**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**
**GAUTENG LOCAL DIVISION,**
**JOHANNESBURG**

**CASE NO: 13/25839**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... .....
DATE SIGNATURE

In the matter between:

**PILOT FREIGHT (PTY) LTD** Applicant

And

**VON LANDSBERG TRADING (PTY) LTD** Respondent

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**J U D G M E N T**

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**KAIRINOS AJ:**

1. The Applicant applies for an order placing the Respondent in provisional or final winding up in the hands of the Master of the High Court and directing that the costs be costs in the application.

2. I shall deal with the merits of the application in due course. However before I do so I will deal firstly with the Applicant's failure to comply with the provisions of section 346(4A)(b) of the Companies Act, 1973 ("the old Act") which is applicable by virtue of the provisions of item 9 of Schedule 5 of the Companies Act, 2008 ("the new Act") and which non-compliance is in any event fatal to the application, for the reasons set out below.

Non-compliance with section 346(4A)(b)

3. At the outset of the hearing, I indicated to Ms Van Aswegen, who appeared for the Respondent, that it did not appear from the papers before me that the Applicant had complied with the provisions of section 346(4A)(b) of the old Act read with the provisions of item 9 of Schedule 5 of the new Act since no affidavit had been filed by the person who furnished the application on the parties referred to in the section, setting out the manner in which section 346(4A)(a) had been complied with.

4. Section 346(4A) of the old Act, provides as follows:

> "(4A) (a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application—
>
> (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company; and
>
> (ii) to the employees themselves—

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application;

(iii) to the South African Revenue Service; and

(iv) to the company, unless the application is made by the company, or the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with."

5. The matter stood down for Ms Van Aswegen to take instructions and thereafter she informed me that the Applicant would furnish the Court with an affidavit in compliance with the provisions of section 346(4A)(b) of the old Act. In terms of the provisions of section 346(4A)(b), such an affidavit would have to be by person who furnished a copy of the application (*in casu* the Sheriff of this Court) setting out the manner in which paragraph 346(4A)(a) had been complied with.

6. The parties then proceeded to argue the merits of the matter. During the course of the argument, an affidavit was handed up from the Bar. It was an affidavit headed "Service Affidavit". It was deposed to by Ms Natasha-Ann Do Rego, an adult female attorney employed by the Applicant's attorneys of record. In the affidavit, Ms Do Rego confirmed that the application had been lodged with the Master of the

High Court and the South African Revenue Services ("SARS") as required by section 346(4A). That much was in any event evident from the notice of motion which bore the stamps of the Master and SARS. She also confirmed that the application was served on the Respondent. That too was in any event common cause. However there was no affidavit from the person who has so furnished SARS with a copy of the application.

7. However in paragraph 6 of the affidavit, Ms Do Rego states as follows:

> "I furthermore caused a copy of the applicant's application herein to be served upon the respondent's employees by the Sheriff of the above Honourable Court, which was so served on the 24th of July 2013 as appears from the Sheriff's return of service dated 24 July 2013, attached hereto as annexure "B"."

8. Upon reading annexure "B" however, things become somewhat more problematic and raised further concerns as to whether the employees had been furnished with the application.

9. Annexure "B" to the service affidavit is a return of service by the Acting Sheriff, Sandton South, Mr JDH Du Bruyn, in which he states that he affixed the notice of motion, founding affidavit and annexures "FA1" to "FA9" to the main entrance of Vinking/V-Kingm Shop U38, Hyde Park Shopping Centre, corner Jan Smuts Avenue & William Nicol Drive, "being the place of employment of the employees of Von Landsberg Trading (Pty) Ltd". He then states that no employee could be found to ascertain if they were members of any trade union.

10. There is no indication on oath, whether in the founding affidavit or the service affidavit, that the address at Vinking/V-Kingm Shop U38, Hyde Park Shopping Centre, corner Jan Smuts Avenue & William Nicol Drive, is indeed the main place of business of the Respondent. Furthermore there is no service affidavit by the Sheriff or even a confirmatory affidavit by the Sheriff attached to the service affidavit of Ms Do Rego, which sets out that the abovementioned address is in fact the principal place of business of the Respondent, where one would expect the employees of the Respondent to be found.

11. It is undisputed that the Respondent has four employees. This is so since the Respondent in paragraph 20.2 of its answering affidavit states that the Respondent has four employees with families that will be affected by the winding up of the Respondent. In paragraph 16 of its replying affidavit the Applicant merely notes this allegation and does not appear to dispute that the Respondent indeed has four employees.

12. However annexure "B" to the service affidavit, being the Sheriff's return of service, states that "no employees could be found to ascertain if they are members of any trade union". The return of service does not indicate whether the Sheriff found the premises closed or open for business. The return also indicates that he attempted service on the employees at 09:26 on 24 July 2013, being a Wednesday. The time indicated on the return of service appears to be business hours on a business day. Where then were the four employees that it is common cause the Respondent employed?

13. It is because of this very situation that the Legislature requires the filing of an affidavit "by the person who furnished a copy of the application to the employees". Who better to answer precisely what the Sheriff found when he attended upon the purported main place of business of the Respondent than the Sheriff himself? Ms Do Rego correctly does not purport to state in the service affidavit that she is the person who furnished the application and she correctly merely confirms that she "caused" a copy of the application to be served upon the Respondent's employees, in other words she merely instructed the Sheriff to do so. It is not within her personal knowledge what exactly transpired when the Sheriff arrived at that address.

14. The service affidavit is therefore not an affidavit in compliance with the provisions of section 346(4A)(b) of the old Act. There was no request to postpone the application to obtain an affidavit from the Sheriff even though it was indicated to the parties in the hearing that the Court would require an affidavit from the Sheriff since it was apparent that the Sheriff was the person who purported to furnish the application to the employees.

15. Furthermore it is not clear that the Sheriff in any event furnished the application to the employees of the Respondent by affixing the application to the door of the aforementioned address, since, as set out above, there is no evidence whatsoever that the aforementioned address is indeed the address of the Respondent. Even a perusal of the annexures to the various affidavits does not reveal the main place of business of the Respondent.

16. There is no evidence to prove that the Sheriff left the application at a place which it would come to the attention of the employees of the Respondent.

17. In *EB Steam Company (Pty) Ltd v Eskom Holdings Soc Ltd* **[2014] 1 All SA 294 (SCA) [22]**, Wallis JA (Mthiyane AP, Cachalia, Pillay and Willis JJA concurring) held as follows:

> "In order for the court to perform this function properly it will be necessary for applicants, in the founding affidavit or the affidavit in terms of section 346(4A)(b), to deal with whether the respondent has employees and if so where those employees are working or are likely to be found. It is only in the light of this information that the court hearing the application can decide whether there has been compliance with the requirements of the section. If there is reason to believe that the respondent does not have employees then this and the grounds for it must be stated."

18. Neither the founding affidavit nor the service affidavit indicated whether there were in fact employees of the Respondent and if so, where the main place of business of the Respondent was where such employees were employed. There is therefore no way for this Court to ascertain from the affidavits before it that there has been compliance with the provisions of section 346(4A)(a)(ii) of the old Act and that the employees are indeed aware of the application for the winding-up of their employer and the Court is therefore unable to perform its function properly as set out in above quoted extract from the *EB Steam* judgment.

19. There was previously some controversy in the case law as to whether the provisions of section 346(4A)(b) were intended to have been complied with when the application was launched or whether it was sufficient to do so before the hearing. In *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* **2013 (1) SA 522 (GNP)**, Van Loggerenberg AJ held that the provisions were peremptory and

had to be complied with when the application was launched. In this Division, Gautschi, A AJ in *Sphandile Trading Enterprise (Pty) Ltd and Another v Hwibidu Security Services CC and Others* **2014 (3) SA 231 (GJ)**, differed and whilst finding that the provisions of section 346(4A) were indeed peremptory, he held that they need not be complied with prior to the launching of a liquidation application, as long as the court was satisfied that they had been complied with a reasonable time before the hearing and the requisite affidavit was before the Court before or during the hearing.

20. Gautschi, A AJ held as follows at paragraph 18 of the aforesaid judgment:

> "I accordingly hold that, whilst the furnishing of a copy of the application to SARS, and proof of such furnishing by way of affidavit, are peremptory, s 346(4A)(a)(iii) does not require the furnishing of the copy to SARS to occur at any particular time. The purpose of the section is met if such furnishing takes place within a reasonable period of time prior to the hearing of the application, and the affidavit is filed before or during the hearing."

21. The controversy and the divergent judgments have in any event now been laid to rest by the Supreme Court of Appeal in the matter of *EB Steam (supra)*. In the *EB Steam* matter the Supreme Court held that the judgment in *Corporate Money Managers (Pty) Ltd v Panamo Properties 49 (Pty) Ltd* **2013 (1) SA 522 (GNP)** was incorrectly decided in regard to the issue of whether it was necessary to furnish a copy of the application on the parties referred to in section 346(4A) prior to the launching of the application and by implication held that the judgment in *Sphandile Trading Enterprise (Pty) Ltd and Another v Hwibidu Security Services CC and Others* **2014 (3) SA 231 (GJ)** was correct in this regard.

22. In the ***EB Steam*** matter, the Supreme Court of Appeal held that whilst the provisions of section 346(4A)(b) were indeed peremptory, the failure to have furnished a copy of the application on the employees (if any), trade unions (if any), SARS and the company is not necessarily fatal and the methods of furnishing the application to the aforementioned are merely directory and a Court is entitled to furnish directions as to how the application should be "furnished" upon such parties.

23. Wallis JA held as follows at paragraphs [23] – [24] of the judgment:

> "[22] In order for the court to perform this function properly it will be necessary for applicants, in the founding affidavit or the affidavit in terms of section 346(4A)(b), to deal with whether the respondent has employees and if so where those employees are working or are likely to be found. It is only in the light of this information that the court hearing the application can decide whether there has been compliance with the requirements of the section. If there is reason to believe that the respondent does not have employees then this and the grounds for it must be stated.
> [23] To sum up thus far, the position is as follows. The requirement that the application papers be furnished to the persons specified in section 346(4A) is peremptory. It is not however peremptory, when furnishing them to the respondent's employees, that this be done in any of the ways specified in section 346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout, the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees."

24. It was precisely because of the aforesaid exposition of the requirements of section 346(4A) that I allowed Ms Van Aswegen to take instructions on how the Applicant intended proceeding with the matter, i.e. whether the Applicant sought a postponement of the matter to comply with the provisions or whether the Applicant would rather proceed and hand up in due course an affidavit in terms of section

346(4A). The Applicant indicated that it would provide an affidavit purporting to comply with section 346(4A) and the hearing proceeded on this basis.

25. I have already set out the difficulties with the affidavit provided by the Applicant, including the failure to indicate on oath what the principal place of business of the Respondent was at the relevant time, whether the premises were open or closed and whether anybody was present at the premises, whether employees or otherwise (such as a director for example). The affidavit therefore falls short of fulfilling the purpose for which the legislature inserted section 346(4A)(ii) into the Old Act and as explained in the ***EB Steam*** judgment, namely to satisfy the Court that the Applicant has achieved "the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees".

26. A further aspect which requires attention is the issue of who precisely must depose to such affidavit. This issue is not pertinently dealt with in any reported judgment of which I am aware. It is so that section 346(4A)(b) requires that the applicant must furnish the affidavit to the Court hearing the liquidation application but the section pertinently states that such affidavit must be "by the person who furnished a copy of the application which sets out the manner in which paragraph (a) was complied with".

27. It is not clear whether the Legislature intended to refer to the person who took steps to arrange that the application was furnished to the relevant parties (which in most cases would be the applicant's attorneys of record) or whether it must be an affidavit

by the person who physically took the steps to furnish the application to the relevant parties.

28. As set out above, only the person who physically furnished the application on the relevant parties, such as a messenger, courier or if service by Sheriff was used, then the Sheriff or deputy-Sheriff who carried out service, is a person who can depose to the affidavit setting out precisely what occurred and how the application was furnished to the relevant parties.

29. The furnishing to SARS is usually uncontroversial and an affidavit from the person who delivered the application to SARS together with the stamp from SARS on the notice of motion acknowledging receipt thereof, would constitute sufficient proof that the application was furnished on SARS.

30. However when it comes to employees and/or trade unions the situation becomes more problematic. In the ***EB Steam*** matter, Wallis JA thoroughly analysis section 346(4A) and explains it purpose, particularly in relation to the requirement that a copy of the application be furnished on employees as follows:

> "[6] The Labour Relations Amendment Act 12 of 2002 effected substantial amendments to the LRA particularly in relation to the issue of security of employment. Among these was the introduction of section 197B, which dealt with the employer's obligation to disclose information concerning insolvency. The section obliges an employer facing financial difficulties that might reasonably result, if it is a corporate body, in its winding-up, or, if they are a natural person or unincorporated entity, in their sequestration, to advise any consulting party with which the employer is obliged to consult over employment issues in terms of section 189(1) of the LRA of that fact. Furthermore, if an employer applies to be wound-up or sequestrated they are obliged at the time of making the application to provide a consulting party with a copy of the application. Conversely, if they receive an application for winding-up they are obliged to supply a copy of the application to any consulting party within two

days of receipt, or if the proceedings are urgent, within 12 hours. Similarly, if the employer is a natural person or unincorporated entity and receives an application for their sequestration, the same notice must be given. Bearing in mind that parties facing winding-up or sequestration may be in a state of administrative disarray the Legislature, at the same time and in the same amending Act, introduced the provision quoted above into the 1973 Act and similarly worded provisions into the Insolvency Act 24 of 1936. This was done with a view to ensuring, so far as reasonably feasible, that employees become aware of an application for the winding-up of a company or an application for the sequestration or voluntary surrender of a natural person or unincorporated entity's estate.

[7] These provisions were introduced simultaneously into the LRA, the 1973 Act and the Insolvency Act, by way of a statute directed at the topic of labour relations and protecting the interests of employees. It must, therefore, be accepted that their purpose was to ensure, so far as reasonably feasible, that applications for winding-up, voluntary surrender or sequestration come to the attention of the employees of the employer in question and their representatives so that the interests of the employees can be protected. Their purpose is to enable the employees of an employer, facing winding-up or sequestration, or their representatives, to engage the employer and possibly the creditors with a view to protecting the position of the employees, insofar as it is reasonably possible to do so. They must be construed in the light of that purpose."

31. The requirement that the application for liquidation be furnished to the employees is therefore to enable the employees to protect their interests and the provisions of section 346(4A) should therefore be construed taking into account this purpose.

32. Interpreting section 346(4A)(b) with this purpose in mind and bearing in mind that a Court may give directions if it is not satisfied with service on the employees, the Court would require something more detailed than the usual cryptic return of service from a Sheriff. An affidavit in compliance with section 346(4A)(b) would have to set out precisely what the person who furnished the affidavit did when he came to the place of employment of the employees, what circumstances that person found there, what steps were taken to bring the application to the notice of the employees (if any) and what steps were taken to ascertain whether the employees belonged to any trade union. The only person who would have personal knowledge of these facts would be the person who physically attended upon the premises. The applicant

and/or the attorney of record would not necessarily have personal knowledge, unless they were the person who physically attended upon the premises and furnished the application to the relevant parties as required by section 346(4A).

33. It appears that too often the requirements of section 346(4A)(b) are overlooked by applicants for the winding up of companies. However as set out above they are peremptory and can in appropriate circumstances therefore be fatal to an application for the winding up of a company.

34. Whilst it is so that Wallis JA indicated in paragraph 8 of the ***EB Steam*** judgment that the requirements of section 346(4A) are not meant to constitute a technical defence to a respondent without a defence to the merits, the fact remains that if an applicant does nothing further to attempt to comply with the provisions of section 346(4A)(b), a court cannot grant an order winding up a company, if it is not satisfied that the purpose of section 346(4A) has been met, namely to, as far as reasonable, inform the employees and/or trade unions of the application.

35. A rather strange anomaly in the section is the requirement in section 346(4A)(a)(iv), that unless the company is making the application or the court dispenses with the furnishing to the company, the application must also be "furnished" to the company. One would have imagined that this requirement is superfluous since in initiating an application for the winding up of a company, inevitably the company would be a respondent in such application and the Sheriff would have served on the company at is principal place of business or registered office in accordance with the provisions of Rule 4(1)(a)(iv) of the Uniform Rules of Court read with Rule 6(2) of the said

Rules. However it is possible that the Legislature realising that often an application for the winding up of a company is served by the Sheriff at a registered office, which has long since been abandoned by the auditor of the company, and the application does not come to the attention of the company. In such circumstances it appears that the Court may be entitled to direct that the application be furnished to the company at its principal place of business (not necessarily via service by the Sheriff) in addition to the service by the Sheriff on the registered office. In such circumstances it is conceivable that the Court has in the court file a return of service of the application by the Sheriff and in addition an affidavit in terms of section 346(4A)(b) by the person who also furnished the application to the company in addition to service by the Sheriff on the registered office. It is also possible that the Legislature contemplated situations of informal furnishing of the application on a company in instances of urgent applications for the liquidation of a company and in such instances the mere furnishing of the application to the company by a person other than the service may indeed be sufficient in the circumstances. However I am not called upon to determine the provisions of section 346(4A)(a)(iv) and what type of "furnishing" (whether by formal service or otherwise) is required in such instance and I refrain from doing so.

36. What is clear from section 346(4A)(b) is that whomever furnishes the application on any of the parties referred to in the section, must depose to an affidavit which sets out the manner in which section 346(4A)(a) was complied with.

37. This was not done in the present matter. In the circumstances and having regard to the fact that even if there had been compliance with the provisions of section

346(4A)(b), I am not inclined to grant the order for the winding up of the Respondent on the merits, for the reasons set out below, the application must fail on this ground alone. If I am wrong in this regard and the non-compliance is not fatal to the application in the circumstances as set out above, then the application in any event must fail on the merits for the reasons set out below.

The merits of the application

38. The founding affidavit is the modicum of brevity and is devoted largely to setting out that there has been or will be compliance with the statutory service requirements and that proper security has been established for the costs of the winding up.

39. Very little is said about the Respondent's indebtedness other than one paragraph, which in essence states that the Respondent is indebted to the Applicant in the sum of R1 878 462.11 in respect of clearing and forwarding services rendered by the Applicant to the Respondent and for the purchase of imported goods, for the period 29 September 2011 to 30 April 2013 ("the period") as set out in a statement attached as annexure "FA3". A perusal of annexure "FA3" does not reveal an opening balance and one must assume from the statement that the amount claimed was incurred during the period.

40. Even more startling is that there is in fact no allegation that the Respondent is unable to pay its debts. It appears that the Applicant believes that this must be assumed from the fact that a statutory demand was made and the Respondent failed to make

payment within 21 days thereafter. However there is no allegation that the Respondent is either factually insolvent or commercially insolvent.

41. If an applicant relies on a company's inability to pay its debts it must not only make this allegation but also support such allegation with facts from which a Court can surmise that the company is at least *prima facie* unable to pay its debts.

42. The failure to make the required allegation is however not necessarily fatal to the application since in the present matter the Applicant did set out that it had served a demand for payment within 21 days on the Respondent's registered office and the Respondent had failed to pay, secure or compound for the amount claimed in terms of section 345(1)(a) of the old Act. The Court would be entitled in such circumstances to deem the Respondent unable to pay its debts, unless the Respondent showed otherwise.

43. This the Respondent attempted to do in its answering affidavit by denying any indebtedness to the Applicant and in essence the Respondent revealed the following three defences:

43.1 The Respondent alleged that it had made payments during the period in the total amount of R3 048 861.52 and that it had therefore overpaid the Applicant in the amount of R718 776.34;

43.2 The Respondent alleges that the Applicant charged interest on the amounts claimed at the rate of 5% per month, which was not only excessive but also

not agreed and if such interest was deducted from the amount claimed, there would be no indebtedness to the Applicant;

43.3 The Respondent relied on an alleged illiquid counterclaim for damages in the amount of R1 594 852.00 arising from the cancellation of a revolving credit facility.

44. The Applicant then delivered a slightly lengthier replying affidavit of some ten pages in which it now appeared that the Applicant's claim was not limited to the period set out in the founding affidavit but that there were also monies due from before that period.

45. The Applicant now for the first time informed the Court that there had in fact been a meeting on 9 October 2012, attended by the deponent and Allan Malherbe on behalf of the Applicant and the father and mother of the Respondent's sole director. At this meeting alleges the Applicant, the parties reached an agreement that the Respondent was indebted to the Applicant in the sum of R2 100 701.53 and such amount would be paid in monthly instalments of R50 000.00 and interest from 1 April 2013 at 1,5% per month or 18% per annum.

46. The amount claimed in the founding affidavit as being owed to the Applicant by the Respondent of R1 878 462.11, was calculated as the amount of R2 100 701.53, less R250 000.00 payments made since that date and plus accrued interest of R27 760.58.

47. This version was only made out in reply. This is a classic case of new material or indeed a new cause of action being made out in a replying affidavit. In the founding affidavit the indebtedness was based on clearing and forwarding services and goods sold and delivered. The reliance on a settlement agreement in the replying affidavit is a different cause of action, namely a compromise and therefore a novation of the original debt.

48. The Respondent on a previous occasion cried foul and launched an application for the striking out of the offending new material in the replying affidavit. The matter came before Weiner J. She took the practical approach and postponed the matter and allowed the Respondent to deliver a supplementary answering affidavit to deal with the new material.

49. The Respondent availed itself of this opportunity and delivered a supplementary answering affidavit in which it stated that whilst the meeting had indeed taken place, the deponent's mother and father were not authorised to bind the Respondent to any agreements and the Applicant was aware that they were no longer directors of the Respondent and had resigned in 2010, a few years before the meeting. On the Respondent's version they were to merely discuss the exhorbitant interest apparently levied by the Applicant on its charges of some 60% per annum.

50. The Applicant did not raise ostensible authority or state on oath that it thought the said parents were authorised to bind the Respondent. In argument Ms Van Aswegen merely referred to the fact that the father had signed cheques in the past. Apparently he had been an authorised signatory on the Respondent's cheque account. In my

view this does not necessarily imply that he is entitled to bind the Respondent to agreements. One often finds in commerce that a particular person, such as a bookkeeper, is an authorised signatory for cheques of a company but this does not imply that the bookkeeper can bind the company to agreements.

51. Therefore even if I take into consideration the new material in the replying affidavit, the Respondent still discloses a defence, i.e. lack of authority, which if proved at a trial, would constitute a defence to the Applicant's belated reliance on an agreement.

52. If the new material is not taken into consideration, then the situation is that the Applicant claims a debt for a specific period and the Respondent contends and proves that it has made an overpayment in respect of that period and furthermore alleges that the amount claimed by the Applicant includes excessive interest charges which were not agreed to. Both would constitute a defence if proved at a trial.

53. The Applicant's counsel in argument attempted valiantly to persuade me that although both the above defences are good defences in law if proved at a trial, they were however not *bona fide*. For this submission the Applicant's counsel relied largely on the fact that the Respondent had not raised such defences in answer to the letter of demand but the Respondent's attorney rather sought an extension in order to allow them to obtain instructions from the Respondent and requested that the Applicant stay any proposed action until they were in a position to respond to the demand. The contention is that since the Respondent consulted with its attorneys on 10 July 2013, the letter seeking a pending of any action should have set out the defence. The contention is therefore that the defences are an afterthought. I am not

persuaded that this is indeed the case or that the failure to raise the defences is necessarily indicative of a lack of *bona fides*.

54. The Respondent explains that the attorneys on the day it consulted, sought documentary proof of the payments to the Applicant and therefore the letter was couched in that fashion. I cannot in a liquidation application reject such version on affidavit and neither can I make a finding on the probabilities.

55. The law relating to the test in liquidation applications is clear. Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed by the company on reasonable grounds since the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt[1].

56. The aforesaid is known as the "Badenhorst rule" after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* **1956 (2) SA 346 (T) 347H–348C**, where it was held as follows in this regard:

> "Die maatskappy betwis die geldigheid van die vordering van £120, **en wanneer 'n skuld te goeder trou betwis word, moet 'n likwidasie aansoek geweier word. Hierdie proses is nie bedoel vir die beslissing van twyfelagtige skulde nie**. (In re Gold Hill Mines (1883) 23 Ch. 210 (C.A.) en Re Welsh Brick Industries Ltd., 1946 (2) A.E.R. 196 (C.A.)).

[1] *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* **1971 (1) SA 524 (T) 529–530**; *Walter McNaughtan (Pty) Ltd v Impala Caravans (Pty) Ltd* **1976 (1) SA 189 (W) 191**; *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* **1979 (1) SA 265 (W) 269**; *Kalil v Decotex (Pty) Ltd* **1988 (1) SA 943 (AD) 980**; Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd **[2001] 3 All SA 15 (W) 48**; *Robson v Wax Works (Pty) Ltd* **2001 (3) SA 1117 (C)**; *SMM Holdings (Pvt) Ltd v Southern Asbestos Sales (Pty) Ltd* **[2005] 4 All SA 584 (W) 591–592**

'n Gerieflike opsomming is die volgende, uit Buckley on Companies, 11de ed., bl. 357:

'**A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company**. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order.'

Die respondent betwis die geldigheid van die beweerde skuld, en **ek is van oordeel dat die juiste benadering is om te oorweeg of respondent die Hof op 'n balans van waarskynlikheid oortuig het, nie dat die beweerde skuld nie opeisbaar is nie, maar dat dit bona fide en op redelike gronde betwis word**. As hy dit doen ten opsigte van so 'n gedeelte van die beweerde skuld dat die onbetwiste gedeelte daarvan (as daar is) minder as £50 word, dan moet die aansoek afgewys word."

(My emphasis)

57. In *Wackrill v Sandton International Removals (Pty) Ltd* **1984 (1) SA 282 (W) 293C-E**, it was held as follows:

"In the case of sequestration proceedings the principle is clearly established that the Court has a discretion to refuse a sequestration order if the application is not made for the bona fide purpose of bringing about a concursus creditorum and a distribution of the respondent's assets by a trustee in insolvency, but is made mala fide and with an ulterior and improper motive. Such a mala fide application is an abuse of the process of the Court. See Berman v Brimacombe 1925 TPD 548; Amod v Khan 1947 (1) SA 150 (N) at 152 and on appeal in 1947 (2) SA 432 (N) at 439; and Millward v Glaser 1950 (3) SA 547 (W) at 551. In my view, there is no reason for not adopting the same rule in the case of proceedings for a winding-up order, if only for the reason that a mala fide application made with an ulterior and improper motive is an abuse of the process of the Court. See Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd 1980 (3) SA 253 (W) at 257H."

58. In *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* **1998 (2) SA 208 (C) at 219F - 220A** it was held as follows:

"Apart from the fact that they dispute the applicant's claims, and do so bona fide, . . . what they must establish is no more and no less than that the grounds on which they do so are reasonable. **They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims**. They do not . . . have to prove the company's defence in any such proceedings. **All they have to satisfy me of is that the grounds which they advance for their claims and the company's disputing these claims are not unreasonable**. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such trial. This is not an application for summary judgment in which . . . a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefor". . . . **It seems to me to be sufficient for the [respondents] in the present application, as long as they do so bona fide, . . . to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company**."

(My emphasis)

59. In *Robson v Wax Works (Pty) Ltd* **2001 (3) SA 1117 (C) 1122B-H**, it was held as follows:

"The applicant was aware prior to the institution of the application that his money claims against the first respondent were disputed. It is trite that winding up proceedings are inappropriate when brought by a creditor whose claims are reasonably and bona fide disputed. See Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) and the many subsequent cases in which the so-called Badenhorst rule has been applied (some of which are collected in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 980D - F). **The institution by a creditor of winding up proceedings in such circumstances has on occasion been stigmatised as an abuse of process**.

...

**A lack of bona fides is not readily inferred**. There is nothing in the papers which leads me to conclude that the second and third respondents, as directors of the first respondent, do not genuinely dispute the claims of the applicant.

In the circumstances it is not necessary for me to analyse and decide the question of whether the first respondent is able to pay its debts."

(My emphasis)

60. Where *prima facie* the indebtedness exists the onus is on the company to show that it is *bona fide* disputed on reasonable grounds[2].

61. Where this onus is discharged, the application should fail even if it appears that the company is nevertheless unable to pay its debts[3].

62. Where the debt is disputed, and hence the applicant's *locus standi* as a creditor, the application will be dismissed (if the dispute is *bona fide* and on reasonable grounds), not because the applicant lacks *locus standi*, but because winding-up proceedings are inappropriate for the purpose of determining whether or not he does.

63. That is precisely the situation in the present matter in regard to the aforesaid defences.

64. The Respondent also referred to an illiquid counterclaim. However this was set out in such vague terms that, but for the aforesaid defences, it would not have passed muster.

65. In regard to illiquid counterclaims as a defence to a liquidation application it was held as follows in *Ter Beek v United Resources CC and Another* **1997 (3) SA 315 (C)** wherein Van Reenen J after an exhaustive analysis of the case law (both South

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[2] *Meyer NO v Bree Holdings (Pty) Ltd* **1972 (3) SA 353 (T) 354–355**; *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd* **1978 (1) SA 70 (D) 72**; *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* **1998 (2) SA 208 (C)**; *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* **2000 (4) SA 598 (C)**; *Kyle v Maritz & Pieterse Inc* **[2002] 3 All SA 223 (T) 226**

[3] cf *Mann v Goldstein* **[1968] 2 All ER 769 (Ch) 773–775**

African and foreign) concluded that an illiquid counterclaim may in certain circumstances constitute a defence to a liquidation application (albeit it in the context of a close corporation but nothing turns on this)[4].

66. Van Reenen J held as follows in regard to the illiquid counterclaim defence:

> "The second of the aforementioned defences is the existence of an unliquidated claim which exceeds any amount that first respondent owes to the applicant. It is trite that an unliquidated claim for damages is incapable of being set off against an admitted liquidated obligation. The provisions of Rule 22(4) and a practice under common law permit the suspension of judgment on an admitted liquid claim in convention pending finalisation of an illiquid claim in reconvention. Although Rule 22(4) applies only to proceedings brought by way of action, it has not modified the common law which applies to such proceedings as well as proceedings brought by way of motion. The Court has a discretion to deviate from that practice. (See Truter v Degenaar 1990 (1) SA 206 (T) at 211D-E.)"[5]

67. Van Reenen J, whilst stating that he could not find authority for the proposition, held that the provisions of Rule 22(4) whereby a claim may be stayed pending determination of an illiquid counterclaim should be similarly applicable in winding-up proceedings.

68. However in such circumstances he held that "*as the existence of the applicant's claim is not challenged the respondent should bear the onus of showing why the Court should exercise a discretion not to grant a winding-up order in his favour*".[6]

69. Van Reenen J then held as follows in this regard:

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[4] See 333C-334C
[5] See 333C-D
[6] See 334C

"Accordingly there exists, in my opinion, no reason why the same approach should not be followed in South African law, subject to the qualification that, by reason of the fact that the 'defence' of a counterclaim recognises the enforceability of the obligation on which the applicant's locus standi is founded, (a) there is no room for an argument that an applicant is seeking to enforce a disputed debt by means of winding-up proceedings (compare Kalil v Decotex (supra at 982F)); and (b) as the existence of the applicant's claim is not challenged the respondent should bear the onus of showing why the Court should exercise a discretion not to grant a winding-up order in his favour (compare Meyer NO v Bree Holdings (Pty) Ltd 1972 (3) SA 353 (T) at 355B; Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening) 1978 (1) SA 70 (D) at 72D)."

70. It therefore appears that the reliance on an illiquid counterclaim, whilst not constituting a defence *per se* to the Applicant's claim and not extinguishing it, may in the appropriate circumstances constitute a factor upon which a Court may exercise its discretion to refuse a winding-up order, if such illiquid counterclaim is *bona fide*, genuine and reasonable.

71. It was aptly stated as follows in the English case of *Re Bayoil SA Seawind Tankers Corp v Bayoil SA* **[1999] 1 All ER 374**:

"Where a company had a genuine and serious cross-claim which it had been unable to litigate, in an amount exceeding the amount of the petitioner's debt, the court should, in the absence of special circumstances, dismiss or stay the winding-up petition in the exercise of its discretion under s 125(1)a of the Insolvency Act 1986."[7]

72. It was this English law which Van Reenen J applied in the *Ter Beek* case. However it is important to note that such states that the claim must be genuine and serious and in addition one which the company has been unable to litigate.

[7] I refer to the headnote

73. It does not appear that the illiquid counterclaim raised by the Respondent in this matters is genuine and serious or one which has been unable to litigate. However since the other defences appear *prima facie* to constitute good defences in law, the fact that the illiquid counterclaim is set out in a bald, sketchy and vague manner without any indication how the amount is calculated or why damages were suffered, is irrelevant.

74. The application for the winding up of the Respondent on the merits can therefore not succeed since the Respondent has set out defences, which if proved at trial would constitute good defences in law and I cannot on the fact set out in the affidavits find that they are not *bona fide*.

75. Lastly there is the issue of the costs of the application. Ordinarily the costs would follow the result and this would mean that the Applicant would pay the Respondent's costs occasioned in opposing the application.

76. However in the present matter, the Respondent appears to have played its cards very close to its chest and from its conduct lured the Applicant into launching an ultimately unsuccessful application for liquidation. I say this since it appears that when the Applicant launched the application for the winding up of the Respondent, it did so in the belief that the capital amount outstanding and interest thereon had been settled at the meeting on 9 October 2012. Indeed the Respondent appears to have made payments of R50 000.00 per month thereafter, apparently in accordance with such agreement. When the payments were no longer made, the Applicant sent a demand in terms of section 345(1)(a) of the old Act to the Respondent affording the

Respondent twenty-one days to appropriately respond thereto. The Respondent did not at that stage or at any stage prior to the delivery of its answering affidavit raise the issue that the parents of the deponent to the answering affidavit, who purportedly had represented the Respondent at such meeting, had not been authorised to conclude the purported settlement agreement. No doubt had this issue been raised the Applicant would not have proceed by way of a liquidation application. In the circumstances it would be appropriate to order that the Applicant pay the Respondent's costs in opposing the application from the date when the Respondent delivered the answering affidavit and each party to bear its own costs in respect of all costs occasioned by the application prior to the date that the answering affidavit was delivered. To avoid any confusion the costs prior to the delivery of the answering affidavit are also to include the costs occasioned by the preparation of the answering affidavit.

77. In the circumstances I make the following orders:

77.1 The application for the winding up of the Respondent is dismissed;

77.2 The parties are to respectively bear their own costs occasioned by the application prior to the date of delivery of the answering affidavit;

77.3 The Applicant is to pay the Respondent's costs occasioned by the application from the date after the delivery of the answering affidavit to date.

For the Applicant:

*Adv Van Aswegan* instructed by *Marais Stephens Attorneys*

For the Respondent:

*Adv Grundlingh* instructed by *Nothnagel Attorneys*

Dates of Hearing: 22 July 2014

Date of Judgment: 25 July 2014