REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER:27145/2019

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	YES/NO
2.OF INTEREST TO OTHER JUDGES:	YES/NO
3.REVISED	
21/02/2020 DATE	SIGNATURE

In the matter between:

SACON RESOURCES (PTY) LTD Applicant

and

ABSOLUTE RECOVERY SOLUTIONS (PTY) LTD Respondent

JUDGMENT

DIPPENAAR J:

Introduction

[1] The applicant ("Sacon") sought the winding up of the respondent ("ARS") in terms of section 344(f) read with section 345(1)(c) of the Companies Act 1973 ("the Old Act"), read with item 9 of schedule 5 of the Companies Act 71 of 2008 ("the Act"), on the basis that it is unable to pay its debts, alternatively in terms of section 344(h) of the Old Act read with section 81(1)(c)(ii) of the Act on the basis that it is just and equitable to do so as ARS has perpetrated a fraud on it. In its papers, reliance was placed on two statutory demands in terms of section 345(1)(a) of the Old Act. Although in its notice of motion a provisional winding up order was sought in the alternative, it was made clear at the hearing that Sacon sought a final winding up order.

[2] The application was opposed by ARS on the basis that it bona fide disputed its indebtedness to Sacon on substantial and reasonable grounds and that the application constituted an abuse of process, warranting the granting of a punitive costs order against Sacon.

[3] At the hearing, ARS sought leave to present a further affidavit in evidence in terms of r6(5)(e). Sacon opposed this application. It did not seek a postponement or an opportunity to deliver an affidavit in response. At the hearing, and after hearing extensive argument, I allowed the introduction of the affidavit and indicated that I would address the reasons for doing so in this judgment.

[4] As a primary consideration, it is in the interests of justice that a matter should be adjudicated upon all the facts relevant to the issues in dispute. I considered the various factors set out in *M&G Media Ltd v President of the Republic of South Africa*[1] against the facts set out in ARS's affidavit supporting its application for leave to introduce the affidavit as well as the grounds of opposition raised in argument by Sacon. I was persuaded to allow the introduction of the affidavit into evidence for various reasons:

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[1] 2013 (3) SA 591 (GNP) 599I-600 E

[13] Two addenda to the master agreement were concluded on 9 February 2016 and 20 June 2016 respectively. On the same dates two addenda to the master licence agreement were concluded.

[14] Various disputes arose between MPS and ARS pertaining to the plant and its completion. There are disputes on the papers as to who was responsible for the issues which arose. On ARS's version, the delays were occasioned by MPS's breaches of the master agreement and purchase order. Sacon's papers do not address these issues in detail. This resulted in two agreements being concluded in February 2016 between them and various related entities, including Sacon.

[15] The first: a settlement agreement between ARS, an entity styled Process Holdings Limited (an entity registered in Mauritius ("PHL") in which Mr Coetzee has some involvement) and MPS' in terms whereof certain claims were settled and MPS agreed to pay ARS half of the $1.2 million required to complete the plant ("the settlement agreement").

[16] The second: a loan agreement concluded between ARS and Sacon in terms of which Sacon agreed to lend ARS $600 000.00 ("the loan agreement") representing the balance of the $1.2 million required to complete the plant. The loan agreement underpins the basis of Sacon's claim and is central to this application.

[17] The conclusion of the loan agreement was a suspensive condition in the settlement agreement and the conclusion of the settlement agreement a suspensive condition in the loan agreement. Both the settlement agreement and the loan agreement referred to the master agreement, the master licence agreement and the addenda thereto as conditions precedent for their conclusion. The loan agreement was an attachment to the settlement agreement and vice versa.

[18] In terms of the loan agreement, Sacon would advance the loan funds by paying certain amounts directly to suppliers of parts of the plant and certain manufacturing costs of ARS. The loan had to be repaid within two years of it being advanced, together with interest. The loan amount would be used solely for the purpose of acquiring the necessary goods and completing the plant as defined in the master agreement and the purchase order.

[19] Under the loan agreement, if ARS (i) failed to pay any amount on due date, or (ii) utilised any part of the loan for any purpose other than the loan purpose, or (iii) failed to commission the plant ("the breaches"), it would constitute an event of default and Sacon would be entitled to claim immediate repayment of the loan in full plus interest. These provisions lie at the heart of the disputes between the parties. Sacon contended that ARS committed the breaches referred to above, entitling it to repayment of the loan, which ARS disputed.

[20] On 26 May 2017, Sacon delivered a letter of demand in terms of section 345(1)(a) of the Old Act for repayment of the loan plus interest, based on two of the breaches, being ARS's alleged failure to commission the plant and its utilisation of the loan amount for purposes other than as stipulated in the loan agreement. The next day, ARS responded to the demand, disputing such breaches. It however acknowledged that an amount of $236 000 would be due and payable to Sacon in February 2018 under the said agreement. At that time, the loan amount was not yet repayable..

[21] Sacon instituted action proceedings against ARS during August 2017 for repayment of the amounts of the settlement and loan agreements based on the alleged said breaches thereof, which ARS has defended. The plaintiffs in the action are MPS, PHL and Sacon. The defendants are ARS, RSSC and Mr Botha. These proceedings are pending and the trial enrolled for hearing during November 2019 was postponed as a result of the present proceedings.

[22] Some twenty-one months later and during May 2019, Sacon delivered a further letter in terms of section 345(1)(a) of the Old Act, claiming repayment of the loan amount pursuant to ARS's further breach and its failure to repay it on 22 February 2018. In such demand Sacon relied on all three breaches of the loan agreement.

[23] ARS's financial position is not addressed in the application papers. The only averments pertaining thereto are that the only other significant creditors of ARS are Mr Botha and Standard Bank Limited. This was not disputed.

Issues

[24] It was undisputed that Sacon complied with the formal requirements pertaining to service as regulated by s346 of the Old Act.

[25] The central issue for determination is whether ARS is liable to be wound up as it is unable to pay its debts under s344(f) of the Old Act. Although reference was made to s345(1)(c) of the Old Act in its founding papers, Sacon's case was based on the deeming provisions of s345(1)(a) and its two statutory demands particularising ARS's breaches of the loan agreement. In the alternative, Sacon relied on the just and equitable ground envisaged by s344(h), on the basis that ARS defrauded Sacon by using the loan funds for purposes other than those set out in the loan agreement and it failed to commission the plant.

[26] Despite the plethora of factual disputes on the papers, Sacon's case was that these disputes were not bona fide and that there were indeed no factual disputes in relation to two of the breaches, to wit ARS's failure to repay the loan amount by 22 February 2018 and its failure to commission the plant. Regarding the third breach, it was argued that ARS admitted using the loan funds for the very purposes Sacon alleged and that its version that such funds were sourced from funds in terms of the settlement agreement was false.

[27] Sacon's case was predicated on the express terms of the loan agreement seen in isolation, rather than on a consideration of the entire suite of agreements and their execution. It was argued that ARS's attempts to blame Sacon, MPS and Mr Coetzee for all the breaches of the loan agreement did not bear scrutiny as its version was contradictory, manipulated and unsustainable and contained irrelevant and scandalous material. On this basis it was argued that ARS's version should be rejected on the papers as false or untenable.

[28] ARS invoked the so-called "Badenhorst rule" to dispute its liability to Sacon. In *Badenhorst v Northern Construction Enterprises Ltd* [4] the relevant principle was stated thus:

> *"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 stigmatized 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."*

[29] ARS's case was that the application constituted an abuse as it disputed Sacon's claim for repayment under the loan agreement on bona fide and substantial grounds and that the various issues should be determined in the pending trial. It sought the dismissal of the application, together with a punitive costs order.

[30] The issues raised by ARS included both factual and legal issues. The legal issues are intertwined with the factual issues underpinning them and are not capable of separate resolution.

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[4] 1956 (2) SA 346T at 348A-B

Applicable principles

[31] The approach to be adopted in relation to a claim based on s344(f) read with s345(1) was explained thus by Justice Rogers in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd*[5] *("Orestisolve")*:[6]

> *"Section 344(f) states that a company may be wound up by the court if 'the company is unable to pay its debts as described in section 345'. Section 345(1) sets out three circumstances in which a company 'shall be deemed to be unable to pay its debts'. Relevant to the present case are the first and third circumstances, namely non-payment in response to a statutory demand (para (a)) and actual (proven) inability to pay debts (para (c)). As to statutory demand, a company is not deemed to be unable to pay its debts merely because an established claim has not been paid or secured; what must be shown is that the company has 'neglected' to pay or secure the claim. The English cases hold that the word 'neglected' is not apt to describe a refusal to pay where the claim is bona fide disputed on some substantial ground ...*[7]*. This interpretation of the word 'neglected', which has support in South African authority (see, for example, Ter Beek v United Resources CC & Another 1997 (3) SA 315 (C) at 328G-330H; Nedbank Ltd v Applemint Properties 22 (Pty) Ltd [2014] ZAGPPHC 1042 paras 20-21), is essentially the Badenhorst rule in a different guise and thus does not in truth give a respondent an additional string to its bow. ...*
>
> *However, the reason for the company's refusing to make payment in response to the statutory demand might, particularly in conjunction with other circumstances, provide a basis for the court to exercise its discretion against liquidation."*
> *I must emphasise, though, that the Badenhorst rule is conventionally formulated as requiring the company to satisfy the court of two things: its bona fides and the reasonableness of its grounds for disputing the claim. ...Bona fides is a question of fact. At the stage of a final order, it must be assessed in accordance with the Plascon-Evans rule. Even though the onus on a particular issue in motion proceedings might rest on the respondent, this does not reverse the operation of the Plascon-Evans rule (see Ngqumba en 'n Ander v Staatspresident en Andere 1988 (4) SA 224 (A) at 259E-263D; Rawlins & Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) at 541I-542B). And bona fides, in the context of the Badenhorst rule, does not in my view require that the company should hold a belief that at trial its defence to the claim would definitely succeed or even be more likely than not to succeed. It would be sufficient, I think, that the company genuinely wishes to contest the claim and believes it has reasonable prospects of success.*

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[5] 2015 (4) SA 449 (WCC) paras [15] and [16]
[6] Footnotes omitted
[7] Authorities omitted

I mention bona fides at this point, because it bears on the two remaining issues to be addressed below, namely inability to pay debts and discretion. A finding that the company is not bona fide in disputing the applicant's claim would usually go hand in hand with a finding that the claim is being disputed solely for purposes of delay; and such a purpose would often support an inference that the company is unable to pay its debts and militate against the exercise of a discretion in its favour.[8]

[32] Sacon sought a final winding up order. The matter is thus to be determined on the basis of the so called Plascon Evans test[9]. If there are genuine disputes of fact regarding the existence of Sacon's claim at the final stage, the application will fail on ordinary principles. The application is thus not to be determined on the balance of probabilities[10]. Where there is a genuine dispute of fact, the respondent's version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.[11]

[33] A real dispute of fact arises, inter alia, where a court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the facts said to be disputed.[12]

[34] In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*[13], the Supreme Court of Appeal enunciated the approach to be followed in relation to whether disputes of fact are bona fide thus:

"The court should be prepared to undertake an objective analysis of such disputes when required to do so. In J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA), it was suggested how that might be done in appropriate circumstances.
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[8] Paras 67-68
[9] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; NDPP v Zuma 2009 (2) SA 277 (SCA) para [26]
[10] Paarwater v South Sahara Investments (Pty) Ltd 2005 4 All SA 185 (SCA) para 4; Badge & Others NNO v Midnight Storm Investments 265 (Pty) Ltd & Another 2012 (2) SA 28 (GSJ) para 14; Orestosolve para 10
[11] Wightman supra para 12
[12] PMG Motors Kyalami (Pty) Ltd (in liquidation) v Firstrand Bank Ltd, esbank Division 2015 1 All SA 437 (SCA) ; 2015 (2) Sa 634 (SCA); Wightman supra para 13
[13] 2011 (1) SA 8 (SCA) at paras [19] and [20]

A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. Nevertheless the courts have recognised reasons to take a stronger line to avoid injustice. In Da Mata v Otto 1972 (3) SA 858 (A) at 689 D-E, the following was said:

In regard to the appellant 's sworn statements alleging the oral agreement, it does not follow that because these allegations were not contradicted – the witness who could have disputed them had died – they should be taken as proof of the facts involved. Wigmore on Evidence, 3rd ed., vol. VII, p.260, states that the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner, because to require such belief would be to give a quantative and impersonal measure to testimony. The learned author in this connection at p. 262 cites the following passage from a decision quoted:

"it is not infrequently supposed that a sworn statement is necessary proof, and that, if uncontradicted, it established the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts-testimony which no sensible man can believe-goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit, cannot be disregarded."

[35] Applying the aforesaid principles, it is necessary to return to the facts. It is not necessary to particularise all the factual disputes raised on the papers in overly prolix detail.

Areas of dispute

(1) Failure to repay the loan amount.

[36] The primary issue raised by Sacon focused on ARS's admitted failure to repay the loan amount of $600 000.00 by 22 February 2018, being the repayment date envisaged in the loan agreement as acknowledged by ARS. Whilst Sacon persisted that the full loan amount was repayable, it relied on ARS's acknowledgment of the lower

amount of $236 000 in argument in contending that ARS's version should be rejected on the papers.

[37] ARS raised various defences to dispute its liability to repay the loan amount, based on its version of events, considered in different contexts. The origin of these defences lay in a proper interpretation of the agreements and how the agreements were executed. ARS's defences were primarily predicated on an interrelated relationship between what it termed "the Sacon parties", being Sacon, MPS and Mr Coetzee. PHL's involvement was not fully addressed in the papers.

[38] Whilst Sacon relied on the separate and independent nature of both the respective entities and the various agreements, specifically the loan agreement, ARS averred that the agreements were interrelated and must be interpreted as such. In the affidavits of both parties, the identities of the respective parties were conflated in various instances.

[39] A proper interpretation of the agreements requires consideration of the various factors set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[14]. The context in which the loan and settlement agreements were concluded, are of specific importance.

[40] ARS averred that the settlement and loan agreements were concluded to address the increased costs of components caused by the delays pursuant to various breaches by MPS of the payment schedule in the master agreement. Such breaches had resulted in delays and increases in prices and costs pertaining to the manufacturing of the plant. Sacon in broad terms denied ARS's version and any breaches by MPS and stated that the settlement agreement recorded that ARS required funding of $1.2 million to complete the plant. It did not address the prevailing circumstances or reasons for concluding the loan agreement. It is not possible to determine a proper interpretation of

[14] 2012 (4) SA 593 (SCA), subject to what is stated in the City of Tswane Metropolitan Municipality v Blair Atholl Homeowners Association [2018] ZASCA 173 (3 December 2018)

the interrelationship between the agreements in context on the papers, considering the factual disputes on the papers pertaining thereto.

[41] ARS raised various contractual defenses supporting its averment that Sacon was not entitled to payment under the loan agreement. To do so, its version relied upon the way in which the various agreements were executed.

[42] A primary dispute on the papers pertained to the commissioning of the plant and the consequences thereof. In its founding papers, Sacon alleged that the plant was not commissioned, thus entitling it to repayment of the loan amount. As this was raised as an independent breach and ground for Sacon's entitlement to payment, it is apposite to deal with this issue separately in more detail.

[43] Relevant to the present context however is that whilst ARS conceded that the plant was not commissioned, it averred that this state of affairs was attributable to Sacon. It was argued that Sacon's conduct gave rise to various defences to the enforcement of its claim as well as various counterclaims.

[44] On ARS's version, Sacon accepted a payment obligation on the part of MPS pertaining to payment for the plant in the loan agreement. The relevant provision expressly provided that on successful commissioning of the plant in accordance with the master agreement and the purchase order, ARS would be entitled to set-off an amount of $337 689.00, payable by MPS to ARS, against the loan amount due to Sacon.

[45] In terms of the master agreement and the purchase order, ARS further placed the obligation on MPS to export the completed plant to a designated Comide site in the DRC, thus enabling final commissioning on site and completion of the works. An agreement was to be concluded between MPS and another entity ("ENRC") pertaining to the DRC mining site where the plant was to be utilised.

[46] On ARS's version, MPS repudiated the master agreement by failing to designate a commissioning site. Sacon demanded[15] and took delivery of the plant which was functionally complete (although certain items were outstanding at the time) but refused to take delivery of the outstanding components thereof, which ARS had tendered. The major components of the plant for which the loan amount was utilised were included in the delivered plant. The plant was not exported and no commissioning on site could take place, which would have resulted in completion of the works.

[47] In reply, Sacon conceded that it (and not MPS as was envisaged in the master agreement) took delivery of the plant. It further averred that it, Sacon, would have signed an agreement in respect of the Comide site in the DRC with ENRC. It also stated in reply: *"Sacon only accepted delivery of the plant in the condition that it was an attempt to mitigate its damages and realise some return on its investment."*

[48] There are numerous factual disputes on the papers pertaining to the state of completion of the plant and the commissioning thereof. I return to this issue later.

[49] ARS contended that the failure of MPS and/or Sacon to perform after delivery of the plant made performance impossible, which resulted in supervening impossibility in terms of the loan agreement and similarly made performance in terms of the master agreement by MPS impossible.

[50] On ARS's version, after delivery to it, Sacon stored the plant at its premises, where it was stripped and dismantled using tools purchased by Sacon and former employees of ARS. It was averred that Sacon unlawfully solicited some 80% of ARS's workforce to do so and in the process unlawfully competed with ARS. After dismantling of the plant, it was disposed of through a subsidiary entity related to the Sacon parties, Funa Manufacturing (Pty) Ltd.

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[15] ARS described it as "forced"

[51] Sacon in broad terms disputed these averments and contended that it salvaged what value it could in the plant pursuant to ARS's breaches. There is merit in ARS's contention that Sacon failed to fully grapple with the version put up by ARS in reply.

[52] ARS contended that due to Sacon's aforesaid conduct, it was entitled to rely on the set off provision in the loan agreement, or would be entitled to claim damages equivalent to the set-off amount, thus reducing any liability owing to Sacon by an amount of $337 689.00 as envisaged in the loan agreement.

[53] In relation to the balance of Sacon's claim, ARS raised various further defences in support of its primary contention that payment under the loan agreement was not due. It further raised various proposed counterclaims which it averred exceeded the amount of Sacon's claim. In support of these defences and claims, ARS relied on the factual matrix already provided.

[54] ARS averred that by its aforesaid conduct, Sacon breached the good faith clause in the loan agreement. It was argued that such conduct on the part of Sacon excused ARS from payment of the loan under the reciprocity principle[16] and further gave rise to a constitutional challenge to the enforceability of the loan agreement and its repayment provisions. This clause provided:

> *"Each of the Parties undertakes with the other to do all things reasonably within its power which are necessary or desirable to give effect to the spirit and intent of this Loan agreement".*

[55] ARS argued that the good faith clause provided for reciprocal obligations in terms of each party to do all things to give effect to the master agreement and purchase order together with the master licence agreement in terms of the prevailing commercial

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[16] Academy of Learning (Pty) Ltd v Hancock and Others 2001 (1) SA 941 (C) at para 33

activities envisaged in terms of the aforesaid agreements and the loan agreement. It contended that Sacon did not act in good faith, thus prejudicing ARS[17].

[56] Sacon's constitutional challenge to the validity of the repayment provisions in the loan agreement, was based on the contention that the repayment terms therein were unjust and unfair as they were subject to commissioning which was entirely within the control of the Sacon parties. Based on their conduct in relation to the commissioning issue and what transpired after Sacon took delivery of the plant, it was argued that Sacon, MPS and Mr Coetzee substantially abused the situation in order to avoid the set off under the loan agreement from occurring. Although primarily of a legal nature, such constitutional challenge falls to be properly determined in the context of the disputed factual matrix which underpins it. It is not necessary to further address this issue.

[57] Based on ARS's version of the facts, it relied on a proposed counterclaim for damages against Sacon and Mr Coetzee based on their unlawful interference in the contractual relationship between ARS and MPS. Unlawful interference in a contractual relationship can constitute a valid basis for a delictual claim, provided that the relevant considerations determining whether it is reasonable to impose liability constituting a balancing of identifiable norms in a given case can be met.[18] Absent a full ventilation of the disputed facts, it is not possible to determine whether the relevant criteria to impose liability would be met.

[58] ARS raised a further proposed claim against Sacon, MPS and Mr Coetzee based on their conduct in relation to the licence fees due under the master licence agreement concluded between MPS and RSSC. The software forming the subject matter of the licence agreement was to have been utilised at the commissioned plant at the Comide site in the DRC. RSSC's claim under the master licence agreement was ceded to ARS shortly before delivery of its answering papers.

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[17] Silent Pond Investments CC v Woolworths (Pty) Ltd and Engen Petroleum Ltd 2011 (6) SA 343 (DCLD) paras 66, 69, 70, 83

[18] Country Cloud Trading Cc v Member of the Executive Council, Department of Infrastructure Development, Gauteng 2014 (12) BCLR 1397 (CC)

[59] In support of such counterclaim, ARS contended that the conduct of Sacon and Mr Coetzee in relation to the execution of the master agreement and pertaining to the plant resulted in a loss of income derived by RSSC under the master licence agreement which would have been available to ARS for repayment of the loan. It further averred that the use of the plant after its delivery contravened the master licence agreement as there were licence fees payable for every ton processed through the plant.

[60] Although there is merit in Sacon's contention that ARS's reliance on licence fees emanating from RSSC, may illustrate an inability on the part of ARS to pay the loan, such inference cannot reasonably be drawn from facts which are in dispute. Any such inference would in any event fall short of the mark of what is required to illustrate an inability on the part of ARS to pay its debts.

[61] ARS's case was that its proposed counterclaims against Sacon, MPS and Mr Coetzee would extinguish the loan amount. Although such counterclaims have not yet been raised in the action proceedings, it cannot be found at this stage that such claims are incompetent or lack merit. Their legal foundation cannot be determined in isolation of the factual foundation which underpin them, which necessitates a resolution of the factual disputes.

[62] There are numerous factual disputes on the papers in relation to each of the aforesaid issues. Without resorting to an attempt to determine the issue on the probabilities, which is impermissible as already stated, the version of ARS must be accepted. This version cannot be rejected on the papers as false or untenable. These factual disputes are substantial and cannot be determined on the papers.

(2) Commissioning of the plant

[63] The issues surrounding commissioning are paramount as it gave rise to a number of ARS's defences pertaining to repayment of the loan. It also underpins

Sacon's reliance on the just and equitable ground under s344(h) of the Old Act. The papers evidenced numerous factual disputes regarding the completion, delivery and commissioning of the plant. It is not necessary to particularise all the factual disputes in detail.

[64] It was undisputed that certain commissioning had to occur on site. Sacon did not contend that a site for commissioning was appointed and it was common cause from the papers that it did not. Sacon's version blamed ARS for the lack of commissioning due to the incomplete state of the plant. ARS blamed it on MPS's and/or Sacon's failure to appoint a commissioning site or to export the plant which would have enabled commissioning. It was contended that ARS was thus not in breach of its commissioning obligation as MPS did not make commissioning possible and that Sacon, who took delivery of the plant, had made commissioning impossible.

[65] Sacon contended that as the plant was never complete, it could not be commissioned. It averred that ARS never tendered to deliver the missing items or to commission the plant. Its version, as already stated, was that it took delivery of the incomplete plant in order to salvage what value it could in its investment. Sacon averred that if the plant had been completed by ARS, it would have exported it to the DRC and would have concluded an agreement with ENRC.

[66] ARS' version was that commissioning itself could only be tendered when it was placed in a position to do so after the plant was exported to the contemplated site. It disputed that the plant could ever have been commissioned in the DRC, absent necessary licenses, which neither MPS or Sacon had. In reply, Sacon averred that no licence was required.

[67] Whilst it was common cause that a completed plant was not delivered in May 2017 and certain components were omitted, the functionality of the delivered plant was in dispute. Sacon averred that it was incomplete and was not operational, whereas on

ARS's version, the plant was functionally complete and included the major components paid for by Sacon under the loan agreement.

[68] ARS averred that the remaining components had to be custom built in accordance with certain specifications which were never provided. Consequently, after Sacon took delivery of the plant, ARS utilised standard specifications to manufacture the outstanding items. It tendered delivery of the outstanding items, corroborated by correspondence emanating from its legal representatives dated 15 June, 10 July and 11 August 2017 respectively. This correspondence particularised the omitted components, indicated when they would be available and indicated on 11 August 2017 that the said items were ready for collection.

[69] It was undisputed that Sacon did not take delivery of the outstanding items. Sacon did not offer any explanation why no response was provided to the said correspondence from ARS' attorneys or why such items were not uplifted.

[70] No explanation was tendered why Sacon took delivery of the incomplete plant, evidence which was within the knowledge of Mr Coetzee. Sacon baldly alleged that it did not have any obligation to deliver the plant to the DRC and MPS similarly had no obligation without due regard to the provisions of the master agreement. Sacon's version in its replying affidavit regarding its involvement in the delivery of the plant was inconsistent and contradictory and conflated its position with that of MPS.

[71] ARS's version and its explanation why commissioning could not occur, cannot be rejected on the papers as false or untenable. The various factual disputes are substantial and cannot be determined on the papers.

(3) Utilisation of loan funds

[72] Sacon's case was that ARS used the loan funds for purposes other than those envisaged in the loan agreement. It contended that ARS's utilisation of the loan funds contrary to the loan agreement constituted a fraud on Sacon, thus underpinning its reliance on s344(h) in contending that it is just and equitable for ARS to be wound up.

[73] Sacon averred that it advanced the loan amount of $600 000.00 by paying an amount of $308 151.49 to a supplier of key equipment, Odin Abrasive Cleaning Services CC t/a Airforce Compressors ("Airforce Compressors") and an amount of $291 848.51 to ARS in respect of the manufacturing costs associated with key equipment on 18 and 22 February 2016 respectively. The latter payment to ARS was undisputed.

[74] Sacon further relied on a forensic report reflecting the utilisation of these loan funds by ARS for purposes other than manufacturing. It is not necessary to deal with the contents of this report in any detail. ARS contended that the settlement amount was partially utilised for legitimate business purposes in the normal course of business and not fraudulently as contended by Sacon.

[75] The fundamental dispute raised by ARS was that it disputed Sacon's version as to how the loan amount was advanced and the source from which the payment to it was made. ARS contended that the payments relied on by Sacon represented payments made to it under the settlement agreement and not the loan agreement

[76] ARS provided a schedule particularising from what source each amount was received. In this schedule, the amounts received under the loan and settlement agreements respectively did not tally up to the exact amount of $600 000.00 stated in each of the respective agreements. On its version, the amount advanced under the loan agreement totaled $685 753.85 and the amount received by it under the settlement agreement totaled $528 402.31. This resulted in the total amount received by ARS pursuant to the loan and settlement agreements exceeding the agreed amount of $1.2 million by some $14 156.15.

[77] ARS contended that the funds advanced in terms of the loan agreement were not paid to it, but were paid directly to two key component suppliers of the plant, Dabmar Manufacturing Company (Pty) Ltd ("Dabmar") and Airforce Compressors. The amount paid to these suppliers exceeded the agreed amount of $600 000 as the additional amount was paid in respect of VAT, exchange rates and price increases because the costs of the components had increased due to time delays. Payment was made to Dabmar via Osmond Solicitors for the sizing screen in an amount of $377 333.94 (R5 891 314.80) on 19 February 2016 and to Airforce Compressors by Sacon an amount of $308 419.94 (R4 815 360.00) on 18 February 2016.

[78] Sacon argued that ARS's version was false and flawed in various respects. Its argument primarily relied on improbabilities in ARS's version, supporting the contention that such version should be rejected on the papers. I have already referred to the applicable principles and the authorities illustrating that a consideration of the probabilities would be improper. To succeed in its argument, Sacon was constrained to illustrate ARS's version to be false or untenable.

[79] Sacon pointed out that on ARS's version, an amount of $85 753.84 more was advanced than the agreed loan amount and argued that no explanation was proffered why Sacon would pay more than it was obliged to. The argument however disregarded ARS's explanation regarding the increased costs of the key components and the purpose for which the loan and settlement agreements were concluded.

[80] Sacon further contended that the amount paid to Dabmar was made by Osmond Solicitors, who at all times acted for MPS and not Sacon. It averred that there was no basis on which it would have made payment on behalf of MPS in terms of the settlement agreement, as it was not a party thereto The proof of payment from Osmond Solicitors however reflected that the payment was made on behalf of Sacon.

[81] Sacon lastly relied on certain email correspondence from ARS's financial manager at the time, Mr Kitching headed "loan denomination" stating that Sacon paid

an amount of $308 151.49 (R4 815 360) to Airforce Compressors on 18 February 2016 and that payment of the amount of R4 560 600 remained outstanding. Although relying on a confirmatory affidavit from Mr Kitching in its replying papers, no such affidavit was attached.

[82] I am not persuaded that ARS's version is untenable or false and can be rejected on the papers. The documentation and versions of both parties were contradictory in certain respects which requires explanation and clarification by way of oral evidence and cross examination. On this issue too, there are material factual disputes which cannot be resolved on the papers.

Conclusion

[83] To establish its bona fides, it was not required of ARS to prove that it would be successful in the trial on the issues raised. Although ARS's case on the papers did not clearly establish that its defences would definitely succeed at trial or even were more likely than not to succeed, this is not the test.

[84] As stated in *Orestisolve*[19], it was sufficient for ARS to establish that it genuinely wished to contest the claim and believed it has a reasonable prospect of success. On the facts presented it cannot in my view be concluded that ARS was not bona fide in disputing its liability to Sacon under the loan agreement.

[85] In its affidavits, ARS attempted to put up all available evidence in support of its allegations. It cannot be said that it did not seriously and unambiguously address the facts sought to be disputed[20]. Whilst Sacon argued that ARS's version was so inherently improbable that it could be rejected on the papers as untenable or even false, once the

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[19] Supra paras 67-68
[20] As envisaged in JW Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) paras 12 and 13

pertaining to, *inter alia*, repayment under the loan agreement. Although such contention is not without merit, I am not persuaded that such an order should be granted.

[91] I grant the following order:

The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	22 November 2019
DATE OF JUDGMENT	:	21 February 2020
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