



**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO: CA21/2025**

In the matter between:

**MORGAN BEEF (PTY) LTD**

Appellant

**and**

**GREY JADE TRADE AND INVEST 69 (PTY) LTD**

Respondent

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**JUDGMENT**

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**MAKAULA J:**

**A. INTRODUCTION**

[1] The appellant instituted an application before the court *a quo*, seeking an order placing the respondent under provisional winding up in terms of the provisions of

section 344(f) read with section 345(1)(a)(i) and (c) of the Companies Act<sup>1</sup> (the Act), alleging that the respondent was unable to pay its debts. The application was opposed by the respondent on the basis that it was not indebted to the appellant. It also bona fide disputed the indebtedness on reasonable grounds. The court *a quo* found in favor of the respondent by dismissing the application with costs. The appellant appeals with the leave of the court *a quo*.

## **B. The parties.**

[2] The parties are private companies for profit, incorporated in terms of the Act. The appellant conducts business mainly throughout the Province of Gauteng as an abattoir and bulk distributor of beef, to butcheries, wholesalers, and supermarkets.

[3] The respondent, on the other hand, is a meat wholesaler and primarily supplies processed meat products to the South African franchise industry, like Steers, under the Famous Brand Group. It has several feedlots across South Africa where cattle are housed before they are dispatched to various abattoirs for processing.

## **C. Grounds of Appeal.**

[4] The grounds of appeal, as I comprehend them, are premised on four fundamental issues. The appellant contends that the court *a quo* misdirected itself in finding, firstly, that it failed to plead the terms of the written credit agreement (the credit agreement). The appellant states that during August 2021 the respondent applied and was granted a credit facility resulting in the conclusion of the credit agreement. The appellant contends that it pleaded the terms of the credit agreement, and the respondent admitted such terms in its answering affidavit.

[5] Secondly, the appellant argues that the court *a quo* erred in concluding that no credit agreement was entered into because it was not signed by the appellant in Springs and still relies on it when interpreting clauses 6.3 and 6.17 in its judgment.

[6] Thirdly, the appellant contends that the court *a quo* misdirected itself in finding that it failed to prove that stock was delivered. The appellant avers that it pleaded that from the date of conclusion of the credit agreement it delivered meat from time to time to the respondent until or about 19 August 2022, and the respondent admitted that in its answering affidavit. The appellant, therefore, submits that the

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<sup>1</sup> 61 of 1973.

observations (and findings) made by the court *a quo* about its alleged failure to plead stock delivery and accounting errors were respectively misconceived, especially that those aspects are not in dispute.

[7] Fourthly, the appellant contends that the court *a quo* was wrong when it found that the respondent *bona fide* disputed its indebtedness to it on reasonable grounds.

#### **D. The facts.**

[8] The parties entered into an agreement during or about August 2021. The terms of the agreement and the agreement itself are in dispute between them. The appellant relies on a credit agreement, which it attached to the founding affidavit as annexure “FA3”, whereas the respondent alleges that the agreement was oral and entered into around the same period alleged by the appellant. Notwithstanding, the respondent admits having signed the document which the appellant claims to be the credit agreement. The respondent claims that the appellant represented to it that it was required to sign ‘a FICA document’<sup>2</sup>.

#### **Appellant’s version.**

[9] The version of the appellant is that on 5 August 2021 and at Welkom, alternatively, Springs, the respondent, represented by Mr. Khaya Ndlazi, applied to the appellant for a credit facility. The appellant was represented by the deponent of the founding affidavit, Mr. Andre Leon Niebuhr. The purpose of the credit facility was for the sale and supply of red meat by the appellant to the respondent on credit. The appellant states that the respondent accepted the terms and conditions of the credit agreement and signed it. The express material, alternatively implied further alternatively, tacit terms of the credit agreement relied upon by the appellant are pleaded as follows:

“19.1 The credit limit granted in terms of the credit agreement would be communicated to the respondent as soon as all the necessary credit checks were conducted. The credit limit granted by the appellant will be in its sole discretion.

19.2 The [appellant] made available a credit facility of R8 million.

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<sup>2</sup> A document signed under the Financial Intelligence Centre Act 38 of 2001.

19.3 The respondent is to always maintain its account within the credit terms and credit limit.

19.4 The respondent had to make payment of the credit amount(s) advanced within 14 days from the date of each invoice.

19.5 Any amounts not paid by the respondent on the due date shall attract interest at the maximum rate permissible from time to time set forth in the limitations and disclosures of the applicable legislation.

19.6 Should the respondent default in making payment of the account within the time periods agreed upon, the total amount outstanding on the account will immediately become due and payable, notwithstanding the fact that a portion of the account might not yet be payable in accordance with the agreed terms.

19.7 All payments received shall firstly be utilised for interest and legal costs, and thereafter in payment of the capital.

19.8 The respondent has no right to withhold payment for any reason whatsoever.

19.9 The price of goods will be the [appellant's] official ruling price at the date on which goods are delivered to the respondent, as set out on the delivery note. All delivery notes/invoices/statements not required within 24 hours from receipt thereof will be accepted as correct.

19.10 The respondent shall be liable for all the [appellant's] legal costs on a scale between attorney and client in respect of any legal action instituted by the [appellant] enforcing any provision of the agreement.

19.11 The respondent agreed that:

19.11.1 the credit agreement represents the entire agreement between the parties and that no alterations or additions to the credit agreement may be effected unless agreed to by both parties, reduced to writing and signed by both parties;

19.11.2 the credit agreement will govern all future contractual relations between the parties.

19.12 Any delivery notes signed by the respondent (including a representative of the respondent) or a third party engaged to transport the goods on the respondent's behalf and held by the [appellant] shall be conclusive proof that delivery was made to the respondent.

19.13 The [appellant] reserved its rights (without any prejudice of rights) to replace any goods delivered, should the claim for defective goods be received within 24 hours from delivery of the specific goods. No claims will be considered if not received within 24 hours of delivery.

19.14 To be valid, claims must be supported by the original text invoice and proof of return of the goods within 24 hours from delivery.

19.15 The respondent agreed that the amount due and payable to the [appellant] may be determined and proven by a certificate of balance issued by the [appellant] and signed on its behalf by any duly authorised director, whose authority needs not to be proven. Such certificate shall be binding and shall be *prima facie* proof of the indebtedness of the respondent”.

[10] The appellant avers that pursuant to the credit facility made available to the respondent, and upon the respondent's special instance and request, it delivered meat from time to time to the respondent from the date of conclusion of the agreement, until or about 19 August 2022. The respondent made sporadic payments in respect of the goods delivered, contrary to the credit agreement.

[11] The appellant attached emails showing business communication, invoices and payments reflecting various transactions between itself and the respondent. Some of the invoices constitute the subject of the dispute between the parties.

[12] The appellant states that notwithstanding its acceptance of the sporadic and partial payments by the respondent, clause 6.15 of the credit agreement stipulates that any indulgence afforded to the respondent would not constitute a waiver of the right to immediately claim payment of the full amount due, owing and payable. It is for that reason that it concluded (amongst other issues) that the respondent contravened the terms of the credit agreement and demanded payment of the whole amount.

[13] The appellant contends that the relationship between itself and the respondent was characterised by disputes regarding delivery of meat, invoices thereof and other related disputes. The appellant cites, by way of example, a dispute regarding the payment of invoices 1102579 and 1102623 concerning the meat delivered thereunder, the copies of which were annexed as FA7 and FA8 respectively. The contention by the appellant is that the respondent refused to pay for these and other invoices until the issue had been resolved. The appellant argues that the stance taken by the respondent was contrary to clause 1.6 of the credit agreement that stipulated that the respondent had no right to withhold payment for any reason whatsoever. Further, the appellant contends that the respondent should have, in terms of clauses 6.10 and 6.11 of the credit agreement, lodged its claims for defective goods within 24 hours of delivery of the specific goods. Such claim was required to be supported by the original tax invoice and proof of return of the goods. The appellant, however, for the sake of preserving the commercial relationship with the respondent, decided to pass a credit note in respect to invoice number 1102579 on 3 March 2022 despite that the query was raised 3 months later. The credit note was for R1 442 005.88.

[14] The appellant contends that, to resolve the unending disputes with the respondent, on 14 March 2022, it sent a statement reflecting the outstanding balance to the respondent's accountant to review and to subtract over payments, if any, from the next payment due. The statement reflected that the respondent owed the appellant R10 359 706.54. Pursuant to that statement and on 18 March 2022, the respondent paid R3 915 762.10 after a credit note difference of R107 256.63 was deducted.

[15] The appellant agreed that, in respect of certain invoices, adjustments were made in the form of credit notes in favour of the respondent. The appellant furthermore agrees that there were on-going instances of credit notes that were processed in favour of the respondent. The appellant contends that it did so when merited for the sake of maintaining the commercial relationship with the respondent.

[16] The appellant states that, because of the amount due and the respondent's failure to fulfill its obligation to bring its account up to date, on 25 August 2022 it issued a notice in terms of section 345(1)(a)(i) of the Act. It demanded payment of

R8 853 823.16 from the respondent, which it claimed was due, owing and payable within three weeks from the date of delivery of the notice. The amount so demanded constituted the total accelerated amount owing by the respondent by virtue of the provisions of clause 1.4 of the credit agreement.

[17] After delivery of the demand, it is common cause that the respondent made the payment of R1 000 000.00 on 15 September 2022. The contention by the appellant is that after the amounts were paid, the respondent remained still owing R4 377 500.37. The appellant submits that the respondent's non-payment of that amount constitutes evidence of the respondent's commercial insolvency.

**Respondent's version.**

[18] The application is opposed by the respondent on various grounds. As previously mentioned, the respondent denied that it entered into a credit agreement. It claimed that the credit agreement upon which the appellant relies (annexure FA3) was presented to it by the appellant strictly for FICA purposes. Further, the respondent avers that there is no legal basis for winding-up, except that the application has been brought for ulterior purposes to enforce payment of a debt in respect of which there is a *bona fide* dispute.

[19] The contentions by the respondent, are that (a) the appellant has, as part of the alleged indebtedness, charged the respondent twice for the same consignment of stock; (b) the appellant has, as part of the alleged indebtedness, claimed for payment for stock which was returned because it did not meet the minimum meat specification requirements between the parties; and (c) the appellant has charged the respondent for stock which, although invoiced, was never delivered in the sum of R4 555 816.81, which exceeds the total value of the appellant's claim by R178 316.44. In addition, the respondent contended that the appellant should have instituted action proceedings rather than application proceedings because it knew fully well before the institution of the application that the claim is disputed.

[20] The respondent's version of events is that during or about August 2021, it arranged to meet with Jan Morgan, the director of the appellant. The purpose of the arranged meeting was to establish a working relationship between the appellant and the respondent. It contends that the deponent to the founding affidavit was neither a

party nor privy to the negotiations during which the working relationship was negotiated and finalised.

[21] The terms of the oral agreement upon which the respondent relies are pleaded as follows:

- “11.1 the applicant would supply a consignment of frozen beef in consignments of either 12,5 tons or 25 tons per truckload to the respondent, which would be delivered to various third-party cold storage facilities around Johannesburg, Gauteng for the benefit of the respondent’s customers.
- 11.2 the respondent would simultaneously alternatively, within a week further alternatively, prior to the delivery by the applicant, supply a consignment of 60 live A-grade or C-grade cattle to the applicant for processing with the respondent then to receive a truckload of frozen processed beef in exchange for the delivery of a truckload of live cattle.
- 11.3 if any of the parties could not match the delivery as agreed, then the other party would wait until the consignment is matched before continuing with further deliveries so as to ensure that if the respondent had not delivered a truckload of live cattle to the applicant, it would not be necessary for the applicant to in turn deliver a truckload of frozen processed meat to the respondent;
- 11.4 the applicant would furnish the respondent with delivery notes in respect of all consignments of stock delivered to the respondent or to third parties cold storage facilities on behalf of the respondent simultaneously to the execution of the delivery.
- 11.5 the applicant would deliver processed stock that meets the minimum meat specifications requirement by the respondent. The processed beef would need to comply with their specification for beef trim which were as follows: 100/0; 95/5; 90/10; 80/20 and 0/100. Any product delivered which would not meet the above specifications would be returned to the applicant.
- 11.6 each party would settle each other’s invoices within seven days of receipt of the relevant stock.”

[22] The respondent contends that the parties varied the oral agreement to read sixteen days instead of seven days as to when the invoices would have to be settled. No surety was signed in respect of the oral agreement.

[23] The respondent testifies that as the contract continued, the appellant raised complaints about live cattle which were bruised during transportation, alleging that the bruising increased to eight percent of the body. The complaint made the respondent stop transporting cattle to the appellant and opted to sell to other abattoirs. Despite the drop in the delivery of livestock, the appellant increased its supply of processed meat to the respondent considerably and at times deliveries amounted to R13 000 000.00 during some weeks. The third-party cold storage facilities that were receiving the frozen stock on behalf of the respondent became unable to timeously confirm stock received for a particular week. However, the respondent would pay the appellant in good faith even though delivery of the processed meat had not been confirmed by third-party cold storage facilities on the respondent's behalf and contrary to the oral agreement, which required that the delivery notes, duly signed on behalf of the respondent to record the receipt of the stock forming the subject thereof, were essential to verify receipt of each consignment of stock from the appellant.

[24] The respondent states that in the fifty weeks that it actively traded with the appellant, it paid the appellant a total of R123 092 573.48. During that time, the appellant invoiced it for R165 026 851.24 for processed stock alleged to have been delivered to it. The respondent maintains that these discrepancies were primarily comprised of the double-billing in respect of delivery of inferior stock which did not meet the requirements agreed upon by the parties and billing at prices for superior quality of meat that was not supplied. Instead, inferior products had been delivered, with the result that the pricing was incorrect. The respondent states that, because of the double-billed invoices,<sup>3</sup> the appellant credited it with R29 685 341.20.

[25] The respondent alleges that the returned stock that did not meet the minimum meat specification requirements, amounted to R8 328 67.14<sup>4</sup> and that amount was credited by the appellant. The respondent states that it was discovered two or three

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<sup>3</sup> The respondent listed thirty-six such invoices.

<sup>4</sup> Similarly, the respondent listed all those invoices.

months later that the appellant had charged it for more expensive grade of beef than had been delivered. The respondent listed invoices in that regard which amounted to R655 540.49.

[26] The respondent argues that it has not received a considerable amount of stock allegedly delivered by the appellant or reflected above. The respondent contends that the amount of stock which has not been delivered is more than the appellant's claim and is valued at R4 555 816.81, as shown in annexure "AA4" attached to its answering affidavit. The respondent marked as "NONE", in annexure "AA4", the stock that had not been delivered as no delivery notes nor invoices were provided by the appellant.

[27] Further, the respondent argues that there are stock returns which had been rejected by it and which the appellant has recorded and received but did not credit the respondent's account accordingly. The rejected stock relates to the meat that did not meet the requirements and specifications and in respect of which credit notes were not furnished by the appellant. The respondent argues that based on all these facts, it is the appellant who owes it money.

[28] The respondent insists that there is no credit agreement between it and the appellant. It pointed out that the terms pleaded by the appellant were impracticable. For instance, it was virtually impossible to comply with the alleged 24-hour requirement, as evinced in the credit agreement, because meat is delivered in a frozen state and thereafter it is stockpiled.

[29] The respondent denies that all the invoices were reconciled, maintaining that not all credit notes, payment allocations, and delivery notes were reconciled and furnished by the appellant. It alleges that as of 27 July 2022, what was discussed were the issues of overcharging, double billing and stock returns, which culminated in the recovery of approximately R40 000 000.00 that includes the R29 000 000.00 credited by the appellant for double billing. From then onwards, the respondent insisted on supporting documents before it made payment and that was by no means a delaying tactic, but a prudent business approach in the wake of the discrepancies previously stated.

[30] The respondent submits that the statement dated 27 August 2022, for R8 853 823.16, reflecting R3 559 362.90, being due and payable, was incorrect.

The respondent accepted that the latter amount was due and as a result, paid it in full on 26 August 2022. The respondent disputes that it owes the appellant R5 517 830.41.

[31] The respondent denies that it received the section 345 demand and that it ever made an admission of liability to the appellant that it owed it money. That is borne out by the fact that in its founding affidavit, the appellant does not state how, to whom and when the admission was communicated. It avers that its assets exceed its liabilities. It owns about 7 000 cattle, worth approximately R110 million, property in the form of 4 farms situated in the Eastern Cape Province and cash in its bank account. It therefore denies that it was insolvent.

### **The reply by the appellant.**

[32] In its replying affidavit, the appellant claims that the assertion by the respondent that the credit agreement was a FICA document is disingenuous because the document itself refers to a credit agreement and not a FICA document.

[33] The appellant was baffled by the respondent's denial of the accuracy of its accounting calculations because in certain paragraphs of the answering affidavit it accepts the correctness of annexure "FA26". "FA26 is a pastel statement of account sent by the appellant to the respondent tabulating the invoices and payments from the beginning of their relationship till 8 September 2022. It reflected a balance of R5 377 500,37 as owed by the respondent. The appellant stated that the respondent is confused because it placed its orders in 25 tons. However, the appellant had only 14-ton trucks. When the truck passed over the appellant's weighbridge, an invoice reflecting a 14-ton truck would be generated by the software system. That meant that a 25-ton order would be accounted for by two invoices (of two 14-ton trucks passing over the weighbridge) on the respondent statement of account. That led the appellant to manually credit and issue a single invoice reflecting a 25-ton order. The respondent accepts that the appellant manually corrected each accounting entry by crediting the two invoices and re-issuing one invoice with the combined amount, so states the appellant. The appellant argues that this is the primary reason for the issuing and re-issuing of invoices.

[34] It is common cause that the respondent relies on "AA4" as proof that some of the goods were not delivered. In disputing "AA4", the appellant referred to sixty

invoices in its replying affidavit as proof that stock was delivered on the respondent's behalf to its appointed third-party cold storage agents, collected by the respondent and third-party transporters. The appellant argues that it is a myth that it owes the respondent R4 555 816.81, as alleged by the latter.

[35] Further, the appellant mentions seven other invoices and claims that the stock thereof was never returned to it, or off set by the respondent because of the slaughtering agreement and amounts which remained due. As a result, the appellant claims that the issues raised by the respondent in "AA4" have been rebutted by it with proof. Consequently, there are no stock returns or any other amount to be credited to the respondent. The appellant places the blame on the respondent's administrative shortcomings in managing the relationship between the operational side and the accounting side of its business for the false claim that it relies on in annexure "AA4".

[36] The appellant pointed out that the respondent did not produce its bank statement and proof of ownership of the alleged assets and their values to show that it is factually solvent. The appellant alleges that it has further discovered, through a deeds search, that the respondent does not own immovable property. It argues that in respect of the alleged 7 000 cattle owned by the respondent, there is no indication of their breed, value, quality and methodology used when assigning an arbitrary value of R110 million to them.

#### **E. Issues for determination.**

[37] The issues for determination based on the grounds of appeal and agreed upon by the parties are summarized as follows.

- 37.1 whether the appellant established the existence of the credit agreement.
- 37.2 whether the appellant charged for stock that was not delivered and/or that had been returned and/or double charged by the appellant.
- 37.3 whether the respondent *bona fide* disputes the indebtedness; and
- 37.4 whether the respondent's deemed insolvency has been established.

#### **F. Analysis.**

[38] Section 344(f) of the Act provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345. Section 345(1)(a)(i) and (c) state,

***“345 When company deemed unable to pay its debts***

*(1) A company or body corporate shall be deemed to be unable to pay its debts if- (a) a creditor, by 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; or*

...

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

**The credit agreement**

[39] The argument by the appellant is that the court *a quo* erred in finding that it had failed in its founding papers to show the *prima facie* existence of the credit agreement and by implication its binding effect.

[40] The credit agreement was the bone of contention before the court *a quo* and before us. It has three parts. The first part is headed ‘Customer Account Application’. The second part is headed Credit Agreement (including deed of suretyship). The third part is headed ‘Terms and Conditions’. The Customer Account Application page comprises of attachments of documents with boxes relating thereto. None of the boxes have been ticked. It reflects that that part of the document was not completed. The Credit Agreement has been completed. For instance, it reflects the full particulars of the respondent as the party/entity applying for credit, inclusive of the identity of the respondent’s representative. Mr. Ndlazi, address of the respondent, its bank account details, VAT account number, auditors, etc. The Terms and Conditions are covered in 5 pages. The clauses contain all the relevant provisions which are the hallmark of a credit agreement. Each page of the agreement is initialed by the parties and signed by them.

[41] The respondent contends that when it signed the credit agreement, it was made to understand that it signed the documentation simply to comply with the provisions of FICA to combat money laundering activities and the financing of terrorist and related activities. The Financial Intelligence Centre Act, (FICA) imposes certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities. Amongst others, the objective of FICA is to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities. The provisions and the objectives of FICA are clear and differ in many respects from the credit agreement. The terms and conditions contained in the credit agreement are different from the requirements of FICA. Unsurprisingly, the answering affidavit fails to explain this difference, and particularly the reason why the respondent confused the credit agreement with a FICA document. Based on the evidence, it is unconvincing that the respondent thought or was led by the appellant to believe that it was signing a FICA document.

[42] As alluded to, the credit agreement has all the essential elements of a written contract. For instance, it identifies the parties and the rights and obligations of each party. It was signed by the parties. The court *a quo* found that the founding affidavit is lacking on critical issues, in that it did not specify when the credit limit/facility was quantified and approved by the respondent and when the agreement was signed by the respondent. Those findings cannot be a bar to the acceptance of the existence of the credit agreement, especially because what the court *a quo* found was not an issue between the parties.

[43] The contention by the respondent is that the appellant failed to plead the coming into existence of the credit agreement, thus contravening the provisions of clauses 6.3 and 6.17. In the founding affidavit the appellant states that it approved and quantified at R8 million the respondent's application for a credit facility. Such approval culminated in the conclusion of the credit agreement, the terms of which are encapsulated in the aforesaid application. The credit agreement shows that on 5 August 2021 at Welkom the respondent signed the credit agreement albeit that it is silent as to the place and date it was signed by the appellant. A reading of clauses 6.2 and 6.3 does not support the contention by the respondent that the credit limit once quantified, approved and signed at Springs, it had to be communicated to it in

writing. Clause 17 requires that once the appellant has determined the credit limit, it had to communicate it to the respondent in writing. As discussed below, the emails and statements exchanged by the parties speak to the credit limit being R8 million. Failure to communicate the credit limit cannot be a factor that can lead to the finding that it did not come into existence. That is particularly the case in the light of there being no dispute raised by the respondent in the pleadings. There is a clear misdirection by the Court *a quo* in this regard.

[44] The issue raised by the appellant is that the court *a quo* erred in rejecting the credit agreement and at the same time relying on it in its findings. There is merit in this argument. The court *a quo* found that the appellant failed to plead the coming into existence of the credit agreement in that it did not aver that after the credit limit was quantified, approved and duly signed at its business address in Springs, it was communicated to the respondent. Once that finding is made, the court *a quo* could and should not have relied on the provisions of the credit agreement in the further analysis of the issues before it. However, the court *a quo* went further and interpreted various clauses of the credit agreement which it had already found not to be applicable and binding on the parties, thus misdirecting itself. It discussed various instances of non-compliance by the appellant with the provisions of the very credit agreement which it had earlier found was not binding on the parties.

[45] The last sentence just above the signature of the appellant states that ‘the document will become an agreement between all the parties by Morgan Beef’s acceptance signature hereunder.’ The signature in this regard sealed the credit agreement, especially in the light of how the parties conducted their business during the subsistence of their commercial relationship.

[46] Contrary to what is argued by the respondent, the appellant pleads that it made a credit facility of R8 million available to the respondent in terms whereof invoices were to be settled within 14 days. The emails between the parties bear out the aspect of 14 days. For example, annexure “FA20” refers to the credit limit being R8 million. The 14-day period and the credit limit of R8 million appear in numerous correspondence, especially in the reconciliation statements sent to the respondent’s accountant by the appellant and that has never been gainsaid or queried by the respondent. From the papers and the exchange between the parties, it is apparent

that the credit limit is a tacit term of the credit agreement and is common cause between the parties. It is my finding that the credit agreement was entered into knowingly by the parties and it is binding on them.

**Proof of delivery and whether the indebtedness is *bona fide* disputed on reasonable grounds.**

[47] It is common cause that stock was delivered, and concomitant payments were made in respect of some of the stock that was delivered. The issue raised by the respondent is pertinent to the accuracy of the delivery of the quantity and in some cases the quality of meat. Central to the agreement between the parties is the supply of meat and payment thereof. Clause 6.7 of the credit agreement provides that 'Any delivery notes (copy of original) signed by the Customer (including a representative of the Customer) or a third party engaged to transport the goods on the Customer's behalf and held by Morgan Beef shall be conclusive proof that delivery was made to the customer.'

[48] It is undoubtedly so that the commercial relationship between the parties has been characterized by various disputes regarding the quality of meat and double billing, charging for superior quality when low quality meat was delivered, etc. Even before the launch of the proceedings, there was an exchange of emails regarding a dispute about how much the respondent owed the appellant. Some invoices (involving millions of rands) were queried and subsequently credited by the appellant even though in others the appellant stated that it did so to maintain the commercial relationship with the respondent. It is insufficient for the appellant to have pleaded in its founding affidavit that it delivered meat to the respondent from time to time. It should have proved the amount claimed by way of invoices and delivery notes. It attempted to do so in reply after the respondent had put up annexure AA4.

[49] The issues raised by the respondent were of concern even before the application was instituted. The dispute was palpable even at that stage. As I found that the appellant has established the existence and coming into effect of the credit agreement, the parties' relationship is governed by its provisions. Clause 2 thereof stipulates that 'The price of goods will be Morgan Beef's official ruling price at the date on which goods are delivered to the customer, as set out on the delivery note.' Ineluctably, this means that the price fluctuates and is determined at the time of delivery to the respondent or its third-party agent. Clause 2 is clear in that the delivery note would set out that price. Read in the context of the credit agreement, what it means is that

the respondent would only be informed by the delivery note as to the price of beef at the time of delivery and which amount it would have to pay for the delivered beef. Without the delivery notes and correct invoices, the appellant would not be able to know which amount is owing. Similarly, without the delivery notes and invoices attached to the founding papers, this court would not be able to determine whether the amount of R4.3 million is owed by the respondent or the appellant owes the respondent, as alleged. The determinant for this amount and by implication the success of the proceedings depends on proof of delivery notes. That should have been part of the appellant's case in the founding papers and not in reply. I find that the appellant has not established that the amount claimed by it was in respect of stock delivered to the respondent or its agents.

[50] The appellant partly relies on the provisions of clause 6.13 in establishing the respondent's indebtedness. The respondent submits that the certificate is insufficient to prove that it is insolvent. It argues that the appellant must first prove delivery of the meat by producing delivery notes to establish its indebtedness. The respondent correctly argues that the dispute is not about the actual computation of the price or whether the appellant applied an incorrect method to determine that price and in which event it would not be prudent to prove the price by way of the certificate. The respondent further contends that the wording of the clause restricts the application of the certificate to summary judgment applications. Clause 6.13 states that the respondent, as the customer, "agrees that the amount owing and payable to [appellant] may be determined and proven by a certificate of balance issued by the [appellant], signed on its behalf by any duly authorised director, which authority need not be proven. Such certificate shall be binding and shall be *prima facie* proof of the indebtedness of the [respondent] for purposes of summary judgment."

[51] I agree with the submissions made by the respondent in this regard. The last sentence of clause 6.13 is couched in peremptory terms. The clause restricts the application of the certificate to summary judgments applications. To extend it to apply to the current proceedings would inevitably result in making a new contract for the parties. Furthermore, the certificate would be meaningless regard being had to the provisions of clause 6.7 which require that the delivery notes be signed. The

signed delivery notes would serve as proof of the ruling price of meat as at the time of delivery.

[52] Clause 6.7 provides that delivery notes signed by either the respondent or its third-party agent 'shall be' conclusive proof of delivery. Flowing from that would be proof of the amount owing as discussed in the preceding paragraphs. The respondent would have no option but to pay for an invoice based on a signed delivery note. As previously mentioned, the appellant should have, in its founding papers, attached delivery notes as proof that meat had been delivered. That would establish *prima facie* indebtedness by the respondent. A finding that the certificate suffices as *prima facie* proof of indebtedness would be against the peremptory provisions of clause 6.7, especially in instances where the very delivery of meat is in dispute.

[53] The respondent highlighted about ten instances in the replying affidavit (regarding annexure AA4) where the appellant did not attach delivery notes as required in Clause 6.7. I shall not deal with all the instances referred to except to highlight a few. The appellant relies in its replying affidavit on emails confirming delivery of meat that occurred prior to the institution of these proceedings. The correspondence, in most, if not all instances, is exchanged after the commencement of these proceedings and when the appellant was responding to annexure 'AA4'.

[54] In one instance, the appellant cites invoice number 1089005 and annexes "RA5.1" as proof that meat amounting to R815 735 48 was delivered to the respondent. The appellant does so by annexing an email from Famous Brands, which is one of the third parties taking delivery on behalf of the respondent. Notably, "RA5.1" is not a delivery note. The respondent correctly observes that the email amounts to hearsay evidence in that Ms. Mandy Fernandez did not file a confirmatory affidavit to confirm the truthfulness of its contents. A similar issue obtains regarding invoice number 10933933 annexed to "RA5.3" to R1 407 341 99 which is a re-issue of consignment invoice number 1093330. Annexed to "RA5.3" is an email dated 12 May 2023 from Nadine Silva of Famous Brands allegedly confirming delivery of meat. This as well is not a delivery note. What compounds the situation is that, in it, she states that 'Die stock was by Cater Chain afgelaai vir Blesfreezing (dis wat ek kan optel van die system af)', translated to mean that 'The stock

was delivered at Cater Chain for Blesfreezing (that is what I can pick up from the system)". It is clear from the quotation that she does not have first-hand information about the delivery, but it is what she picks up from the system. This is more than hearsay evidence. This does not assist the appellant considering clause 6.7 of the credit agreement.

[55] The dispute between the parties is also in relation to the type and weight of the alleged delivered meat. Annexure "RA5. 1" is a 'Goods Received Note'. Under remarks, is an entry that reads: 'Stock mixed on the palettes individual mass not confirmed'. This should not have been the case because the price of meat is determined by the weight as well as the quality.

[56] In response to annexure 'AA4', the appellant refers to invoice number 1104078 for R2 357045.15 (being a re-issued invoice) in respect of certain credit notes. The meat is alleged to have been delivered on 8 November 2021. Proof of delivery was attached as annexures "RA5.14" and "RA5.15" respectively. "RA5.15" is a 'Goods Received Note GR13865' from Chiiewenl Cold Storage. It reflects the supplier of goods as Rapid Purple Waters Trading and the transporter being Mogan Beef. The note has nothing to do with the appellant as a supplier but more with another supplier, i.e. Rapid Purple Waters Trading. Despite that, it is attached as proof that meat was supplied by the appellant. As stated above, the appellant argues that invoice number 1104080 is a re-issued invoice borne out by that it refers to RA5.14 and RA5.15 as having the same weight. That may be so, but it does not explain the anomaly that the supplier reflected is not the appellant.

[57] These are some of the obvious examples which establish that the appellant has failed to prove that it has complied with the provisions of clause 6.7 of the credit agreement. As stated previously, the commercial relationship between the parties is marked by errors or disputes pertaining to the quality of meat, its weight, the amount owing and various other issues relating to payment. The parties are blaming one another's accountant.

[58] It has become trite that liquidation proceedings ought not be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* by the company on reasonable grounds; the procedure for winding-up (liquidation) is not designed for

the resolution of disputes as to the existence of a debt.<sup>5</sup> The dispute, as is evident now, was foreseeable, especially having regard to the history of their relationship. The following statement of law by Cameron J in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*<sup>6</sup> finds application in this matter “[86] ... That [the Badenhorst] principle is less a sensible rule of practice. It says that if you want to claim a debt you know is disputed, you should not bring liquidation proceedings to do it. You should claim the debt by way of action – and only once your claim has been established may you, if necessary, seek to liquidate or sequester.” Based on the above, I find that the respondent has established that it *bona fide* disputes its indebtedness to the appellant on reasonable grounds and its liquidation ought to fail. The appellant, based on this, should have issued summons to claim its debt, if any. Considering the circumstances and the facts dealt with, I find that the respondent has established that it *bona fide* disputes the appellant’s indebtedness/claim.

[59] The appellant argues that the facts in this case and the issues relevant are identical to those in *Gap Merchant Recycling CC v Reach Trading 55 CC (Gap)*.<sup>7</sup> I shall pertinently deal with the facts and the relevant clauses as the court did in *Gap* because of the heavy reliance placed on them by the appellant. The facts in *Gap* are that the applicant entered into an agreement with the respondent (duly represented by Mr. Muller) in terms of which the former would supply the latter with waste material. The oral agreement endured until it was reduced to writing on 18 April 2013 when the respondent signed the credit application. The credit application provided that the purchase price for goods supplied would be due not later than the end of the month in which the tax invoice was issued. The credit limit was set at a minimum of R300 000.00 and maximum of R600 000.00 per month. Clause 3 of the standard terms and conditions stipulated that the respondent had ‘no right to withhold payment for any reason whatsoever’ and was ‘not entitled to set off any amounts due to the respondent by the applicant against its indebtedness to the Supplier’.

[60] The court cited the following terms and conditions as relevant to the dispute between the parties.

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<sup>5</sup> *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348; Henochberg on the Companies Act 71 of 2008 Volume 2; [Issue 16] APPL-47

<sup>6</sup> 2017 (2) BCLR 1562 (CC), 2018 (1) SA 94 (CC) at para [86]

<sup>7</sup> (2480/2014) [2014] ZAWCHC 53; 2016 (1) SA 262 (WCC) (15 April 2014).

*“(a) The purchase price for goods supplied would be due, in the case of an account-approved customer, within the credit period specified in the account application or no later than the end of the month in which a tax invoice was issued by the supplier (clause 34).*

*No different period for payment was specified in the respondent’s credit application.*

*(b) The customer had ‘no right to withhold payment for any reason whatsoever’ and was not entitled to set off any amounts due to the Customer by the Supplier against its indebtedness to the Supplier (clauses 37 and 38).*

*(c) The supplier gave no warranty concerning the suitability of the products for any particular purpose. (clause 11). The products were sold ‘voetstoots with no warranty against latent defects’ (clause 13). The customer agreed to establish, immediately upon delivery, that the products on the delivery note, tax invoice or other documentation correctly represented the products and prices agreed to and were free of defects (clause 24). Any defective product was to be returned to the by the respondent at the latter’s cost (clause 28). Claims under the agreement would only be valid if the respondent, within three days of the alleged breach or defect, gave the applicant 30 days’ written notice by prepaid registered post to rectify the defect or breach (clause 29).”*

[61] The applicant in Gap continued to supply material to the respondent until November 2013. It sent an account reconciliation to the respondent covering the period March to November 2013. The reconciliation reflected that over that period the applicant supplied material to the respondent at a total price (inclusive of VAT) of R2 075 568.87, of which R1 047 015.45 was settled either by payment or by the setting-off of the purchase price of recycled material purchased back by the applicant from the respondent. The shortfall of R668 553.42 was the applicant’s claim.

[62] When demand for payment was made, the respondent raised complaints about the quality of the product and that it was delivered late, as a result had ‘to carry over to the next month and thus I never catch up’. The respondent further complained that ‘if [respondent] did not have enough raw material, [it] could not fill [its] orders and repayment then became difficult.’(sic) and was not receiving payment timeously from his customers. That made repayment to the applicant difficult. It stated in one of its correspondence that it was trying its utmost to repay the outstanding amount but its

situation was ‘unfortunately not as easy as it seems’, and in another it said ‘... [it] also made a commitment towards you and will keep to [it] but you have to understand that [it is] in survival mode at the moment as [it] do(es) not get enough material that [it] need(s) to make money off.’ (emphasis added).

[63] The applicant issued a letter demanding payment of the outstanding balance within 21 days, failing which it would bring an application for the winding up of the respondent on the grounds that it was unable to pay its debts. The applicant launched liquidation proceedings. The respondent denied that it was indebted to the applicant in the amount claimed.

[64] The applicant’s contention was that the respondent failed to establish on the papers that it was *bona fide* disputing the claim on reasonable grounds. The respondent raised three issues to escape the validity of the credit application which were correctly rejected by the court. The first is that the respondent denied that the credit application dated 18 April 2013 was binding on it because the applicant caused it to sign a blank document. Secondly, that the credit application was never accepted by the applicant; and thirdly, that the applicant was not registered as a credit provider in terms of the National Credit Act. The first issue was abandoned by the respondent because it conceded that the handwriting on the application was that of Mr. Muller. Regarding the second issue the court found that the respondent did not dispute that it was the applicant which insisted that a credit application be signed before further material was delivered. Further the credit application incorporated the suretyship by Mr. Muller himself, and the application form did not specify a form of acceptance by the applicant. In respect of the third issue, the court found, amongst other factors, that the respondent ‘did not attempt to explain in its answering affidavit why the National Credit Act should be held to apply to the credit agreement between the parties and Mr. Du Prees made no submissions on the point in his heads of argument’.

[65] The appellant placed emphasis on paragraph 43 of *Gap* for the submission that this is a valid credit agreement. The court found as follows in that paragraph: ‘Once it is concluded that there is no reasonable and *bona fide* dispute that the contract between the parties incorporated the standard terms and conditions contained in the credit application form, the respondent’s assertion that it is not obliged to pay for

certain of the material because it was contaminated or unusable is rendered untenable. The respondent does not allege that it gave timeous notice of any breach or defect in the manner required by clause 29 of the standard terms and conditions. On the face of it the respondent accepted material supplied to it and only afterwards complained about quality when pressed for payment.' (emphasis added)

[66] I found that the credit agreement is the covenant that governs the relationship between the parties, as is the case in *Gap*. However, I find that *Gap* is distinguishable from the present matter. Unlike in this matter, the respondent in *Gap* admitted that he was experiencing financial difficulties and was unable to meet its monthly financial obligations to the applicant and was 'in a survival mode'. In this matter, other than the dispute between the parties, there is no issue of inability to pay. In *Gap*, the respondent's operation was to separate recyclable plastic from extraneous material. The court in *Gap* found that the respondent did not state what it did with contaminated or unusable material and further did not state whether the material was rejected on delivery or returned to the applicant at a later stage. In this matter, there is countless correspondence between the parties where queries were raised about the quality of beef, the issue of weight, the double billing and reconciliation of the account, resulting in credits being processed etc. In *Gap* the price of the product and the payment date were determined by the credit application. The purchase price was payable on the month end of the date of the tax invoice. Likewise in this matter, the payment was expected 14 days after the date of each invoice. However, there were issues regarding the quality of meat, its weight etc, that were raised by the respondent during the subsistence of the contract. In *Gap*, the court found that 'the respondent accepted material supplied to it and only afterwards complained about quality when it was pressed for payment'. Even then, the dispute centres around delivery of meat and how the actual indebtedness is distilled.

### **Respondent's commercial insolvency.**

[67] The appellant submits that the respondent's non-compliance with the section 345 letter of demand and non-payment thereof constitutes *prima facie* evidence that it is commercially insolvent. The appellant points out that the respondent has failed to disclose its financial statements or copies of its latest bank account statement and to allege that it is commercially solvent. Furthermore, the appellant avers that the

respondent has not provided evidence to confirm its ownership of the alleged immovable properties and their value. It states that it conducted a Deeds Search and could not find immovable property registered in the name of the respondent. It further contends that the respondent had failed to state how it arrived at the value of the cattle it allegedly owns, especially that it is silent on their breed, value and quality. The appellant submits that the respondent has failed to satisfy the evidential burden placed on it to establish its solvency.

[68] The essence of the respondent's contention to its alleged commercial insolvency is that the appellant proffered inconsistent claims or amounts that were due on the date of section 345 letter of demand. The respondent submits that the R8 853 823.16 allegedly owing as of 26 August 2022 was because of the acceleration clause. The respondent argues that, for the appellant to rely on the acceleration clause, it had to show that it was in breach of the agreement, something the appellant had failed to establish. Furthermore, the respondent contends that the section 345 letter of demand is incorrect and inconsistent with the reconciliation statement issued by the appellant (annexure "FA27" dated 22 August 2022), which stated the amount due as R8 853 823.16 and that was 6 days before the demand. It further contends that the reconciliation statement does not consider the money paid on 26 August 2022 by the respondent. The respondent therefore argues that the amounts claimed in both the reconciliation statement and the section 345 letter of demand are incorrect and are inconsistent.

[69] I found that the appellant should not have relied on the certificate of balance because the amount reflected therein is *bona fide* disputed by the respondent on reasonable grounds. The commercial insolvency of the respondent should be viewed in the backdrop thereof. Even the issues raised by the respondent have substance and cannot be resolved in liquidation proceedings. I find that the respondent has established that it is commercially solvent and unable to find that the court *a quo* exercised its discretion improperly.

### **Costs.**

[70] The parties agreed that costs should include the costs occasioned by the employment of two counsel. I have no reason not to agree with that submission as

both parties, from the inception of these proceedings, used the services of two counsel. It was a reasonable measure to take.

Consequently, I make the following order:

1. The appeal is dismissed with costs, such costs to include the costs of two counsel, where so employed.

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**M MAKAULA**  
**JUDGE OF THE HIGH COURT**

I agree

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**GH BLOEM**  
**JUDGE OF THE HIGH COURT**

I agree

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**S TILANA-MABECE**  
**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES**

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MAKHANDA

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**MAKHANDA**

Date heard : 11 August 2025

Judgment delivered : 5 March 2026