IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 8069/2015

In the matter between:

MAVERICK TRADING 1581 CC Applicant

(Registration Number: 2010/041991/23)

And

OASYS INNOVATIONS (PTY) LTD Respondent

(Registration Number: 2002/015718/07)

JUDGMENT DELIVERED 07 OCTOBER 2015

BOQWANA, J

Introduction

[1] This is an application for provisional liquidation of the respondent. The applicant alleges that it is a creditor in that the respondent owes it a debt which was initially stated to be R 395 401.93 in the founding affidavit, but was later in the same founding affidavit stated as different amounts, as well as the replying affidavit. The applicant alleges that the respondent is insolvent and unable to pay its debts as and when they fall due and that it is just and equitable to grant an order for its provisional liquidation. The respondent denies that any claim exists.

[2] At the start of these proceedings the respondent applied for leave to file a further affidavit which was not opposed by the applicant. The further affidavit presented by the respondent sought to deal with the indebtedness set out in the replying affidavit which was allegedly based on different sets of figures and a different conclusion as compared to the position in the founding affidavit. Having considered the issue I granted the respondent leave to file the additional affidavit.

Jurisdictional point

[3] A preliminary point of jurisdiction was taken by the respondent on the basis that the registered office of the respondent is 6 Dwars Street, Krugersdorp, and accordingly this court lacked jurisdiction to hear this matter. It seems that both parties' counsel were in agreement in their heads of argument that the only court that can grant the winding up of a company is the one in whose jurisdiction the registered office of such company was located. This view was held in the decision of **Sibakhulu Construction (Pty) Ltd vs Wedgewood Village Golf Country Estate Ltd (Nedbank intervening) 2013 (1) SA 191 (WCC)** where the court stated that under the Companies Act, 71 of 2008 ('the new Companies Act') the company's 'place of residence' could only be in one place and that place was to be its registered office. It was furthermore held that such registered office also had to be at the company's only office or, alternatively, if it has more than one office, its principal place of business.

[4] Applicant's counsel, Mr van der Linde, submitted, however, during oral argument that he had come across a decision of the full court of this Division, namely, **Van der Merwe vs Duraline (Pty) Ltd (7344/2013) [2013] ZAWCHC 213 (23 August 2013)** penned by Gamble J which seemed to disagree with the position held in **Sibakhulu.**

[5] It appears that in the **Van der Merwe** judgment a full court was convened to deal with the issue of jurisdiction in relation to winding-up proceedings, after the applicant in that matter disagreed with the conclusions made by the court in **Sibakhulu**.

[6] Gamble J in **Van der Merwe** concluded that, given the fact that the new Companies Act specifically provided that liquidation proceedings (save in respect of solvent companies) are to be brought under chapter 14 of the Companies Act 61 of 1973 ('the old Act'), the dual jurisdiction regime recognised under the old Act by virtue of the definition of 'Court'[1], read with the provisions of section 12[2] thereof, prevails in respect of such proceedings, notwithstanding the introduction of the new Act (at para 25). As such the court concluded that a creditor was entitled to approach the Court in whose jurisdiction the main or principal place of business was located, in circumstances where the registered office of the company is located elsewhere.

[7] Mr van der Linde also referred to the judgment of the Northern Cape Division, **De Bruyn v Grandselect 101 (Pty) Ltd and Another (1961/2013) [2014] ZANCHC 3 (5 March 2014),** which disagreed with the conclusions reached by the court in **Sibakhulu** and found that '[the] Court would have jurisdiction to determine the liquidation or business rescue application of a company whose principal place of business and/or registered office is situated in its area of jurisdiction.' (at para 13)

[8] It was held in **Leibowitz t/a Lee Finance v Mhlana and Others [2006] 4 All SA 428 (SCA)** at para 9 that '[T]he principal place of business of a company for jurisdictional purposes is the place where the central control and management of a company are situated.'

[9] Mr Troskie SC, who appeared for the respondent, submitted during oral argument that the respondent had no difficulty with the position as illustrated in **Van der Merwe** and **de Bruyn.** I therefore do not need to decide the issue. He however submitted that even if those decisions were to be followed, they do not

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[1] In the Old Companies Act "**Court**" *in relation to any company or other body corporate, means the Court which has jurisdiction under this Act in respect of that company or other body corporate…"*

[2] That section provides that "*(1) The Court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provisional or local division of the High Court of South Africa within the area of jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate."*

assist the applicant in its case at all, in that it neither instituted the process at the respondent's registered address nor its principal place of business.

[10] The applicant alleged in its founding affidavit that this Court has jurisdiction to determine this application particularly because the respondent's principal place of business and main office are situated at Unit 9 and 11, 6th Street, Montague Gardens in the Western Cape. This seems to be different to an earlier averment that the Montague Gardens address is the respondent's main office for the Western Cape area and the later allegation that the main office within the Gauteng region is situated at 8 Harry Street, Robertsham. It must also be kept in mind that the applicant was aware of the fact of the respondent's registered address being in Krugersdorp: it alleged such a fact in its founding affidavit, and further annexed a company report from Windeed reflecting the respondent's registered address as at 24 April 2015 to be 6 Dwars Street, Krugersdorp.

[11] In dealing with this issue in its answering papers, the respondent contends that the office in Montague Gardens is simply an office in the Western Cape and there is no significance in describing it as a main office, particularly with reference to jurisdiction. It avers that its operating mind is at its Johannesburg office, situated in Robertsham. Mr van der Linde criticised the respondent for not providing any further details about its 'principal place of business.' He argued that this is a bald allegation which ought to be rejected.

[12] The applicant in its replying affidavit alleges that the sheriff attempted to serve the papers at the respondent's registered address but was unable to do so because the respondent's erstwhile auditors to whom the registered address belonged were no longer auditors for the respondent. In that regard the applicant submitted that the respondent had no connection with that address anymore. Phillip Glasser ('Glasser'), the deponent to the replying affidavit (and the founding affidavit), claims that he was advised that the Cape Town address and the Johannesburg address are 'on a par with one another.' Apart from him not revealing his source of information on this particular issue, this allegation seems to

be in conflict with an assertion made in the founding affidavit that the respondent's principal place of business and main office are situated at Montague Gardens in the Western Cape.

[13] Mr van der Linde submitted in his heads that the applicant was faced with a problem that the respondent's registered address is clearly an address of convenience, the respondent does not trade from there, and it was not the address of the auditors nor does it seem to have any connection with the respondent. According to Mr van der Linde, the applicant chose to institute proceedings in the Western Cape where it has always dealt with the respondent and in which the applicant knows an address from which the respondent conducts its business and at where it can be contacted. He argued further that the applicant would not know what the principal place of business of the respondent is and was accordingly entitled to assume, based on the amount of work that it does with the respondent which appears to be mainly in the Western Cape and the fact that the applicant's account is wholly administered by the Cape Town office of the respondent, that the Western Cape is the area in which the respondent's principle place of business is located.

[14] Nothing is said in the applicant's papers as to what steps it took to establish what the principal place of business for the respondent was. It cannot be entitled to simply assume that the respondent's principal place of business was located in the Western Cape office when it knew that apart from the registered address, there was another office in Robertsham in Gauteng, which on the applicant's own version is described as being on par with the Western Cape office. The applicant did not ascertain which of these offices was the actual principal place of business for the whole country, and not simply in respect of a particular province.

[15] It seems to me that the applicant merely brought the proceedings before this court on the basis of convenience. It is significant that the applicant was not consistent on this issue in its papers. In the first instance it stated that the Montague Gardens office was the main office 'for the Western Cape area' and later on it

stated that Montague Gardens was the respondent's principal place of business. It went on to state in reply that the Cape Town and Johannesburg offices are on par with one another.

[16] In my view, there is no evidence that supports Mr van der Linde's argument that the applicant would not know what the principal place of business of the respondent is and was accordingly entitled to assume that it was located at the Cape Town office based on the amount of work that it does with the respondent which appears to be mainly in the Western Cape and the fact that the applicant's account is wholly administered by the Cape Town office of the respondent. Secondly, I do not believe that the respondent was required to say anything more than what it has said in its answering papers to the effect that its operational mind was in Gauteng. It is indeed logical, as Mr Troskie put it, that most of the work done by the respondent with the applicant would be in the Western Cape because the applicant is in Cape Town. The applicant has not been able to show that the central control and management of the respondent are situated in the Western Cape. I disagree that it was up to the respondent to 'prove' that indeed the Gauteng office is where the central and management control of the company are situated. It has made an allegation to that effect and I do not think any more than that is required of it.

[17] In terms of the **Plascon-Evans** rule[3], where disputes of fact in motion proceedings arise in the affidavits, a final order could be granted only if the facts averred in the applicant's affidavit and admitted by the respondent, together with facts alleged by the latter, justify such order. If the respondent's version, however, consists of bald or implausible denials, raises fabricated disputes of fact, or are palpably implausible, far- fetched or untenable such that the court would be justified in rejecting it merely on papers, the situation would be different.

[3]Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H – 635C.

[18] I agree with Mr Troskie that this is not the case where it could be said that the respondent's version as to the place where the central management and control of the respondent are located is far-fetched. It must be remembered that the test in situations where disputes of fact are present is a stringent one.[4]

[19] In conclusion on this point, the respondent's assertion that the registered place of business is in Gauteng is in fact confirmed by the applicant in its own papers. The consolidated annual financial statements of the respondent also confirm the respondent's registered address. As regards the respondent's principal place of business, the applicant essentially showed that it was unsure of the location of the respondent's principal place of business. In that regard, it could not assume that the 'main office' was Montague Gardens; it would have been expected of it to either investigate where the principal place of business was or bring the application in the court in whose jurisdiction the registered address was situated.

[20] The issue of service of process is a different issue altogether to the question of which court would have jurisdiction to grant a winding up order. See **Standard Bank Ltd v Butlin** 1981 (4) 158 (D) at 165 C where the Court said the following:

> 'The service of processes is one thing. Jurisdiction is quite another. They are separate and distinct topics, lending themselves to treatment that is separate and distinct.'

Also, see **ISM Inter Ltd v Maraldo and Another** 1983 (4) SA 112 (T) at 115 F-G where the Court stated:

> 'The fact that service may be possible within a court's jurisdiction whilst the court has no jurisdiction in the action (eg when nothing more than a chosen *domicilium* for service falls within the court's jurisdiction) or that the court may have jurisdiction (eg because the cause of action arose within its area or the defendants is domiciled in that area) but service within its area is not possible, perhaps because the defendant resides abroad, demonstrates that the possibility of service and the existence of jurisdiction remain two distinct questions. To put it differently. "the question of service does not

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[4] See *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at para 21 and 22

> affect the question of jurisdiction". (*Grimshaw v Mica Mines Letd* 1912 TDP 450 at 456).'

Finally see **Leibowitz t/a Lee Finance v Mhlana** supra at para 9 where the Court said that: '…there is a vast difference between 'a company's principal place of business' and 'a company's principal place of business within the court's jurisdiction'. <u>The principal place of business of a company for jurisdictional purposes is the place where the central control and management of a company are situated (*Bisonbaord* at 496C</u>*)*. The Court *a quo* therefore erred in holding that the Court of first instance had jurisdiction over the insurance companies by reason of their principal places of business being situated within the Transkei.' (Own emphasis)

[21] The applicant in this case had knowledge of the different addresses where it could effect service upon the respondent. It would not have been prevented from instituting the process in Gauteng simply because the registered address was no longer an address in which business was conducted, where such address had not been changed by the respondent. Furthermore, it knew that another office existed in Johannesburg which seemed to be on par with the Cape Town office and did not follow up to confirm which of these addresses was the principal place of business. It persisted with this application even upon the respondent alleging that the main office was in Robertsham.

[22] For those reasons, the applicant falls short on both the **Sibakhulu** and the **van der Merwe** decisions. It can therefore be dismissed on the basis of jurisdiction alone. I will nonetheless deal with the merits of this case, notwithstanding my findings on the question of jurisdiction, in the event I am found to be wrong on such point.

<u>Applicable legal principles - Provisional order</u>

[23] The legal principles applicable in a provisional liquidation application that is in opposed are trite. The applicant must establish that it is entitled to a provisional

order on a *prima facie* basis. It must show that the balance of probabilities on the affidavits is in its favour.

[24] In the matter of **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another** 2015 (4) SA 449 (WCC) Rogers J held at paragraph 8, 'Even if the applicant establishes its claim on a *prima facie* basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds.'. In **Orestisolve**, Rogers J further held that a distinction must be drawn between factual disputes on the respondent's liability and those that exist in relation to the other requirements for liquidation. In relation to the claim, the court must not only consider where the balance of probabilities lies on the papers, it must also consider whether the claim is bona fide disputed on reasonable grounds. The court may reach that finding even if the applicant has established a *prima facie* claim on a balance of probabilities. However, where the applicant has shown that the debt *prima facie* exists, the onus is on the respondent to show that it is bona fide disputed on reasonable grounds. (**Orestisolve** supra at para 8 also citing **Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T) at 347H-348C; **Payslip Investment Holdings CC v Y2K Tec Ltd** 2001 (4) SA 781 (C) at 783G-I and **Hulse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd** 1998 (2) SA 208 (C) at 218-219C.

Facts

[25] During 2010 the applicant, represented by Glasser, and the respondent, represented by Lappies Labuschagne ('Labuschagne'), concluded an agreement in terms of which the applicant would supply goods and services to the respondent from time to time upon the respondent's request and special instance on the 'usual terms and conditions'. The applicant alleges that the agreement was partly oral and partly written which is disputed by the respondent, who alleges the contract to be only oral. Nothing turns on this issue, however, as the conclusion of an agreement is common cause.

[26] The parties differ as to the exact content of the 'usual terms and conditions' or what exactly comprises the 'usual terms and conditions' but what is clear is that a written quotation would be furnished to the respondent. According to the respondent, this would be pursuant to an enquiry by it about the availability of goods to be supplied. The applicant alleges that the quote would be accepted by the respondent signing and returning it to the applicant. The respondent disputes this. It states that a purchase order would be issued and that such purchase order and no other document constituted acceptance by the respondent of the applicant's quoted price, the latter being regarded as the offer. According to the respondent, on occasion the purchase order would differ from the quotation as typically it specifies a different combination of goods than contained in the quotation. A purchase order would lead to the generation of a tax invoice and at month-end a statement of tax invoices so generated would be compiled and forwarded to the respondent. According to the applicant invoices were to be settled 30 days from date of statement whilst the respondent alleges that invoices would be settled on 36 days with a discount to apply. Breakage or shortages would be invoiced to the respondent upon return of the goods to the applicant and included payment in the next monthly statement.

Applicant's claim

[27] As stated before, the applicant initially claimed that it was owed at least an amount of R395 401,93 by the respondent for goods supplied and services rendered by the applicant to the respondent. In paragraph 14 of its founding affidavit, however, the applicant claims that the respondent was indebted to it in the sum of R982 311.78 as at 28 February 2015.

[28] The applicant alleges further that on 23 March 2015 it received two payments from respondent, in the respective sums of R69 147.84 and R12 198.00. Neither of these payments, it claims, directly related to the amount due as set out in paragraph 14 of its founding affidavit referred to above, although according to

the applicant, a case could be made out for the payment of R12 198.00 being in respect of the Durban account due as at 31 March 2015.

[29] The applicant alleges further that on 31 March 2015 it received a payment in the sum of R89 779.56. According to it, the respondent was at that date at least R892 532.22 in arrears with the payments due to applicant.

[30] On 14 April 2015, the applicant alleges that it received a further payment of R100 000.00 from respondent. The outstanding and overdue amount was then R792 523.22.

[31] It further alleges that on 20 April 2015 Glasser advised the respondent that no further orders would be met until its account was brought up to date. That led to a flurry of emails being exchanged between himself and the respondent's employees to try and rectify the situation. However, according to Glasser, it was abundantly clear that the respondent was unable to meet its financial obligations to the applicant as at 31 March 2015 and that as at the end of April 2015 a further R347 917.95 would be due for payment by the respondent.

[32] Glasser alleges that the respondent has also retrenched its staff in the Johannesburg office due to its financially adverse situation as indicated in the letter in terms of section 189 of the Labour Relations Act 66 of 1995 dated 17 March 2015.

[33] He further contends that he also ascertained that the respondent was indebted to other creditors, namely:

Avis Van Rental (CPT)	:	± R40 000.00
Snap Shot Printing (CPT)	:	R1.2 million
Circa (JHB)	:	amount not known
Prime Air (JHB)	:	R1.8 million
DEON Mama Events	:	R900 000.00
Tabitha Promotions	:	R59 000.00

[34] He claims that he was also informed that the respondent entered into some scheme or arrangement with Circa, in order to reduce its indebtedness, but has been unable to ascertain the exact nature thereof and the amount involved in the time available to him.

[35] The applicant alleges further that on 22 April 2015 the sum of R397 130.29 was paid to the applicant at 10h02, which constituted a breach of the respondent's undertaking to pay R400 000.00 on 21 April 2015. The payment reflected in the applicant's account only the next day, namely, 23 April 2015.

[36] The applicant contends that the respondent has made no effort to pay the balance of at least R395 401.93 which it alleges, as from the date of 30 April 2015 has clearly been overdue. The respondent will be indebted to the applicant in the sum of R743 319.88. Glasser is of the belief that the respondent is not in a position to pay the applicant what it owes. He alleges that the respondent simply does not have the money to do so and is commercially insolvent.

[37] The applicant's claim changed in the replying affidavit. In it it claims that it is owed an amount of R771 907.00. This is in reaction to the answering affidavit revealing that a number of payments were in fact made. Perhaps for the sake of clarity it is convenient to deal with the allegations in the answering affidavit.

[38] The respondent denies that it is indebted to the applicant. According to the respondent the alleged debt does not exist. It attached a creditor reconciliation document to its answering affidavit as annexure 'DP3', which it alleges is a reflection of the correct position between the parties and shows no indebtedness.

[39] This reconciliation document showed a total amount of R 982 311.78 as disputed invoices. In respect of these disputed invoices, the reconciliation document shows that a payment of R 950 236.74 was made between March and May 2015. The balance of R 32 075.04 is regarded as 'awaiting credit note from stuff rentals – duplication of invoices'. The respondent alleges that the applicant faced challenges in record-keeping and habitually omitted payments made.

[40] In the replying affidavit the applicant alleges that '[E]*ven after all the payments made by Respondent to Applicant since the launch of these proceedings, Respondent remains indebted to the Applicant...'* The alleged debts are listed as: a total value of invoices issued to respondent with corresponding orders in the amount of R 2 422 414.04 – R 2 023 322.42 (total value of payments received from respondent = R 399 091.62; total value of goods delivered to respondent for which no purchase orders issued by respondent, but tax invoices issued by applicant, in the amount of R 252 881.30 ('this amount is reflected in the respondent's reconciliation document attached as annexure 'PG4' to the founding affidavit as an 'offset of debtors invoices') and total value of goods delivered but no purchase orders issued by respondent and no invoices issued by applicant in the amount of R119 934.08. As such, the applicant alleges a total sum due by respondent in the amount of R 771 907.00. No dates, statements of account or quotations accompanied these allegations.

[41] The respondent dealt with these allegations in the further affidavit. The reconciliation document attached to the further affidavit shows a total sum invoiced for November 2014 to April 2015 in an amount of R 2 422 414.04 and payments of R 2 023 322.42 leaving a balance of R 399 091.62 (which seems to correspond with the replying affidavit). From that amount, however, there was an off-set of the amount of R 237 905.31 as well as a payment of R 143 344.74 effected by the respondent on 3 June 2015. The replying affidavit does not deal with these amounts.

[42] The respondent alleges that there are duplicated invoices for which credits in the amount of R 35 269.32 should be passed. There are also credit notes in the sum of R 100 301.76 which are still to be passed. According to the respondent, the applicant has failed to mention two further invoices reflecting amounts owing by the respondent in the sum of R 55 656.17, thereafter further invoices paid in the amount of R 314 954.64. The respondent alleges that simply based on the amounts mentioned above a sum of R252 881.30 would be owed by the respondent to the

applicant. The respondent, however, alleges that the applicant owes it a sum in the amount of R587 239.08 as shown in annexure ‘RR2’; therefore, through the application of set-off, it is the applicant which is indebted to the respondent. From that amount stood to be deducted an amount of R 81 476.48 as per annexure ‘RR3’. The amount payment of R 252 881.30 was accompanied with a 50% off-set leaving a zero balance. The respondent contends that no amount is owed to the applicant or, at best for the applicant, there is a dispute as to whether the amount of R 252 881.30 is owed by the respondent and nothing further.

[43] It is clear that the respondent has been making payments to the applicant since the lodgement of the proceedings or even before, which the applicant has not completely mentioned in its papers.

[44] The basis of the claim and the amount claimed changed in the replying affidavit. Mr van der Linde submitted that at the very least the applicant is owed an amount of R252 881.30 by the respondent. It seems to me the applicant could not persist in alleging that it was still owed an amount of R771 907.00 as it stated in its replying affidavit or other amounts earlier claimed.

[45] Whilst I accept that a lot more detail could have helped, I cannot find that the explanation given by the respondent is so bald such that it must be held not to be bona fide. I am of the view that there is a factual dispute at least from the papers with regards to the amount of R 252 881.30. Having been restricted to the claim of R 252 881.30, Mr van der Linde argued that the respondent simply ‘wipes out’ amounts without explaining the reasons for the off-set and how it was determined.

[46] I do not think the defence is manufactured for the purposes of engineering a dispute that does not exist. I say this because the amount first appeared in the PG4 reconciliation annexure which was received by the applicant from the respondent, and attached to its founding papers. There was an indication of ‘off-set of debtors invoices’ already at that point. Furthermore, ‘RR1’, the reconciliation document attached to the further affidavit, contains the following inscription next to the amount of R252 881.30: ‘*Invoices from Oasys for Presidential Inauguration –*

Offset'. This in my view is consistent with the allegation made in the further affidavit that an amount of R252 881.30 was accompanied by a 50% offset.

[47] At the very least there is a dispute about whether the amount of R252 881.30 is owed. I am unable to find that such dispute raised by the respondent is not genuine and bona fide. It can also not be said that that the grounds upon which the dispute is raised are not reasonable. It must be remembered that at this provisional stage the court may reach a conclusion that the claim is bona fide disputed on reasonable grounds, even though on the balance of probabilities the applicant's claim has been made out.

Respondent's inability to pay its debts

[48] Even if the applicant were to satisfy the court on the papers that it has a claim against the respondent that is not bona fide disputed on reasonable grounds, it still has to show that the respondent is unable to pay its debts as and when they fall due. The applicant contends that the respondent is commercially insolvent. It bases this assertion on alleged repeated late payments as an indication that the respondent is unable to meet its commitments as and when they fall due for payment and that it was not only indebted to the applicant but it owed a list of creditors large sums of money. It places a lot of emphasis on the fact that most payments were made during the course of these proceedings and invites the court to take that into account as a factor.

[49] Not only do the allegations about other creditors amount to hearsay evidence, the respondent has given a detailed account of when and how those creditors were paid. It set out their names and dates of those payments. Glasser admits that he is not privy to the respondent's internal workings. He cannot go beyond the statements made by the respondent in its affidavit in this regard. He also presents no evidence to gainsay what is being alleged by the respondent in its papers. Sean Wyer's ('Wyer') confirmatory affidavit simply confirms paragraphs 17 and 18 of the replying affidavit. The allegations in these paragraphs are general

statements which take the matter no further. In any event, Wyer could only testify about the respondent's state of affairs up to the point of his resignation, May 2015.

[50] The respondent placed before the court its consolidated financial statements for the year ended 31 December 2014 to demonstrate that it was neither actually nor commercially insolvent. The applicant invited the court to draw certain conclusions from the respondent's annual financial statements. It contends that the financial statements show that the company has been trading at a loss for the last two years and has inflated a list of its assets in the balance sheet. As an example of the latter, the applicant alleges that the respondent has stated goodwill as an asset where it has made an operational loss in excess of double the amount alleged to represent goodwill, which it views as questionable. It further views as unrealistic the manner in which depreciation has been reported. It also disputes that deferred tax can be considered an asset and drew the court's attention to other aspects of the financial observations which it viewed as curious.

[51] I am not persuaded by the applicant's contentions on this point. Firstly, Glasser is not an expert; he is therefore not qualified to draw the conclusions he does from the financial statements.

[52] Secondly, while keeping in mind that a court is required to independently satisfy itself as to the respondent's state of financial affairs, it is an important factor that the respondent's consolidated financial statements were examined by external auditors and approved and signed by the respondent's directors on 26 March 2015. Paragraph 10 of the financial statements records that the directors believe that the group has adequate financial resources to continue in operation for the foreseeable future and that the annual financial statements have been prepared on an on-going basis. Paragraph 12 states that the directors have performed the required liquidity and solvency tests as required by the new Companies Act.

[53] Thirdly, the current assets exceed the current liabilities. The respondent has trade and other receivables, cash and cash equivalents sitting at approximately R 89 million in 2014 against current liabilities of about R50 million.

[54] Gross profit was R97, 361, 958 and the operating loss R 26, 878, 033. Total assets were approximately R 198 million against liabilities of about R 112 million. It is not for Glasser to dispute these figures as he has no knowledge of the respondent's business and is not an expert.

[55] I am satisfied that as at 31 December 2014, the respondent was neither factually nor commercially insolvent. The fact that it ran at a loss operationally for the past two years does not mean that it is commercially insolvent as long as it can show that it has resources from which to meet it current obligations. For the purposes of assessing its commercial insolvency, it matters not that the respondent was not profitable in the past year or two. (**Orestisolve** supra at para 74).

Conclusion

[56] My findings regarding a bona fide dispute being raised on reasonable grounds and the fact that on the papers the applicant has not been able to show that the respondent is commercially insolvent provide sufficient basis for me to decline granting the provisional liquidation order.

[57] As regards the issue of costs, Mr Troskie argued that the application constitutes an abuse of process and therefore the applicant should be visited with a special cost order on an attorney and client scale. The applicant alleges in its replying affidavit that it was advised by its attorney that an action to recover what was due would take in excess of two years to complete. When he advised his attorney that the matter was far more urgent and that he was convinced that the respondent was unable to pay its debts due to the applicant in any case, he was advised that in the light of acts of insolvency that had been committed, its interests would be best served by bringing liquidation proceedings.

[58] Whilst the applicant should not have brought this application, I am not convinced that this is a clear case of abuse of process. It seems to me, the applicant chose a route which it believed could best serve its interests (albeit wrongly so). The applicant's point that payments are made late is not unfounded, although a claim could have been enforced by way of the normal route of enforcing a debt.

There does seem to be lack of coordination between the parties in respect of their accounts reconciliation. In light of that, I am not convinced that a special cost order is warranted.

[59] In the circumstances, I make the following order:

1. The application for the provisional winding up of the respondent is dismissed with costs.

N P BOQWANA
Judge of the High Court

APPEARANCES

FOR THE APPLICANT: Adv. D J A van der Linde

INSTRUCTED BY: Michael Ward & Associates, Wynberg.

FOR THE RESPONDENT: Adv. A J Troskie SC

INSTRUCTED BY: Shepstone & Wylie, Umhlanga Rocks, c/o Shepstone & Wylie, Cape Town.