IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 31095/2012

DATE: 2/4/2014

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

....
DATE SIGNATURE

In the matter between:

RICOH SOUTH AFRICA (PTY) LTD Applicant

and

BULA DOCUMENT SOLUTIONS (PTY) LTD Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND SUMMARY OF ISSUES

1. The applicant seeks an order for the winding up of the respondent pursuant to the transitional provisions of section 9 of Schedule 5 of the Companies Act, 71 of 2008 ("the new Companies Act") read with sections 344(f) and (h) and section 345 of the Companies Act, 61 of 1973 ("the old Companies Act") *alternatively* pursuant to section 81(c)(ii) of the new Companies Act.

2. The winding up of the respondent is sought on the basis that the respondent is unable to pay its debts and that it is just and equitable that the respondent be wound up.

3. The applicant has the exclusive rights to distribute Ricoh equipment in South Africa having been appointed as the distributor of Ricoh equipment for Ricoh Europe SCM and Ricoh ESP for inter alia the territories of South Africa, Namibia, Botswana, Swaziland, Lesotho and Mozambique.

4. On 10 May 2011 the applicant and the respondent concluded a written agreement in terms of which the applicant appointed the respondent on a non-exclusive basis to sell Ricoh equipment to customers in the Republic of South Africa. The written agreement was called the "Enterprise Development Agreement" ("the EDA") dated 1 September

2009. The duration of this agreement was two years, with an option to renew, which the parties did indeed renew.

5. On 1 September 2009 the parties also concluded a “Cession and Pledge of Customer Base” in terms of which the respondent, as security for the due and punctual payment and performance of all its debts and obligations to the applicant, (who was then known as “NRG Gestetner South Africa (Pty) Ltd”), ceded and delivered in pledge to the applicant all its rights under agreements with its customers (“the customer base”) as continuing covering security for the due and proper payment on demand and the due and proper performance of the secured indebtedness subject to the terms and conditions contained in the cession.

6. It is common cause that in essence the relationship between the parties regarding payments would operate as follows:

6.1 The respondent would conclude sales contracts with a variety of customers for the supply of photocopying machines;

6.2 The respondent would also conclude service contracts in respect of the photocopying machines with the customers;

6.3 Thereafter the respondent would place an order with the applicant for the supply of the copiers;

6.4 The applicant would provide the services referred to in the service contracts to the customers, as agent for the respondent;

6.5 The applicant would then deliver the copiers directly to the customer and email an “upload file” to the respondent before close of business on the 3rd business day of each month;

6.6 The respondent would then use the upload file on its system to generate an invoice from the respondent to the customer;

6.7 The applicant would thereafter invoice the respondent the same amount as the respondent had invoiced the customer by the last day of each month;

6.8 The respondent would then invoice the applicant for the rebate being:

6.8.1 12.5% of turnover in respect of sales of equipment up to R2 million;

6.8.2 7.5% of turnover in respect of sales of equipment in excess of R2 million;

6.8.3 20% of turnover in respect of service contracts, where the applicant provided the services;

6.9 The applicant would make payment to the respondent of the rebate within 21 business days from receipt of the respondent's invoice;

6.10 The respondent in turn would be liable to pay to the applicant the purchase price of the photocopying equipment supplied by the applicant to the respondent's customers regardless of whether the customers paid the respondent;

6.11. The respondent would make payment of the amounts due to the applicant for the sale of the equipment by the applicant to the respondent within 60 (sixty) days after delivery of the equipment to the customer;

6.12 In essence the customer would pay the respondent within 30 days from invoice and the respondent (irrespective of whether it had received payment from the customer) would be liable to make payment of such amount to the applicant within sixty days of invoice;

6.13 Thereafter the respondent would invoice the applicant in respect of the rebates and applicant would make payment of such invoiced rebate amount to the respondent within 21 days of invoice.

7. In practice the amounts owing by the parties to each other were paid by means of applying set-off from time to time.

8. The respondent duly concluded both sales and service contracts with its customers and the applicant duly delivered equipment to the customers on the respondent's behalf and the applicant serviced the customers. It is common cause that after 1 March 2012 no further sales or service contracts were concluded.

9. The respondent, on numerous occasions breached the EDA in that it did not make payment of the amounts so invoiced within sixty days of the delivery of the equipment to the customer or at all as agreed and as required by the provisions of the EDA and the Applicant cancelled the EDA.

10. The respondent disputed that it was indebted to the applicant in the amount claimed and disputed that the applicant was entitled to cancel the EDA and as a result these disputes were referred to arbitration.

11. The arbitrator ruled and awarded that the applicant was entitled to have cancelled the EDA and was entitled to take cession of all the respondent's claims against the customers and this award was made an order of court. This is not disputed by the respondent.

12. The applicant contended that the respondent is indebted to the applicant as at end of February 2012 in an amount of R18 722 062.44 and provided a schedule reflecting the computation of this amount.

13. The applicant contended that the respondent is unable to pay its debts as and when they fall due and is factually and commercially insolvent.

14. The respondent disputed the indebtedness to the applicant on essentially the following grounds:

14.1 On a proper interpretation of the relevant provisions of the EDA, the applicant is indebted to the respondent for the 20% turnover of the service contracts after the cancellation of the EDA and that such amount (estimated by the respondent at some R30 million) has not been taken into account by the applicant and that if such are taken into account, the applicant is in fact indebted to the respondent ("the 20% of turnover issue");

14.2 Even if not taking the post EDA 20% rebates into account, the applicant's reconciliation is in any event incorrect and that upon a reconciliation conducted by Mr Peterson of the respondent, the applicant was indebted to the respondent in the amount of R826 885.83 ("the reconciliation issue");

14.3 The applicant issued incorrect upload files thereby precluding the respondent from properly invoicing the customers ("the upload files issue").

15. The respondent filed a counter application late (but not objected to) for:

15.1 A declaratory order that the respondent's right to receive 20% of the turnover of the service contracts survives the cancellation of the new EDA concluded on 10 May 2011;

15.2 An order that the applicant furnish the respondent with all the necessary documentation and upload files pertaining to the service contracts;

15.3 An order that the respondent be ordered to render an account with substantiating documents to the applicant within two months from the date of the order reflecting the indebtedness of the respondent to the applicant or vice versa;

15.4 That such account should be debated within three months of rendering such account.

THE LAW

16. Schedule 5 to the new Companies Act deals with transitional arrangements. Item 9 thereof deals with the continued application of the old Companies Act to the winding-up and liquidation of companies. It reads as follows:

> "(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).
>
> (2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.
>
> (3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.
>
> (4) The Minister, by notice in the Gazette, may —

(a) determine a date on which this item ceases to have effect but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a)."

17. Section 344(f) of the 1973 Act provides that a company may be wound up by the Court if it is unable to pay its debts as described in section 345 of the Act.

18. Section 345(1)(a) of the Act in turn provides as follows:

"(1) A company or body corporate shall be deemed to be unable to pay its debts if—

(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due—

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) in the case of anybody corporate or not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor."

19. The court's power to grant a winding-up order is a discretionary power, irrespective of the ground upon which the order is sought. (See F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd 1959 (3) SA 841 (D) at 844 and SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk 1973 (3) SA 371 (C) at 373). Such discretion must be exercised on judicial grounds (See Irvin & Johnson Ltd v Oelofse Fisheries Ltd 1954 (1) SA 231 (E) at 244). In its exercise the court should have regard to the grounds and the reasons for the proposed winding-up (See Leca Investments (Pty) Ltd v Shiers 1978 (4) SA 703 (W) at 705). The circumstances under which such an order was

granted in other cases can serve as a guideline only. (See Kyle v Maritz & Pieterse Inc [2002] 3 All SA 223 (T) at 225)

20. Winding-up proceedings ought not to be resorted to in order to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds. The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt. (See The "Badenhorst rule" after Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347–348 and authorities there cited; Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 980; Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd [2001] 3 All SA 15 (W) at 48)

21. Even though the court has a discretion to refuse a winding-up order in these circumstances it is one which is limited where a creditor has a debt which the company cannot pay. In such a case the creditor is entitled, ex debito justitiae, to a winding-up order. (See Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) at 440F–441A; and Nedbank Ltd v Migolie Investments CC [2007] JOL 19341 (T) at para 42)

22. Where the indebtedness exists prima facie the onus is on the company to show that such indebtedness is bona fide disputed on reasonable grounds. (See Meyer NO v Bree Holdings (Pty) Ltd 1972 (3) SA 353 (T) at 354–355; Machanick case supra at 269; Payslip Investment

case supra at 788; Kyle v Maritz & Pieterse Inc [2002] 3 All SA 223 (T) at 226)

23. However, if the dispute on the papers concerns the existence of the applicant's claim, upon which the applicant relies for its locus standi as a creditor, the onus rests upon the respondent to show, on a balance of probabilities, that its dispute in regard to that indebtedness is bona fide and founded upon reasonable grounds. The respondent is not required to prove that it is not indebted to the applicant: it must merely show that the indebtedness is genuinely disputed upon reasonable grounds. (See Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) 980)

24. Evidence that a company has failed on demand to pay a debt payment of which is due is cogent prima facie proof of inability to pay its debts: “for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources”. (See Rosenbach & Co (Pty) Ltd v Singh’s Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597 per Caney J)

25. It is no answer to the application that the company has a counterclaim against the applicant which, if established, would result in a discharge by set-off of the applicant’s claim; but that there is prima facie a genuine counterclaim which the company intends to enforce should be taken into account by the court in exercising its discretion whether or not to wind up. (See Re LHF Wools Ltd [1970] Ch 27 (CA); [1969] 3 All

ER 882 and cases therein considered; compare further Ter Beek v United Resources CC 1997 (3) SA 315 (C) at 333–334)

26. Mr Kairinos who appeared for the applicant submitted that the onus is on the respondent company to prove that the discretion should be exercised in its favour and referred me to apparently the only South African authority which has dealt with the proposition whether an illiquid counterclaim constitutes a defence to a liquidation application, namely the case of 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 African and foreign) concluded that an illiquid counterclaim may in certain circumstances constitute a defence to a liquidation application.

27. The first of the defences raised in that matter was a reliance on the exception de non adimpleti contractus. It is important to note that the respondent in the present matter does not rely on such defence and it is therefore irrelevant.

28. The learned judge held as follows in regard to the second defence (the illiquid counterclaim):

“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)"

29. The learned judge went further to state 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.

30. However in such circumstances the learned judge 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".

31. Van Reenen J then held as follows: "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)."

32. 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.

33. In the English case of Re Bayoil SA Seawind Tankers Corp v Bayoil SA [1999] 1 All ER 374 the Court of Appeal held as follows: "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."

34. It was this English law which His Lordship Mr Justice Van Reenen applied in the Ter Beek case. The important issue however is that the claim must be genuine and serious and in addition one which the company has been unable to litigate.

35. In the present application the court must establish whether the respondent's reliance upon its counterclaim is genuine, serious, bona fide and reasonable.

36. The applicant submitted that since the respondent's counterclaim is exclusively based on the respondent's reliance on the contention that it is entitled to 20% of the turnover of all the service contracts in terms of the provisions of the EDA, after cancellation of the EDA, one must interpret the provisions of clause 15.7 thereof and determine whether indeed the respondent has a claim for payments post the cancellation of the EDA and whether any such future claim for payment of the 20% of the turnover constitutes a defence to the current indebtedness.

THE 20% OF TURNOVER ISSUE

37. Mr Wilson who appeared for the respondent submitted that upon a proper interpretation of clause 15.7 of the EDA, the respondent is still entitled to the 20% of turnover rebate on all service contracts until their respective expiries. Most of these contracts have to date expired in

any event as set out in the answering affidavit in the counter-application. The respondent did not contend otherwise.

38. The respondent did not contend that the applicant has not made payment of any rebates due to it prior to the cancellation of the EDA and that this issue was raised pertinently in respect of the payment of the 20% rebate after the cancellation of the EDA.

39. Mr Wilson argued that if the provisions of clause 6.1.2 of the EDA which provide for the payment of the 20% rebate survive the cancellation of the EDA, then the respondent will in the future become indebted to it for an estimated total of some R30 million and that such must be taken into account in determining whether the respondent is indebted to the applicant and whether the respondent is insolvent.

40. The applicant submitted that even if the 20% rebate did survive the cancellation of the EDA such claim is a contingent claim and cannot be set off against the amounts owed to the applicant as at the date of the liquidation application.

41. In Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (N) 597G - H Caney J stated that:

“a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available sources.”

42. Mr Kairinos submitted that future claims for a 20% rebate of whatever the turnover happens to be in the future on the service contracts can hardly be “current revenue” or “readily available sources”. He argued that these future claims cannot therefore be taken into account in determining whether the respondent is able to make payment of the amounts which it has been invoiced by the applicant for sales and service contracts since they do not establish whether the respondent has funds at its disposal to make payment of these due and payable invoices.

43. The fact that the respondent may have claims in the future for 20% rebates as and when they fall due, is a prospective claim which the liquidator can take into account and the liquidator can sell such prospective claims at a public auction.

44. The applicant submitted that it is not an answer to the APPLICANT’S current claim against the respondent and does not assist the respondent in proving that it is now able to pay its debts as and when they fall due.

45. It is for this reason that section 345(2) provides that “In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.” Section 345(2) refers to

contingent and prospective “liabilities” and not contingent and prospective “claims”.

46. The applicant submitted that the 20% rebate on turnover of service contracts as provided for in clause 6.1.2 does not survive the cancellation of the EDA. The debate concerns the proper interpretation of clause 15.7 of the EDA. Clause 15.7 of the EDA provides as follows:

“15.7 In the event that Ricoh becomes entitled to cancel this Agreement BDS ***shall be entitled to continue to exercise its rights in terms of any Service Contract***, (my emphasis) provided that:

15.7.1 BDS shall comply with all of its obligations in terms of such Service Contract;

15.7.2 BDS shall, by not later than the 7th (seventh) day of each calendar month following the date upon which this Agreement is cancelled, furnish Ricoh with a written report, setting out:

15.7.2.1 the names and contact details of all Customers that are party to any Service Contract that is then in effect;

15.7.2.2 details of any Service rendered under such Service Contract during the immediately completed calendar month;

15.7.2.3 details of any communications received from the Customer during the immediately completed calendar month in which any complaint is made that BDS has failed to render any Services, either in accordance with the terms of the Service Contract or at all; and

15.7.2.4 details of the steps that BDS has taken to remedy the cause of such complaint."

47. Mr Wilson relied on the emphasised portion of clause 15.7 above to show that it shall be entitled to continue to exercise its rights in terms of any Service Contracts, notwithstanding the cancellation of the EDA.

48. On a proper interpretation of the emphasised portion of clause 15.7 it is clear that the respondent only has the right to continue to exercise its rights in terms of the Service Contracts, not in respect of the EDA. Thus any rights of the respondent in the Service Contracts survive the cancellation of the EDA and not its rights arising from the EDA.

49. The rights in terms of the Service Contracts which would survive the cancellation of the EDA are for example its right to invoice the customers in terms of the provisions of the Service Contracts and to seek payment from the customers.

50. The right to a 20% rebate is not a right in terms of the Service Contracts and is a right arising from the provisions of clause 6.1.2 of the EDA and there is nothing in the EDA to suggest that any rights arising from the EDA survive the cancellation of the EDA.

51. The applicant submitted that the reason that the EDA provides for the survival of the respondent's rights arising from the Service Contracts is so that it can continue claiming the payments from the customers, since without a cession of such rights, the customers would persist in paying the contracting party, namely the respondent.

52. Clause 15.7 merely entrenches and confirms that position and does not entitle the respondent to breach the EDA, have such EDA cancelled, but continue to profit from the 20% rebate on the Service Contracts, which the applicant is servicing and in respect of which the respondent is doing nothing. It was submitted that such a state of affairs could never have been contemplated by the parties and it is therefore not a commercially sensible interpretation of the EDA.

53. The applicant contended that the respondent appears to have conveniently ignored the fact that its entitlement to exercise the rights in the Service Contracts is in any event subject to its compliance with the provisions of clauses 15.7.1 to 15.7.3 of the EDA.

54. The respondent has not only failed to allege compliance with clauses 15.7.1 to 15.7.3 but has failed to prove any such compliance. This despite the applicant's contention that it has not complied with such clauses.

55. The applicant argued that under the circumstances the issue of the 20% rebate on turnover of service contracts does not assist the respondent since the respondent is not entitled to any rebate after the cancellation of the EDA. In any event any such rebate would constitute a contingent future claim which cannot be set off against a current indebtedness and does not therefore show that the respondent is able to pay its current debts as and when they fall due.

56. The respondent has not alleged or proved that it has complied with the proviso in clause 15.7. For these reasons the applicant submitted that the respondent's counter-application also falls to be dismissed since the respondent's interpretation of clause 15.7 is incorrect and in any event it has not alleged or proved compliance with the proviso in clause 15.7. The respondent is therefore not entitled to the declarator or statement and debatement it seeks.

THE RECONCILIATION ISSUE

57. The applicant relied upon its reconciliation schedule to show that the respondent is indebted to it in the amount of R18 772 062.44.

58. The respondent disputed the applicant's reconciliation and argued that Peterson's reconciliation shows that in fact the applicant is indebted to the respondent in the amount of R826 885.83.

59. The applicant in essence contends that the respondent is commercially insolvent and is unable to pay its debts. In Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) 440G-441A, Berman J held as follows in this regard:

> "The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s

344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.

60. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F: 'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts."

61. Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where it has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding-up order. (see Henochsberg on the Companies Act 4th Ed volume 2 at 586; Sammel and Others v President Brand Gold Mining Co Ltd 1969 (3) SA 629 (A) at 662F)

62. I have had regard to the references in the affidavits to the respondent's bank accounts and the relatively small amounts. It would appear that if I do find that the respondent is indebted to the applicant in the amount claimed, the respondent is unable to make payment of this amount and will not be able to stay afloat.

63. An example hereof as pointed out by Mr Kairinos is that only when the applicant delivered a supplementary affidavit setting out the respondent's inability to pay the taxed bill of costs, arrangements were made by the respondent for these costs to be paid. Mr Kairinos submitted that despite such belated payment, the fact remains that all warrants served stated that there were insufficient funds or assets to satisfy the judgment debt.

64. The taxed costs, after service of the supplementary affidavit, were paid by the respondent from an unknown source. The source is not the respondent's bank account. The inference is that there were insufficient funds therein to cover the taxed costs on both occasions. Mr Kairinos submitted that it is probably common cause that if one ignores the purported future claims to 20% rebates in the alleged sum of R30 million, the respondent does not have the resources to make payment of the amount claimed by the applicant if the court finds that this amount is due. The respondent does not contend otherwise.

65. The respondent has not established any other resources from whence it would be able to make payment of the amount of some R18 million if this is found due. On its own version its resources are solely the amounts found in its bank accounts from time to time.

66. Furthermore it appears from the papers that the respondent is depleting such accounts in order to pay other creditors, such as its

landlord, and is therefore unable to pay the applicant. It was submitted that the respondent is sued periodically for unpaid debts such as its rental obligations.

67. The respondent's contention is solely that it is attacking the applicant's locus standi as a creditor, namely that it denies that it owes any amount whatsoever to the applicant.

68. Consequently and correctly submitted by Mr Kairinos the sole issue to determine before me is whether the applicant has established that the respondent is indebted to it for an amount in excess of R100. If this is established the respondent has not proved any cogent reason why it has not made payment of whatever is due to the applicant.

69. The question is whether the applicant's calculation and reconciliation is correct or whether the respondent has bona fide disputed the indebtedness on reasonable grounds.

70. The respondent appears not to have bona fide disputed the indebtedness on reasonable grounds. I say so because Mr Peterson, who is not said to be qualified to conduct a forensic audit, purportedly prepared a reconciliation of the account between the applicant and the respondent and on his version the applicant owes the respondent monies. It is however inexplicable how Peterson conducted any audit whatsoever when on the respondent's own version, the source

documents were sought from the applicant pursuant to Rule 35(12) notices, as they could not be produced by the respondent.

71. The reconciliation by Peterson can therefore not be accepted as bona fide or reasonable disputing of the applicant's claim for the following reasons:

71.1 Peterson did not feature in the arbitration and the accounts were not debated with him at all. Throughout the arbitration proceedings the applicant's expert produced summaries and reconciliations during December 2011 and January 2012 and these were debated at length with Nola Rae ("Rae") the respondent's accountant at the time.

71.2 At no stage did Peterson during the arbitration proceedings make the allegations he now makes concerning the reconciliations. Rae, being the respondent's accountant since May 2010, did not at any stage of the arbitration proceedings raise the allegations raised by Peterson in the answering affidavit. These allegations appear to be opportunistic and an attempt to stave off liquidation.

71.3 Peterson is not in possession of all the documentation allegedly relied upon by him to make the allegations in the answering affidavit as appears from the respondent's failure to produce

such for inspection pursuant to the provisions of Rule 35(12). This failure makes his version of events in the answering affidavit untenable in my view.

71.4 Peterson only took up employment with the respondent on 1 November 2011, a period of approximately 5 months after cancellation of the new EDA. He was not personally involved in the business relationship between the parties and has no knowledge of the various issues that transpired during that time to which he refers to in the answering affidavit.

71.5 Mr Makobe, the previous managing director of the respondent deposed to an affidavit in support of an application for the postponement of the arbitration and a replying affidavit wherein he confirmed on the respondent's behalf that the respondent was indebted to the applicant in the amount of R965 639.72 in respect of arrears. He on behalf of the respondent undertook to make payment of this amount without attaching any conditions thereto. This is crucial and Mr Wilson was unable to explain why this amount, despite the undertaking to pay, was not paid.

71.6 Makobe referred to the applicant's expert's report and his findings with apparent approval. There is no explanation in Peterson's affidavit why the report of the applicant's expert, Mr Sabagh, is now incorrect, despite being accepted by Makobe.

The only dispute at that stage was the opening balance of the accounts between the parties upon which Sabbagh had predicated his report.

71.7 There is no explanation by Peterson why this amount confirmed on oath by a director of the respondent and confirmed by its accountant on oath (Nola Rae) is incorrect or whether Rae had incorrectly calculated the amounts.

71.8 The aforesaid affidavits now stand in stark contrast to Peterson's version and his reconciliation.

71.9 An analysis of Peterson's reconciliation evidences the mala fides of such version since there were material inconsistencies in Peterson's reconciliation as appears from the replying affidavit.

71.10 It is apparent from the analysis of Peterson's reconciliation together with the fact that upon an inspection of the documentation in the respondent's possession (pursuant to the rule 35(12) notice) that the respondent was in fact in possession of much of the documentation referred to by Peterson. It is therefore inexplicable how Peterson could have correctly reconciled the account or show that the applicant's reconciliation is incorrect.

71.11 Furthermore the respondent acknowledges that it cannot reconcile the account when in its counter-application it seeks production of the applicant's documents and upload files to enable it to draft a statement and debatement thereof. The question arises as to how Peterson carried out the reconciliation referred to in the respondent's answering affidavit and the only answer is that he could not.

71.12 If this is so then the respondent cannot dispute the applicant's reconciliation on reasonable and bona fide grounds.

72. The respondent has not set out precisely what it owes the applicant or and set out how the applicant's reconciliation schedule in respect of the respondent's indebtedness is incorrect.

73. The court, in determining whether the respondent is genuinely and bona fide disputing its indebtedness to the applicant on reasonable grounds must consider the fact that the respondent had repeatedly stated that it intended to conduct a forensic audit of the account. This was repeatedly referred to in the respondent's answering affidavit.

74. That affidavit was signed by the deponent thereto on 6 July 2012. Since then the respondent has still not conducted any forensic audit despite being given access to the applicant's documentation. The only inference that I can draw is that the forensic firm OMA that were

scheduled to conduct the forensic audit were never placed in a position by the respondent to conduct the audit and this was merely a delay tactic.

75. The inescapable inference is that the respondent has not bona fide and on reasonable grounds disputed the applicant's claim and is merely seeking to delay the inevitable. This much is evident from the respondent's bank accounts from time to time.

76. Furthermore the respondent has not stated that if the applicant's claim is established then the respondent is in the financial position to make payment thereof. The reason is simply that the respondent cannot do so. The only logical inference is that the respondent is unable to pay its debts.

THE UPLOAD FILES ISSUE

77. The respondent submitted that the so called upload files it was sent by the applicant to enable the respondent to generate invoices to the customers, were incorrect.

78. How Peterson became aware of any such alleged errors appears to be unclear because he was not involved at the time when the upload files were sent to the respondent.

79. Peterson does not explain how he acquired knowledge of the alleged errors or from whom and no reference to specific errors has been made or substantiated. Other than a reference to the issues pertaining to two customers of the respondent, namely Rotek and the Department of Higher Education, the respondent has not shown any errors in the upload files.

80. By contrast it is the applicant who in its replying affidavit shows the disingenuousness of Peterson's reference to the Rotek and Department of Higher Education disputes. Rotek changed machine models which led to an alteration in the billings as a result of the pay per page calculations (the charges) and the service charges having to change. The Rotek dispute is therefore taken out of context and the respondent fails to disclose all the relevant facts. Peterson was furthermore not employed by the respondent when this issue arose and has no personal knowledge of such dispute. In fact this aspect only arose after the cancellation of the EDA.

81. In regard to the Department of Higher Education, it is clear from the respondent's attorney's correspondence relating to the Department issue, that such issue related to arrear rentals due by the respondent to the applicant in terms of the rental agreement and was not an issue of allegedly incorrect information or incorrect invoices for service billings and did not therefore relate to incorrect upload files or an inability to generate invoices.

82. The vague and inaccurate manner in which Peterson has dealt with the alleged errors leads to the only inference that his version is not bona fide and that in fact there are no errors.

COMPLIANCE WITH SECTION 346 (4A) (ii) (aa) or (bb) OF THE COMPANIES ACT 1973

83. At the commencement of the application I enquired from Mr Kairinos as to the affidavit that is required to be handed in in compliance with the provisions of section 346 (4A) of the Companies Act. Mr Kairinos submitted that the application had been served upon all the interested parties as required but that he would nevertheless prepare and affidavit dealing with the requirements of the relevant provision and deliver such affidavit prior to judgment. Mr Wilson for the respondent had no objection such affidavit being handed in prior to judgment.

84. I have had sight of the affidavit and considered the contents. I am satisfied that there has been compliance with the relevant section of the Act.

CONCLUSION

85. In the circumstances I am satisfied that the applicant has made out a proper case for the relief sought. The respondent's counter application

holds no merit under the circumstances. Consequently the respondent's counter-application is dismissed.

86. Accordingly I order that:

86.1 The respondent is placed under final liquidation in the hands of the Master of the High Court.

86.2 That the costs of this application shall be costs in the liquidation.

_____

AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Applicant:

Counsel	Adv: G Kairinos
Instructed by	Hogan Lovells (South Africa)

Representation for Defendant:

Counsel	Adv: R Wilson
Instructed by:	Glover Incorporated