REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/3712

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

[18 FEBRUARY 2022] ..... SIGNATURE

In the matter between:

SERVILOR 70 CC t/a TYRENOLOGY **APPLICANT**

and

NATCORP SPECIALISED LOGISTICS SOLUTIONS (PTY) LTD **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] This is a winding up application in terms of sections 344 (f) and 344(h) read with sections 345 and 346 of the Companies Act, 61 of 1973 ("the Old Companies Act") on the basis that the respondent is deemed unable to pay its debts, alternatively that it is just and equitable to do so.

[2] The facts are largely common cause. The applicant conducts business in wholesale and retail of tyres and tyre related products and 24-hour roadside assistance. On or about 2 August 2012 and at Boksburg, the applicant duly represented by a duly authorised representative and the respondent likewise represented by a duly authorised representative, entered into a credit facility agreement in terms of which the applicant supplied tyre and tyre related products as well as 24-hour mechanical breakdown and roadside assistance to the respondent at the latter's special instance and request during the period approximately March 2019 to February 2020, subject to the terms and conditions of the credit facility agreement. The credit facility agreement contains, inter alia; the following express terms and conditions: all amounts due by the respondent to the applicant will become due and payable within 30 (thirty) days from the date upon which the applicant generates its statement or invoice reflecting the amount due (in terms of Clause 1).

[3] In terms of clause 4 all goods, delivered and service rendered by the applicant (or its service providers, agents, employees, affiliates and assigns) will be deemed to have been correctly delivered and properly rendered free of defects or any problems whatsoever unless the applicant is notified in writing to the contrary by the respondent within 48 hours of the goods being delivered and the services rendered. Clause 5 made provision that the respondent will under no circumstances be entitled to withhold payment for goods received from the applicant pending the resolution of any dispute or complaint whatsoever.

[4] On the applicant's version, the respondent fell into arrears with its payment obligations having made only sporadic and small payments. As at 31 October 2020 the respondent was indebted to the applicant in the amount of R308

097.32. On the applicant's version, the respondent's promises of payment commenced as far back as January 2020 when the applicant began enquiring when payment would be made. For the month of January 2020 alone, 4 promises of payment were made (per email Annexures FA4.1 — FA7.3 respectively.) From Annexures FA6.2 and FA7.2, the respondent admits in writing that it does not have the money available to pay the applicant the amounts that are due and owing to the applicant and that payment would be made as soon as monies reflect in the respondent's bank account. On 7 April 2020 the respondent also admitted its indebtedness to the applicant by presenting the applicant with a reconciliation of the amounts due and owing to the applicant in the amount of R458 923.99. (as per email Annexure FA11).

[5] On or about the 24th day of November 2020, the applicant caused a letter of demand in terms of Section 345 of the old Companies Act, 61 of 1973, to be served via the sheriff at the registered address of the respondent. Subsequent to the service of the Section 345 Notice on the respondent and on 31 December 2020, the respondent through its attorneys of record, directed a letter to the applicant's attorneys of record alleging that various invoices have been placed in dispute and denying that the respondent is indebted to the applicant as claimed.

[6] On 7 January 2021 the applicant's attorneys of record responded to the abovementioned letter, pointing out to the respondent's attorneys of record, amongst others, that the applicant denies that there is any dispute regarding invoicing that numerous promises of payment were made by the respondent and no form of dispute was ever raised in such correspondence; that the respondent admitted indebtedness to the applicant during April 2020 in the amount of R458 923.99 and that the respondent is clearly trading in insolvent

circumstances as it is unable to pay its debts. (as per Annexure "FA15".). There was no response to the applicant's letter.

[7] In its answering affidavit, the respondent denied that it is trading in insolvent circumstances. It denied that the respondent is indebted to the applicant for the amounts claimed, but R202 830.27', as the rest was disputed. The respondent alleged, without more, further that during lockdown from March 2020 until May 2020 and beyond no businesses were generating an income and any debtors owed to any company were not being paid.

[8] The respondent also attached a reconciliation schedule without indicating what the disputed invoices were albeit way out of the agreed period of 48 hours within which to raise a dispute. As the applicant pointed out correctly in reply, this does not assist the respondent or the court. A court cannot be expected to trawl through attachments to affidavits without an indication what the relevance thereof is all about [1].

[9] It is common cause that, after the application was launched, after the amount that being R192 830.27was paid to the applicant. However, this falls short of the amount which on the respondent's own previous version is owed to the applicant. It would seem to me that the respondent has cash flow problems and not in a position to make payments as and when they fall due.

[10] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds[2] This is known as the so-called "Badenhorst Rule". Where, however, the respondent's

[1] Minister of Land Affairs and Agriculture v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA)
[2] See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348 and *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A) at 980D.

indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.[3]

[11] Ordinarily, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt[4]. A correct statement of the law is, once the applicant has demonstrated that the respondent was prima facie indebted to it, it was for the respondent to establish that it disputed that indebtedness on bona fide and reasonable grounds.

[12] Most significantly, the underlying debt, giving rise to the application for the winding-up of the respondent, was not seriously put in dispute. Indeed, it was admitted by the respondent in the answering affidavit albeit for a lesser amount. The respondent has therefore failed to discharge the onus of demonstrating that its indebtedness to the applicant has indeed been disputed on bona fide and reasonable grounds.

[13] The applicant demonstrated satisfactorily that the respondent is prima facie indebted to it. In the circumstances, it may indeed be in the interest of a *concursus creditorum* to grant a provisional winding-up order to be served on creditors and published accordingly. Upon reading and considering the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law.

[14] Accordingly, I am satisfied that the applicant has made a prima facie case, at the very least, for the granting of a provisional order of winding-up of the respondent on the ground that the respondent is unable to pay its debt. I find

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[3] Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd; Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd 1979 (1) SA 265 (W) at 269B.

[4] Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd 1962 (3) SA 424 (T) at 428B-D.

the issues raised by the respondent in opposing the claim of the applicant insufficient to constitute a bona fide dispute on reasonable grounds.

[15] The following order is made:

15.1 The respondent is hereby placed under provisional winding-up;

15.2 All persons who have a legitimate interest, are called upon to put forward their reasons why this Court should not order the final winding¬ up of the respondent on 19 April 2022 at 10h00 or as soon thereafter as the matter may be heard;

15.3 A copy of this order be served on the respondent at its registered office;

15.4 A copy of this order be published forthwith once in the Government Gazette and any local daily English newspaper;

15.5 A copy of this order be forwarded to each known creditor by prepaid registered post or by e-mail;

15.6 A copy of this order be forwarded to each of the established employees of the respondent by prepaid registered post or by e-mail;

15.7 A copy of this order be served on the employees' trade union, if any, at the respondent's registered office;

15.8 A copy of this order must be served on the South African Revenue Services;

15.9 A copy of this order must be served on the Master;

15.10 The parties to enroll the matter for 19 April 2022; and

15.11 Costs of the application on the scale as between attorney and own client, are to be costs in the winding-up of the respondent.

T P MUDAU
[Judge of the High Court]

Date of Hearing:	25 January 2022
Date of Judgment:	18 February 2022

APPEARANCES

For the Plaintiff:	ADV. JHF LE ROUX
Instructed by:	HATTINGH AND NZABANDZABA ATTORNEYS
For the Defendant:	ADV SMD KELLY
Instructed by:	FRANCIS KINSELLA INC