REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

1/2/2021

DATE SIGNATURE

Case No.: 29755/2019

In the matter between:

BRAVURA CAPITAL (PTY) LIMITED Applicant

and

DRIVE PATH TRADE & INVEST (PTY) LIMITED
t/a SOUTHERN ENERGY
(Registration Number: 2012/116161/07) Respondent

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JUDGMENT

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*This judgment was handed down electronically by circulation to the parties' legal representatives by email.*

Gilbert AJ:

1. The applicant seeks the winding-up of the respondent in terms of section 344(f) as read with section 345(1)(a) of the Companies Act, 1973.[1] The applicant contends that it is a creditor of the respondent and that the respondent is deemed to be unable to pay its debts.

2. The applicant provides corporate finance advisory services. The respondent's business is described as identifying, developing, financing and operating clean energy generation projects utilising technology such as solar, wind, gas and hydro.

3. The respondent was looking to raise capital for its energy projects and approached the applicant to render corporate finance advisory services. To this end, the parties concluded a written agreement with extensive terms regulating their relationship. They describe their relationship as a 'mandate', although not one of agency. The terms included the payment of two upfront or retainer amounts, on 28 September 2017 and 31 October 2017. The applicant invoiced the respondent for these two amounts, totalling R456,000.

4. The respondent has refused to pay. The respondent asserts that the applicant did not perform in terms of the mandate and that, in any event, the mandate was suspended.

[1] As read with item 5 of schedule 9 of the Companies Act, 2008.

5. The applicant seeks as primary relief that the respondent be placed under final winding-up. Stripped of its nuances, the threshold that the applicant would have to cross to persuade the court to grant a final winding-up order (in contrast to a provisional winding-up order) is that of the usual *Plascon-Evans* approach[2] where the respondent's version is effectively to be preferred over that of the applicant[3] unless the respondent's version can be rejected as far-fetched and fanciful.[4]

6. It is unnecessary for me to consider whether the applicant has achieved this threshold in the present instance because the applicant has failed to comply with section 346(4A)(a)(ii) of the Companies Act, 1973 as the employees have not been properly furnished with a copy of the application. This means that a final order cannot be granted.

7. Section 346(4A)(a) provides, in relevant part:

> *"(4A)(a) When an application is presented to the court in terms of this section, the applicant must furnish a copy of the application –*
>
> *(ii) to the employees themselves -*

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[2] *Paarwater v South Sahara Investments (Pty) Limited* [2005] 4 All SA 185 (SCA) para [3] and [4].

[3] Final relief can only be granted on motion if the facts as stated by the first respondent, together with the admitted facts in the applicant's affidavits, justify the granting of the relief: *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 D-G. Effectively, any factual disputes ought to be resolved by accepting the respondents' version, save where such version is "*so far-fetched or clearly untenable that the court is justified in rejecting (it) merely on the papers": Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints*.

[4] Once the respondent's version is rejected as far-fetched and fanciful, there would only be one version before the court, namely that of the applicant and therefore the *Plascon-Evans* approach does not come into play as there are no longer conflicting factual versions.

(*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 the 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 presentation of the application.*"

8. Section 346(4A)(b) provides that:

> *"(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".*

9. Wallis JA in *EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 (SCA) at paras 16, 17 and 23 held that although it was peremptory that the employees be furnished a copy of the application, the modes of doing so as set out in subsections (aa) and (bb) are directory such that the effective furnishing of the application can be achieved by other means. The court must be satisfied that the method adopted was reasonably likely to make the application papers accessible to the employees (*EB Steam* para 17).

10. The applicant relies upon a return of service that reflects that a copy of the application and other papers was "*served … upon the employees of [the respondent] and the registered address at 73 Beyers Naude Drive, Cnr Preller Drive, Roosevelt Park, JHB by affixing a copy of the abovementioned process to the principal door as registered address (Rule 4(1)(a)(v))*".

11. The return of service continues, in capitalised font, that "*PLEASE NOTE I WAS INFORMED BY MS MOUTON THAT NO EMPLOYEES OF THE RESPONDENT BELONGED TO A TRADE UNION*".

12. The applicant did not file an affidavit by the person who furnished the affidavit to employees (which in this instance would be the deputy sheriff), as required in terms of section 346(4A)(b) and instead relied upon the deputy sheriff's return of service.

13. Often both attorneys and sheriffs fail to see the distinction between service of process, which is regulated by Uniform Rule 4, and the effective furnishing of the application to the specified persons as required by section 346(4A) of the Companies Act, 1973. Section 346(4A) does not require service of the application, but that the application be "furnished" to the particular person. "Service" ordinarily and in the context of court process, refers to the delivery of the document by the sheriff or deputy sheriff, in terms of the rules of court. In contrast, "furnish" does not require formal service by the sheriff but, in the context of section 346(4A), that a copy of the application be furnished to the particular person in a manner

that is reasonably likely to bring that application to the attention of the person, or, in the context of employees, reasonably likely to make the application accessible to those employees.

14. Section 346(4A), relating to the furnishing of the application, can be contrasted to section 346A of the Companies Act, 1973 relating to the service of the winding-up order, once granted. The latter section expressly refers to "service" of the order, and so requires service of the order by sheriff. And in effecting such service, the sheriff is required to have regard not only to the relevant rules of court, such as Uniform Rule 4, but also the specific requirements of section 346A.[5]

15. When a provisional order is sought, the court is not concerned with the service of the order (as there is no order), but instead whether there has been effective furnishing of the application to employees (and the other parties listed in section 346(4A)).

16. I do not have a difficulty that a sheriff or deputy sheriff is the person that attends to furnish the application under section 346(4A)(a). I also have no difficulty that the sheriff or deputy sheriff does not provide a formal affidavit in terms of section 346(4A)(b), as the contents of the return of service are *prima facie* evidence of the matters therein stated (section 43(2) of the Superior Courts Act, 2013). In many instances though, it may be practically easier to achieve effective furnishing of the application under section s346(4A) if a properly informed candidate attorney or messenger

[5] For the same analysis, in the context of sequestration proceedings and sections 9(4A) and 11 of the Insolvency Act, 1946, see *C C v D C* [2020] ZAGPJHC 225 (12 August 2020), para 45 to 61.

furnishes the application. That person can then depose to the required affidavit in terms of section 346(4A)(b) instead of seeking to persuade a sheriff or deputy sheriff to depart from what he or she may have become accustomed to during years of effecting service of process in terms of the rules of court.

17. The difficulty that I have is whether in the present instance there has been effective furnishing of the application to employees by the deputy sheriff as evidenced by the return of service. Without further explanation from the deputy sheriff who attended to furnish the application, I can only consider what is contained in the return of service as read with the papers filed in the application. It is not at all clear that the deputy sheriff or the applicant's attorneys were aware of what was expected of them, namely, to furnish the application in such a way that it was reasonably likely to make the application papers accessible to the employees. Both the deputy sheriff and the applicant's attorneys appear to have lapsed into a mind-set of service of process under the Uniform Rules, rather than seeking to comply with section 346(4A) of the Insolvency Act.

18. The return of service expressly refers to service having been effected under Uniform Rule 4(1)(a)(v), which applies in respect of service of process in the case of a corporation or company, by delivering a copy to the responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if no such employee is willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner provided by law.

19. What is immediately notable is that service in terms of Uniform Rule 4(1)(a)(v) has nothing to do with service of a document on an employee – it is a form of service upon of a corporation or company, albeit that a responsible employee may be the natural person who receives the document on behalf of the corporation or company.

20. The seeds of doubt having been sown in the present instance, the concern grows that reasonable steps have not been taken to make the application accessible to the employees. The deputy sheriff states that he affixed a copy of the papers to the principal door of the registered address. But it appears neither from the return of service nor any of the affidavits that the registered address is the respondent's business address or that any employees were to be found at the registered address. During argument, the respondent's counsel upon instructions volunteered what would appear to be the respondent's local business address. That address is not the registered address, as reflected in the return of service. The respondent's counsel also directed me to the answering affidavit stating that the respondent's projects are located in the Northern Cape and Free State, the inference being that employees are to be found at those projects.

21. In any event, if there were employees at the registered address, then section 346(4A)(a)(ii)(aa) requires that the application be affixed to a notice board to which the applicant and employees have access inside those premises. This was not the case, as appears from the return of service. Although section 346(4A)(a)(ii)(bb) provides that if there is no

access to the premises, a copy can be affixed to the front gate of the premises, failing which to the front door of the premises from which the company conducted any business at the time of the application, this presupposes that the relevant address was a business address or an address from which the company conducted business. As stated, there is no evidence that this was so.

22. The recordal in the return of service that a certain Ms Mouton informed the sheriff that there were no employees of the respondent that belonged to a trade union raises further questions. Who is Ms Mouton and why would she be giving information as to whether the employees belong to a trade union? This then calls into doubt whether there has been compliance with sections 346(4A)(a)(i) which requires a copy of the application to be furnished to every registered trade union that represents the employees.

23. In the circumstances, I am not satisfied that the application was furnished in such a way that it was reasonably likely to make the application papers accessible to the employees. The question that arises is the consequence of non-compliance with section 346(4A).

24. Wallis JA in *EB Steam* furnished the answer - in those circumstances the court may still grant a provisional order. In *EB Steam* a final liquidation order was sought and granted by the court *a quo*. On appeal, Wallis JA found in paragraph 26 that the court *a quo* should instead have granted a

provisional winding-up order, giving directions if necessary, on how the employees are to be served with the papers.

25. In the circumstances, it is not open to me to grant a final winding-up order and therefore it is unnecessary for me to consider whether the applicant has achieved the threshold for the granting of a final winding-up order.

26. Has the applicant crossed the threshold for a provisional winding-up order?

27. It is not altogether a simple exercise in delineating precisely what threshold needs to be satisfied to enable a provisional liquidation order to be granted. A consideration of the various decisions that traverse the standard, such as the oft-cited *Badenhorst v Northern Construction Enterprises (Pty) Ltd*,[6] and *Kalil v Decotex (Pty) Limited,*[7] and the more recent pronouncements, reveals that they are not entirely reconcilable. Nonetheless, particularly useful is the judgment of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading 55 CC*,[8] from which the following can be extracted:

27.1. If there are factual disputes relating to the requirements for a winding-up <u>other</u> than respondent's liability to the applicant, has the applicant established those requirements on a *prima facie*

[6] 1956 (2) SA 346 (T) at 347H – 348C, and from which comes the often referred to 'Badenhorst rule'.
[7] 1988 (1) SA 943 (A).
[8] 2016 (1) SA 261 (WCC).

basis, i.e. on a balance of probabilities with reference to all the affidavits (without employing *Plascon-Evans*).[9]

27.2. If there are factual disputes concerning the respondent's liability to the applicant and the applicant shows *prima facie* its claim on a balance of probabilities with reference to all the affidavits,[10] then the onus is on the respondent to show that the debt is *bona fide* disputed on reasonable grounds, i.e. the *Badenhorst* rule comes into play. If the respondent does demonstrate this, then the application should (rather than necessarily must)[11] be dismissed.[12] This means that even if the applicant can demonstrate its claim on a balance of probabilities, a provisional winding-up order can be refused if the respondent nevertheless demonstrates that the debt is *bona fide* disputed on reasonable grounds.[13]

27.3. *Bona fides* and reasonableness are two distinct requirements.[14]

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[9] Para 20.See also para 7 and 8 of *Orestisolve p/l t/a Essa Investments v NDFT Investment Holdings p/l* 2015 (4) SA 449 (WCC)*;* para 9 of *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24 (24 March 2017)

[10] The Full Bench of this Division in *Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC* [2012] ZAGPJHC 211 (30 October 2012), para 13 describes this as an exception to the general reluctance of the court in motion proceedings to decide disputes of fact purely on the basis of the probabilities, citing *Kalil v Decotex* at 979G-H. See also *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 80G to 81A.

[11] See the discussion in *Kalil v Decotex* at 980G-I as to whether the Badenhorst rule (namely that where the respondent disputes liability for a debt *"bona fide en op redelike ground"… "dan moet die aansoek afgewys word*") is inflexible, or is applicable only where it appears that the applicant is abusing the winding-up procedure as a means of putting pressure on a company to pay a debt that is *bona fide* disputed. This discussion features in *Hannover Group Reinsurance (Pty) Ltd and another v Gungudoo and another* [2011] 1 All SA 549 (GSJ) para 11 to 16, where the court expresses, in effect, doubt whether the Badenhorst rule is immutable, as contrasted to the court, at the provisional stage, doing *"its best to decide the probabilities by taking into account the full conspectus of allegations and denials as they appear in the affidavits, read as a while, placed before it."*

[12] Para 20, citing *Hulse-Reutter and another v HEG Consulting Enterprises* 1998 (2) SA 208 (C) at 218D – 219C. See also *Orestisolve* paras 7 and 8; *Afgri Operations* paras 6, 14, 17.

[13] *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783I.

[14] Para 23, *Standard Bank of SA Ltd v El-Naddaf and another* 1999 (4) SA 779 (W), at 748G-895B, which in turn cites *Badenhorst*.

27.4. As to whether the indebtedness is *bona fide* disputed, the court must look to the respondent's subjective state of mind. Bald allegations lacking particularity are unlikely to persuade a court that the respondent is *bona fide*.[15]

27.5. As to whether indebtedness is disputed on reasonable grounds, the court looks to whether there are facts, if proven at trial, that would constitute a defence. This requires more than bald allegations lacking in particularity.[16]

28. Generally, a referral to oral evidence has more of a role to play at the final stage than at the provisional stage.[17]

29. If at the provisional stage a *prima facie* case is not made out on a balance of probabilities with reference to all the affidavits, the application should be dismissed, unless the applicant seeks a referral to oral evidence. In that event, the more the balance on the probabilities is tipped in favour of the applicant, the more likely the referral and vice versa. It would only be in rare cases that a court would order oral evidence where the preponderance of probabilities on the affidavits favours the respondent.[18]

30. At the provisional stage, the court is not likely to refer the matter to oral evidence where the probabilities favour the applicant, and a *prima facie*

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[15] Para 24 to 26, citing *Badenhorst* and *El-Naddaf.*
[16] Para 26; citing *Hulse-Reutter*.
[17] In *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W), the court at 79H to 80E expressed a somewhat firm view that save in exceptional circumstances, a referral to oral evidence should not be resorted to at the provisional stage, and that a provisional order should be granted. Subsequent support for this approach by our Full Bench is found in *Total Auctioneering* above, para 14.
[18] *Kalil* ay 979E-I.

case is made out (as it is only necessary at the provisional stage to make out a *prima facie* case with reference to all the affidavits). The court may grant a provisional order as the matter can be referred to oral evidence at the final stage if so requested by the respondent.[19]

31. At the final stage, although the cases do refer to the court being required to be satisfied on a balance of probabilities before granting a final order, the *Plascon-Evans* approach remains applicable.[20] It is not about assessing whether on all the affidavits the applicant has established its claim (as was the assessment at the provisional stage), but on the application of the *Plascon-Evans* approach where the respondent's version is effectively preferred.

32. It nonetheless remains open for the parties to seek a referral to oral evidence at the final stage,[21] and that is where a referral would be more commonplace than at the provisional stage. If at the final stage the probabilities favour the applicant, a referral to oral evidence is particularly apposite where *viva voce* evidence has reasonable prospects of disturbing the probabilities already in favour of the applicant. If at the final stage the probabilities favour the respondent, the court should dismiss the application rather than refer to oral evidence, particularly as liquidation proceedings are not the forum to determine *bona fide* disputed claims and

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[19] *Kalil* at 979B-E.
[20] See *Paarwater* above, para 3 and 4.
[21] Uniform Rule 6(5)(g) expressly allows for such a referral. See also *Kalil* at 979B-E, citing *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) at 285H – 86A.

where the *Plascon-Evans* approach effectively prefers the respondent's version.

33. Applying these principles to the present matter, the first step in considering whether a provisional order may be granted is to consider whether the applicant has shown *prima facie* its claim on a balance of probabilities with reference to all the affidavits.

34. In my view, the applicant has done so. As stated earlier, the respondent asserts that the applicant did not perform in terms of the mandate and that in any event the mandate was suspended.

35. The applicant relies upon two invoiced retainer amounts, which are expressly provided for in the written agreement to be invoiced at the end of each of September and October 2017. By their nature as retainers, such performance as can be expected from the applicant may be rendered after the retainers have been paid. This is reinforced by the express terms of the agreement. The respondent cannot expect performance from the applicant before being liable to pay these invoiced retainers.

36. This is not to say that the applicant can simply invoice for the retainers and then not perform. The applicant must perform to earn, and retain, the retainers. But that performance does not equate to successfully bringing about a successful debt or equity capital raise for the respondent. The respondent is entitled to expect the applicant to perform in return for the retainer by rendering the corporate finance advisory services. But if the

rendering of those services does not result in a successful capital raising, this does not mean that the retainer was not earned. Although the agreement provides for additional fees to be paid to the applicant in the event of a successful capital raise, the retainer fees are not dependent on this.

37. In the circumstances, the respondent's grounds of opposition based upon non-performance are not sufficiently cogent to enable me to find that the applicant has not *prima facie* established its claim on a balance of probabilities with reference to all the affidavits. This is particularly so having regard to the respondent's answering affidavit in which it raises such non-performance (under the heading "*Bravura cannot deliver*") and the applicant's response in its replying affidavit providing a detailed exposition of that which it did in performing under the agreement, supported by various contemporaneous documents.

38. The applicant having so *prima facie* established its claim on a balance of probabilities with reference to all the affidavits, it is for the respondent to show that the debt is nonetheless *bona fide* disputed on reasonable grounds.[22]

39. That the applicant has established its claim *prima facie* on a balance of probabilities will often inform, perhaps definitively in many cases, the enquiry as to whether the debt is nevertheless *bona fide* disputed by the

[22] I assume in favour of the respondent that the "Badenhorst rule' applies notwithstanding the debate referred to above as to whether it is an immutable rule, or a rule only to be applied where there is an abuse of winding up proceedings.

respondent on reasonable grounds. For example, the greater force with which the applicant can demonstrate its claim on a balance of probabilities, the more difficult it would be for the respondent to demonstrate that it *bona fide* disputes the debt on reasonable grounds. Nonetheless, as appears from *Payslip Holdings*,[23] it is possible that the respondent can nevertheless show that it bona fide disputes the debt on reasonable grounds even where the applicant's claim is made out on a balance of probabilities.

40. As pointed out in *Gap Merchant*, *bona fides* and reasonableness are two distinct requirements.

41. The respondent contends that the applicant has not performed in relation to the retainer amounts. The respondent asserts that a key deliverable under the mandate is a binding term sheet from a *bona fide* investor. In looking at the reasonableness of these grounds, which is an objective enquiry to ascertain whether certain facts, if proven at trial, would constitute a defence, in my view the applicant has sufficiently demonstrated in its replying affidavit, with reference to contemporaneous documents, how it performed in the discharge of its mandate. The respondent expects the performance to translate into a successful raising of capital, or a binding term sheet, but, as discussed above, this is not what is required of the applicant in terms of the mandate, at least as a *quid pro quo* for the retainer amounts. Even should the respondent demonstrate at trial that there is no binding term sheet, which is in any

[23] Above, at 783G, as cited in *Gap Merchant* at 267I.

event common cause on the papers, that will not constitute a defence to the respondent's non-payment of the invoiced retainer amounts.

42. The respondent's reliance upon a suspension of the mandate at some point in 2017, and so presumably a suspension of its obligations to pay the invoiced retainer amounts, also, in my view, does not constitute reasonable grounds for disputing the indebtedness. I assume in favour of the respondent that there is sufficient evidence that the parties may have agreed on some or other "*suspension"* of the mandate. For example, the gap in correspondence from October 2017 to March 2018 between the parties supports the respondent's assertion that there was such a suspension. Further, the respondent in its email of 9 April 2018 to the applicant, in response to the applicant making enquiries as to it continuing to render services under the agreement, refers to a suspension of the 'original mandate'. The applicant's response shortly thereafter that day per email does not take issue with the respondent's recordal of a suspension of the mandate.

43. The respondent's difficulty does not lie so much in there being no evidence to support a possible suspension of the mandate, but rather the express terms of the agreement.

44. Clause 23.3 of the written "*Terms of Business*" that form part of the written agreement expressly provides:

> "*23.3 No agreement varying, amending or cancelling the Mandate or these Terms, and no suspension of any right*

*under the Mandate or these Terms is effective unless reduced to writing and signed by or on behalf of the Parties by a person duly authorised thereto.*"

45. A suspension by the applicant of its right to payment of the retainer amounts, assuming that there was such a suspension, falls foul of clause 23.3.

46. Clause 23.2 of the Terms of Business provides:

> "*23.2 No extension of time or other indulgence which either party may allow the other constitutes a waiver by the first mentioned Party of its rights to require the other to comply with its obligations strictly in accordance with the Mandate and these Terms*".

47. The suspension contended for by the respondent would be such an extension of time or indulgence, at least concerning payment of the retainer amounts, and too would fall foul of clause 23.2.

48. I enquired of the respondent's counsel how, in the light of these exclusionary clauses, reliance can be placed by the respondent upon a suspension of the mandate, and the payment obligations. The submission was that in the exercise of my discretion in liquidation proceedings I could go beyond the written terms of the agreement and look to the parties' conduct. In my view, the precise purpose of exclusionary clauses is to preclude a court from looking at such conduct of the parties, at least in the absence of an adequate jurisprudential basis to do so, such as by an assertion of fraud. I am unaware of any jurisprudential basis arising from

such discretion as the court may have in deciding whether to grant a winding-up order that would justify the exclusionary clauses from being disregarded.

49. In the circumstances, I am unable to find that the respondent has disputed the indebtedness on reasonable grounds.

50. But, more telling, in my view, and even should I have erred in finding that the debt is not disputed on reasonable grounds, the respondent has not demonstrated that its dispute is *bona fide*. As stated in *Gap Merchant*, *bona fides* is a separate enquiry and is to be assessed with reference to the respondent's subjective state of mind, i.e. is the respondent *bona fide* in raising the dispute that it now does?

51. On 25 May 2018, the applicant terminated the mandate on thirty days' notice and reminded the respondent that the first and second retainers remained payable. The response that was forthcoming from the respondent in a brief email on 20 June 2018 is to record a belief that "*Bravura still has a role to play on this matter*" which is inconsistent with an assertion that the applicant's performance was so lacking it could not be said to have earned its retainer. That email further continues as follows:

> "*After our meeting at your offices, where we discussed the revised mandate, it remained clear to us that your expertise is more in pure corporate finance advisory, rather than infrastructure projects and equity financing. This, of course, initially became evidence in the early phase of our engagement where you could not grasp the*

> *proposed concept, and therefore the appropriate approach and audience. We then suspended the mandate, and engaged PWC to assist with putting together a project document which would form the basis of a new capital raising plan.*"

52. Whilst this does to some extent question the applicant's expertise and refers to a suspension of the mandate, the respondent does not squarely dispute its indebtedness to the applicant on the retainer amounts that had already been invoiced and which the applicant was pressing be paid.

53. Perhaps if the applicant's correspondence ended there, a finding of *bona fides* could have been made in favour of the respondent. But the correspondence did not end there.

54. On 9 July 2018, the applicant addressed a formal demand to the respondent demanding payment. No response was received.

55. On 3 December 2018, the applicant addressed a further demand seeking payment. Again, no response was received.

56. The applicant approached its present attorneys, and on 4 March 2019 the applicant’s attorneys addressed a formal letter of demand to the respondent. Again, there was no response forthcoming.

57. On 20 September 2019, the formal statutory demand was made in terms of section 345(1)(a) of the Companies Act, 1973 and it was served upon the respondent at its registered address. There is no denial of receipt of this letter. Notwithstanding the obvious seriousness of the statutory

demand, threatening liquidation proceedings, still no response was forthcoming from the respondent.

58. On 30 October 2019, the present application was served upon the respondent[24] but still no response was forthcoming.

59. It was only after the enrolment of this liquidation application for the unopposed roll for hearing on 11 December 2019 that the respondent, to use the phraseology of the applicant's counsel, came out the woodwork on 9 December 2019 in belatedly delivering an answering affidavit in which the respondent disputes its indebtedness to the applicant. Such communications as had emanated from the respondent preceded formal demand, and had then only in vague terms suggested a suspension of mandate and a lack of expertise on the part of the applicant. Had the respondent been *bona fide,* it would have responded to the several demands, raising its grounds of opposition.

60. To the extent that the respondent did have some or other reasonable grounds for disputing the indebtedness, it cannot be said to now be raising that dispute in good faith in circumstances where over a protracted period it had the opportunity to do so, but failed to do so.

61. In the circumstances, the respondent has failed to demonstrate that it *bona fide* disputes the indebtedness on reasonable grounds.

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[24] This was an amended version of the application that contained the statutory demand in terms of section 345(1)(a) that had since been served upon the respondent at it registered office. The application in its initial form relied upon a statutory demand that had been served at an incorrect address as there had been a typographical error.

62. Neither party sought any referral to oral evidence and therefore I need not consider whether there should be such a referral. In any event, it remains open for either party to seek a referral to oral evidence when the court is called upon to decide whether to grant a final order.

63. Such other defences as have been raised by the respondent can be shortly disposed of. Although the agreement provides for a dispute resolution mechanism by way of *inter alia* arbitration, the respondent's counsel conceded, justifiably, that the mere presence of an arbitration clause in and of itself does not constitute a bar to granting a winding-up order. This is especially so where the respondent cannot demonstrate that there is a *bona fide* dispute that would be worthy of consideration by way of the dispute resolution mechanism.

64. Respondent's counsel's belated reliance in his heads of argument on one of the two invoiced retainer amounts having prescribed cannot be considered as it falls foul of section 17(2) of the Prescription Act, 1969 which requires a party to litigation who invokes prescription to do so in the relevant document filed of record in the proceedings. Nothing is said about prescription in the answering affidavit and it cannot be raised for the first time in heads of argument.

65. The respondent's complaint that the applicant seeks to make out a case for an inability to pay debts in the replying affidavit overlooks that the case made out by the applicant in its founding affidavit is that the respondent is deemed to be unable to pay its debts in terms of section 345(1)(a) of

the Companies Act, 1973. Once the respondent is unable to demonstrate that it *bona fide* disputes the indebtedness on reasonable grounds and so did not have a justifiable basis for failing to respond to that letter, the deeming provision is sufficient to demonstrate that the respondent is unable to pay its debts.

66. In the circumstances, the applicant has demonstrated that it is entitled to a provisional order of winding-up.

67. Section 346A of the Companies Act, 1973 regulates the service of the provisional order, including on employees and trade unions, if any. Undoubtedly, the applicant's attorneys will take heed of what is stated in this judgment to ensure effective and compliant service of the provisional order, including upon employees and any registered trade unions.

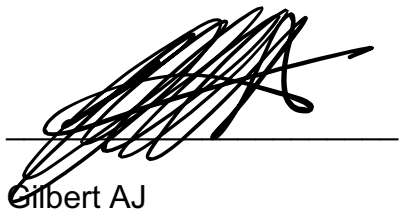
68. In the circumstances, the following order is made:

    68.1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court, Johannesburg.

    68.2. All persons who have a legitimate interest are called upon to put forward on a date to be obtained from the Registrar at 10h00 or so soon thereafter as counsel may be heard the reasons why this court should not order the final winding-up of the respondent and that the costs of this application be costs in the winding-up of the respondent.

68.3. A copy of this order is to be served on the various persons as provided for in section 346A of the Companies Act, 1973 and is to be published once in the Government Gazette and once in a newspaper circulating in Gauteng.

68.4. A copy of this order is to be furnished to each known creditor and shareholder, either per email or per telefax or per registered post.



Gilbert AJ

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| Date of hearing: | 26 January 2021 |
| Date of judgment: | 1 February 2021 |
| Counsel for the Applicant: | Ms P Bosman |
| Instructed by: | Ulrich Roux & Associates |
| Counsel for the Respondent: | Mr K Mokoena |
| Instructed by: | Nsele Trevor Attorneys |