goods, but whether it was entitled to withhold further loading pending payment of the outstanding amount due under the first invoice.

[29] The contemporaneous WhatsApp exchange annexed to the supplementary affidavit confirms this arrangement. In that exchange the applicant recorded, in terms, that payment for both containers from the last order had to be made before further loading could proceed and that the newly produced batch would *‘not be loaded given the payments are not cleared.’*

[30] The respondent’s representative, and the deponent to the answering affidavit, Mr. Lawrence Worship, responded stating: *‘Fully understood. No excuses.’*

[31] This evidence is decisive. It constitutes a contemporaneous acknowledgement that further shipment was conditional upon payment of the outstanding balance, and that there was no unconditional obligation on the applicant to ship further goods under the pro forma invoice while the indebtedness under the first invoice remained unpaid.

[32] The respondent cannot, considering the express agreement that further shipment would not proceed before payment of the first invoice was made, fail to make payment and thereafter allege that the applicant acted unlawfully in withholding shipment and delivery of goods under the pro forma invoice.

[33] The question which therefore arises is whether the claim in terms of the pro forma invoice constitutes a genuine counterclaim such as to defeat liquidation proceedings.

The applicable legal framework

[34] In terms of section 69(1)(a) of the Act, a corporation shall be deemed unable to pay its debts if a creditor to whom it is indebted in a sum not less than the statutory minimum has served on the corporation a demand requiring payment and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

[35] It is undisputed *in casu* that the respondent has failed to make payment or to furnish the requisite security.

[36] Under section 68 of the Act, a corporation may be wound up if it is unable to pay its debts (section 68(c)) or if it appears to the court that it is just and equitable that the corporation be wound up (section 68(d)).

[37] In terms of section 69(1), for the purposes of section 68(c) a corporation shall be deemed to be unable to pay its debts, if—

- (a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the corporation is returned by a sheriff, or a messenger of a magistrate's court, with an endorsement that he or she has not found sufficient disposable property to satisfy the judgment, decree or order, or that any disposable property found did not upon sale satisfy such process; or
- (c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.'

[38] Upon the establishment of the jurisdictional facts for deemed inability to pay, the court is vested with the discretion whether to grant a winding up in order.

[39] The Supreme Court of Appeal (“the SCA”) in *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd*² (*Afgri*) held that:

‘Where, however, the Respondent’s indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.’

[32] The existence of a counterclaim is not a ground upon which a winding up order must necessarily be refused. In *Afgri*, the SCA clarified the position thus:

‘The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant’s claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court’s discretion as to whether to grant the order or not.’³

[40] The respondent must satisfy the court of its bona fides (which relates to its subjective state of mind), and the reasonableness of the grounds relied upon (that is whether, objectively speaking, the facts it alleges constitute a defence in law). Inadequacies in the statement of facts underlying the alleged defence (or counterclaim) may indicate that the respondent is not bona fide in asserting those facts.⁴

² (542/2016) [2017] ZASCA 24; 2022 (1) SA 91 (SCA) at para 6.

³ Ibid at para 7.

⁴ *Gap Merchant Recycling CC V Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC) (Gap Recycling)* at para 26.

[41] The respondent's case should be set out properly and persuasively, for the court to be satisfied that the dispute is bona fide and founded on reasonable grounds.⁵

[42] The discretion of the court in deciding whether to wind the respondent company up, where no other creditors express their opposition to a winding-up and the applicant creditor has a debt which the company cannot pay is narrow, as the applicant is entitled *ex debito justitiae* to a winding-up order.⁶

[43] In *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd*⁷ Binns-Ward J stated that, 'It is for the respondent to persuade the court to exercise the discretion in its favour by showing on the papers that its counterclaim is what the English judges would call a 'genuine and serious' one. This requires more of a respondent than is needed if its basis for opposition is the existence of a disputed indebtedness. If the respondent fails in this respect the court is unlikely to exercise the discretion in terms of s 347 (1) of the Companies Act in its favour.'

[44] In *Gap Recycling*, Rogers J carefully examined the different approaches to the issue of a disputed counterclaim and observed⁸ that '...the respondent has no right to withhold payment on the basis of an alleged counterclaim. Naturally a counterclaim for damages, even if it had *prima facie* merit would not constitute a defence as such to the claim for payment because an illiquid claim for damages cannot be set off against a liquidated claim... In such a case the court in action proceedings might nevertheless in terms of rule 22 (4) postpone

⁵ *Grenco Projects and Construction CC V Hermanus Esplanade Dev Co (Pty) Ltd* 2024 (6) SA 500 (WCC) at para 18.

⁶ *Afgri* at para 12.

⁷ *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd and Another* [2012] ZAWCHC 43 at para 27.

⁸ At para 47.

the giving of judgment on the main claim until the determination of the counterclaim..’

[45] The learned judge concluded⁹:

‘It is thus not strictly necessary to comment on the prima facie merits of the alleged counterclaim because the counterclaim is not, in the light of the contract between the parties, an objectively reasonable ground for resisting payment of the applicants claim.’

Evaluation

[46] The respondent’s opposition, and the bona fides and reasonableness of the dispute raised (and genuineness and seriousness of the alleged counterclaim) must be assessed in light of the aforementioned legal principles.

[47] This is not a *Badenhorst* case.¹⁰

[48] A claim for damages requires proof of breach, causation and quantifiable loss. It is insufficient for the respondent to merely assert that the orders were cancelled.

⁹ Ibid at para 48.

¹⁰ The rule that winding up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the courts processes should not be abused. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the ‘Badenhorst Rule’, after one of the foundational cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C.

[49] The respondent was required to demonstrate the actual loss which flowed from the cancelled orders, and that the cancellation was directly attributable to the alleged failure by the applicant to perform its obligations.

[50] Perhaps even more fundamentally it must show that the performance by the applicant was not conditional on the payment by the respondent of the full amount due in terms of the first invoice, which in my view it has failed to do.

[51] As postulated in *Aerontech*¹¹, the burden on a party who relied on an unliquidated counterclaim to resist liquidation is a weighty one. To persuade the court that its counterclaim is '*genuine and serious*', the respondent was required to fully disclose the factual basis thereof and to properly quantify such claim.

[52] The correspondence placed before the court by the respondent falls far short of what is required. It does not allow the court to assess whether the alleged damages exceed the respondent's admitted indebtedness, whether the claim is capable of extinguishing the debt and whether the alleged loss is speculative or well founded.

[53] The respondent does not deny delivery of the goods in respect of which the indebtedness arose nor receipt of the relevant invoices. The terms of the agreement, and specifically that payment is due within 30 days of the date of invoice, are not disputed.

[54] The respondent does not contend that the invoices are incorrect, or that the goods delivered were defective. It does not allege that the applicant was in breach in relation to the delivered goods to which the indebtedness relates.

¹¹ *Aerontec (Pty) Limited v South Harbour Tankfarm CC* (18712/2019) [2021] ZAWCHC 21.

[55] The respondent relies solely on an alleged illiquid counterclaim for damages which are yet to be quantified (and claimed in action proceedings or by particularised and properly vouched written demand), concerning a future order.

[56] The *Badenhorst* principle is therefore not engaged.

[57] Significantly, the respondent does not deny that the amount due remains unpaid. It expressly undertook to discharge its indebtedness by ‘the end of March.’

[58] In reply, the applicant averred that the order to which the pro forma invoice relates *‘never progressed to shipment, does not give rise to any indebtedness, and forms no part of these proceedings.’*

[59] In my view, and on a conspectus of the evidence before me the respondent has fallen woefully short of showing that the counterclaim on which it relies to defeat liquidation is genuine or serious, or that it creates a bona fide dispute on reasonable grounds.

[60] The transaction to which it relates postdates the debt forming the subject matter of these proceedings and only emerged, conveniently on the last day of the statutory demand period.

[61] In the circumstances the application for a provisional order of liquidation must succeed.

Order

[62] The following order shall issue:

1. Respondent is placed under provisional liquidation in the hands of the Master of the above Honourable Court;
2. A rule *nisi* is hereby issued, calling upon Respondent and all interested parties, if any, to show cause to the above Honourable Court on 28 April 2026, why an order in the following terms should not be granted:
 - 2.1. that Respondent be placed under final liquidation;
 - 2.2. that the costs of the application should be costs in the liquidation which costs are to include costs of counsel on scale B.
3. A copy of this order shall be served:
 - 3.1. on the Respondent by the Sheriff of the above Honourable Court at Unit 4[...] M[...] Park, c/o P[...] B[...] and R[...] S[...] Street, Beville South;
 - 3.2. on the local offices of the Receiver of Revenue by the Sheriff of the above Honourable Court;

- 3.3. on Respondent's creditors by one publication thereof in an issue of "The Cape Times" and "Die Burger" newspapers respectively;
- 3.4. on Respondent's employees (if any), and any trade unions of which such employees may be members (if any), by the Sheriff of the above Honourable Court.

M HOLDERNESS

JUDGE OF THE HIGH COURT

Appearances:

For the applicant : Adv J Bester

Instructed by : Bester & Lauwrens Attorneys c/o Pincus Matz
Attorneys

For the respondent : Adv D Zantsi

Instructed by : T J C Dunn Attorneys c/o JMB Gillan Attorneys