IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 65526/2012 9/5/14

DATE OF HEARING: 11 FEBRUARY 2014

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

9/5/2014
DATE

SIGNATURE

In the matter between:

LIBERTY LANE TRADING 337 (PTY) LTD
(In liquidation) **APPLICANT**

and

F AND S SCAFFOLDING (PTY) LTD **RESPONDENT**

J U D G M E N T

MALI AJ:

INTRODUCTION

[1] This is an application for the payment of an undisputed amount of R545.488.00

[2] The respondent does not dispute the payment of the amount but has instituted a counter application in respect of rental claims and damages related to certain scaffolding.

BACKGROUND

[3] The applicant sold scaffolding and related products to the respondent amounting to R653. 331.33. The respondent made payment of an amount of R107. 843.33 leaving a balance of R545, 488.00 due to the applicant.

[4] On 10 June 2011, the applicant was placed under provisional liquidation by the order of this honourable court.

[5] On 19 April 2012, the joint provisional liquidators of the applicant instructed a firm of attorneys to collect monies owed to the applicant by the respondent.

AD POINT IN LIMINE

[6] The respondent contends that the applicant through its liquidators does not have the necessary powers to institute actions or applications for the recovery of alleged outstanding debts. The applicant's powers are derived from the court order dated 28 June 2011.

[7] The abovementioned court order reads as follows:

"*It is ordered that:*

6.1. the applicants are authorised to bring this application in terms of section 386(5) of the Companies Act No 61 of 1973 (as amended)(" the Old Companies Act") as read with item 9 (1)of schedule 5 of the Companies Act 71 of 1973 ("the Current Companies Act");

6.2. the applicants are authorised, in terms of section 386(5) of the Old Companies Act, to exercise the following powers in relation to the administration of Liberty Lane Trading 337 (Pty) Limited (in provisional liquidation) (" Liberty Lane"):

6.2.1 to obtain legal advice on any question of law affecting the administration of Liberty Lane and to engage the services of attorneys and counsel in connection with any matter arising out of or related to the affairs of Liberty Lane;

6.2.2 to agree with such attorneys and/or counsel on the tariff or scale of fees to be charged by and paid to such attorneys and/or counsel for the rendering of services to Liberty Lane and to conclude written agreements with attorneys and/or counsel on the basis of that the costs incurred by the applicant, except costs awarded against the company in liquidation in legal proceedings, shall not be subject to taxation by the

taxing master if the applicants have entered into a written agreement in terms of which the fees of any attorneys or counsel will be determined in accordance with a specific tariff, provided only that no contingency fee arrangement shall be entered into without the prior written consent of creditors;

6.2.3 to pay the attorneys and/or counsel the agreed costs and the disbursements made by the attorneys and/or counsel out of the funds of Liberty Lane as costs in the administration of Liberty Lane as and when such services are rendered and the disbursements are made;

6.2.4 to agree any reasonable offer of composition made to Liberty Lane by any debtor and/or to accept payment of any part of a debt due to Liberty Lane in settlement thereof and/or to grant an extension of time of the payment of any such debt owing to Liberty Lane;

6.2.5. to compromise or admit any claim or demand against Liberty Lane, including an unliquidated claim;

6.2.6 to carry on or discontinue any part of the business of Liberty Lane in so far as it may be necessary;

6.2.7 to elect whether or not to abide by certain agreements concluded by Liberty Lane prior to its liquidation;

6.2.8 to submit any dispute concerning Liberty Lane or any claim or demand by or upon Liberty Lane to the determination of arbitrators;

6.2.9 to terminate lease agreements concluded by Liberty Lane prior to its liquidation in respect of movable and immovable property;

6.2.10 to sell any movable and immovable assets of Liberty Lane by public auction, public tender or private contract and to give delivery

thereof;

6.2.11 to borrow funds on behalf of Liberty Lane and to ratify any decision by the provisional liquidators regarding funds borrowed prior to the date of this Order.

6.3 The actions of the Applicants to date hereof in respect of the engagement of the services of attorneys and counsel are ratified and confirmed, in accordance section 386 (5) of the Old Companies Act; and

The costs of this application to be paid out of the assets of Liberty Lane.

[8] The respondent's counsel relied on section 386(4) (a) of the Companies Act 61 of 1973, which reads as follows:

"...to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts".

[9] The respondent's counsel argued that having regard to the provisions of section 386 (4) above, the liquidators have not been granted, nor have their powers been extended to bring this application in the name of the applicant. Such powers can only be granted to the provisional liquidators by the Master, or with the leave of the Court. Accordingly, the provisional liquidators ought to have proceeded in their own names as

representatives of the applicant and not in the name of the applicant directly.

[10] The respondent's counsel referred to Henochsberg`s commentary on section 386 of the Companies Act. ("the Act"). The relevant excerpt at page 818 reads as follows:

"*Proceedings to obtain directions under S387 (3) must, however, be distinguished from proceedings by or against the company as envisaged by S 386 (4) (a). The reference to "liquidator" in S 359 does not include a reference to a provisional liquidator.*

Because S 359(1) (a) suspends all civil proceedings by or against the company until the appointment of a liquidator, i.e. the liquidator finally appointed, it follows, it is submitted, that the reference to the "liquidator in S 386(4) (a) read with S 386(3) does not, in the context, include a reference to a provisional liquidator. Therefore , the provisional liquidator has no power under S 386(4)(a) to bring or defend proceedings, whatever the terms of his appointment, not even with authority or directions as envisaged by S 386 (3)(a) and the Master cannot grant to him the authority envisaged by the proviso to S 386(4)(a).If any proceedings by the company required to be taken , it is submitted that the only basis upon which the provisional liquidator can take them, in the light of the provisions of S 359 (1)(a) is for him to approach the court under S 386(5) read with S 387 (3) and S 361 (3) to procure the vesting in him in his official capacity of the company's right of action, thereby enabling him, as distinct from the company, to take the proceedings....

Ordinarily, in view of the provisions of S359(1)(a), there should be no occasion for the provisional liquidator to require authority to defend civil proceedings against the company, since they may not be brought at all during his period of office. If they are, however, it is submitted that the court may empower him to defend them in his own name in terms of S 361 (3) read with S 385(5) and S 387(3)."

[11] In ***Millman NO and Steub NO v Koetter*** 1993 *(C) at 758D,* Marais J, while accepting that the term 'liquidator' in s 359 means a liquidator of the company in liquidation and not for the benefit of the company's debtors; states that it would be absurd to read into them a desire to prohibit absolutely a provisional liquidator from litigating in the name and on behalf of the company.

[12] The respondent's counsel argued that the liquidators' powers are limited to the powers as recorded in Clause 2.8 of the court order. Clause 2.8 reads as follows:

"to submit any dispute concerning Liberty Lane or any claim or demand by or upon Liberty Lane to the determination of arbitrators;

[13] The respondent's counsel further argued that it is incorrect for the applicants to rely on section 386 (4) (f) of the Act which reads:

"*The liquidator in any winding –up shall have power to carry on or discontinue any part of the business of the company in so far as may*

be necessary for the beneficial winding-up thereof: Provided that, if he considers necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection 3."

[14] The respondent's counsel submitted that the applicant is attempting to read into the above provision a power to litigate, whereas there is a difference between litigation for the recovery of assets and litigation for the purpose of collecting debts. The respondent`s counsel submits that a provisional liquidator has no power under section 386(4)(a) because this section clearly prohibits litigation and therefore the applicant is prohibited to apply section 386(4)(f). The carrying on part of the business envisaged in 386(4)(f) does not include litigation. Any issues requiring litigation fall squarely under section 386(4) (a).

[15] The respondent submits that the applicant approached the court to seek the powers which were granted in the court order which do not cover litigation. The only officer authorised to deal with litigation is the final liquidator. The court deemed it fit to grant the applicant order which on interpretation is inclusive of litigation powers. The honourable court rightfully granted the order without subjecting the applicants to the provisions of section 386(4)(a) of the Act.

[16] The respondent further referred to *Blackman*[1] page 386 at paragraph

[1] Blackman et al Commentary on the Companies Act volume 3

14-357, wherein it is stated that;

"While the purpose for the enactment of section 359)1)(a) no doubt includes some of those listed by the learned judge, the fundamental purpose of the section is to ensure that, before the company is committed to legal proceedings, the liquidator finally appointed is given sufficient time to consider the matter and obtain authority to do so from those whose interests are at risk, namely the creditors and members of the company".

[17] To permit a provisional liquidator to waive the provisions of s 315(1)(a), and so free himself to seek the authority of the court to litigate would defeat the purpose of the subsection. Unlike the provisional liquidator (who is appointed by the Master and whose task is merely to conserve and protect assets of the company until the liquidator is appointed), the liquidator is chosen by the creditors and members, and it is his, and not the provisional liquidator's duty to wind up the company. Furthermore, it is only at and after the first meeting of the creditors (where the final liquidator is nominated) that creditors have an opportunity to prove their claims and thus it is only at and after that meeting that the creditors can authorise the liquidator to institute proceedings on behalf of the company.

[18] My view is that the learned judge who granted the order would have clearly set the limitations if the law intended to do so. The court order constitutes wide powers befitting the role of the provisional liquidators.

Clause 2.1 of the court order clarifies the wide scope within which the liquidators should operate. Clause 2.1 reads as follows:

"*to obtain legal advice on any question of law affecting the administration of Liberty Lane and to engage the services of attorneys and counsel in connection with any matter arising out of or related to the affairs of Liberty Lane;" **(my emphasis).*** It is my considered view that debt collection arises out of and/or is related to the affairs of the applicant. Debt collection is therefore inherent to any process of trade.

[19] The applicant's counsel submitted that the provisional liquidators have the powers as conferred by the Master to exercise discretion. In this regard he referred to Section 386(1)(a) (b)(c)(d) and section 386(4)(f) of the Companies Act 61 of 1973. Sections 386(1)(a)-(d) reads:

"(a) *to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;*

(b) to prove a claim in the estate of any debtor or contributory of the company and receive payment in full or a dividend in respect thereof;

(c) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4)(f) have power to impose any additional liabilities upon the company;

(d) to summon any general meeting of the company or the creditors or contributories of the company for the purposes of obtaining its or their authority of sanction with respect to any matter or for such other purposes as he may consider necessary;

Section 386 (4) (f) reads:

"*to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3)...*"

[20] The applicant's counsel further referred to Section 386 (4) (f) which grants the joint provisional liquidators the powers to carry on with the business. The liquidators acted within their ambit by carrying on with the applicant's business. Debt collection is an integral part of any trade in the event the debtors are involved.

[21] In further amplification of his argument, the applicant's counsel referred to ***Fourie NO v Le Roux and others*** 2006(1) SA at page 279 particularly paragraph 8 where the learned judge Boshielo stated that:

'*it appears to me that ss 386 (1)(e) of the Act, read with s 69(2) of the Insolvency Act 24 of 1936('the Insolvency Act') , are relevant to a resolution of this polemic. Section 386(1) (3) of the Companies Act provides that:*

(1) The liquidator in any winding-up shall have power-

....

(e) subject to the provisions of ss (3),(4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustees of an insolvent estate may take in the ordinary course of his duties and without the authority or a resolution of the creditors.'

On the other hand, s 69(2) of the Insolvency Act provides that:

'(2) If the trustee has reason to believe that any property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to a magistrate having jurisdiction for a search warrant mentioned in ss (3).'

Equally important is s 386 (5) of the Companies Act which provides as follows:

'(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do anything which the Court may consider necessary for winding –up the affairs of the company (my emphasis) and distributing its assets.'

[22] The applicant's counsel also referred to paragraph 10 of **Fourie NO** supra where the honourable judge Boshielo stated that:

*"Borrowing the elegant expression of Marais J in **Milliman NO and Steub NO v Koetter** 1993 (C) at 758D, I cannot accept that a provisional liquidator can do more than impotently wring his hands.*

The respondent's argument in this case is suggestive of the wringing of hands by the provisional liquidators".

[23] The honourable Judge Boshielo further stated at 10 paragraph 2 that:

"speaking for myself, I find it startling if not incongruous that the Legislature could deny a provisional liquidator, who has an interest in the protection and preservation of the assets of a company in liquidation, of the right to approach the Court for leave to institute proceedings or whatever directions specifically intended to protect and preserve the assets of such a company. (my underlining).Such an interpretation of the Act in any event appears to me to be in conflict with the underlying spirit of ss 386(1), (5) and 387 (3) of the Act read with s 69 (2) of the Insolvency Act."

[24] Referring to the honourable Judge Boshielo's finding above the applicant's counsel submitted that certainly the money owed to the applicant in this case is the property of the applicant. Part of the functions of the provisional liquidators is to recover money. The purpose of the Act is not to stand in the way of proper administration of estates. Litigation squarely falls under directions which are intended to protect and preserve the assets of a company.

[25] The respondent's counsel in response to the above submitted that the decision in ***Fourie NO v LE Roux and others*** *is* distinguishable as it

deals with the preservation of property and not debt collection and in particular litigation therefore it does not extend to litigation.

[26] I am in full agreement with the applicant's submissions. When the business carries on trade, the scope of trade cannot be limited to certain areas of the business with the exclusion of debt collection. Doing anything which the court may consider necessary to recover monies can be carried in any manner deemed necessary by the provisional liquidators including litigation. The respondent could not make a case as to what qualifies the final liquidators to be in a better position than that of provisional liquidators regarding the litigation proceedings. The major role of a liquidation process takes into account the interests of the company in liquidation; a role which also covers the rights of the creditors.

[27] I have regard to the fact that the learned Judge in Le Roux specifically referred to ***Milliman NO and Steub NO v Koetter*** above, wherein it was decided that the provisions of s 359 do not read into them a desire to prohibit absolutely a provisional liquidator from litigating in the name and on behalf of the company. For the aforementioned submissions and due consideration of the above two cases; I find that the provisional liquidators in this matter have powers to litigate.

Accordingly the point in *limine* is dismissed.

AD MERITS

[28] It is common cause that the respondent owes the applicant, the sum of R545.488.00. The respondent brought a counter application, consisting of claim A and B against the applicant's undisputed claim for payment.

[29] In the introductory remarks, the respondent's counsel referred to the case of ***Truter v Degenaar*** 1990 (1) SA at page 206, wherein it was stated that :

"Although Rule 22 (4) of the uniform rules (which provides for the suspension of judgment on a claim pending the decision of the counter- claim in the case of actions) is limited to actions only, it did not amend the existing law which was applicable to both actions and motions. In terms thereof, the premise was that the claim and counterclaim (application and counter- application) should be adjudicated *pari passu* and that where the claim/application was unopposed judgment thereon was suspended pending finalisation of the unliquidated counterclaim/counter-application".

[30] The respondent's papers allude to the fact that the court has a discretion to depart from Rule 22(4). The discretion is not limited to cases where the counter-application is frivolous or vexatious and instituted merely to delay judgment on the claim/application. The discretion is wider and the good reasons which would move a court to

discretion is wider and the good reasons which would move a court to exercise it in favour of a plaintiff/applicant are not capable of pre-definition.

[31] This court is therefore asked to exercise its discretion in respect of the counter application as it is founded in fact and law. The court should allow proper investigation by referring the respondent's counter application for trial. The respondent's counsel further submitted that in the circumstances the court should weigh the respondent's counterclaim. The respondent argued that it has a strong counterclaim, which is not vexatious, it cannot be right to be ordered to pay the applicant whilst ignoring the counterclaim.

[32] I now turn to the respondent's counter application. The respondent in claim A seeks payment of the amount of R171. 932.69, being the amounts due by the applicant to the respondent for the rental of scaffolding equipment which has been rented to the applicant at the applicant's special instance and request.

[33] The respondent's counsel argued that the directors of the applicant melted down the respondent's equipment and were therefore unable to return the scaffolding. The applicant was in possession of 97 tonnes of the respondent`s scaffolding equipment. It is common cause between the parties that the applicant returned 97 tonnes of scaffolding by way of scaffolding boards as was agreed between the parties.

[34] The respondent further submitted that it is common cause between the parties that 29.574 tonnes of such scaffolding boards were defective and were to be replaced by the applicant. In this regard the respondent referred to the letter sent by the applicant's attorneys to the respondent's attorneys on 5 March 2012. The relevant extract of the letter reads:

"The future rental stock will be regarded as a post-liquidation expense therefore form an administration cost in the estate for the period in which lease and therefore until its return to your clients".

[35] In support of the above the respondent claims that 29, 574 tonnes of the scaffolding returned to it by the applicant is defective and as such the respondent states that contractually it can continue to claim rent until the proper scaffolding is returned by the applicant. The respondent also referred to its customer statement clearly setting out the calculation of the amount claimed and the method of calculation. In this regard the respondent submitted that the amount is readily and easily ascertainable and is accordingly liquidated.

[36] The respondent further referred to the applicant's letter to the respondent dated 28 May 2012 wherein the applicant set forth the following:

"with regards to the purported defective material, our client as a sign of good faith replace the material which your client has indicated is defective without admitting liability and on a without prejudice basis".

[37] In response to the above the applicant submitted that it is common cause that since 20 April 2012 the applicant has not been in possession of any scaffolding. The applicant in challenging the respondent's argument submitted that the respondent has failed to present admissible evidence in support of the allegation of a defective scaffolding.

[38] In respect of claim B, the respondents seeks the replacement of scaffolding, as per the applicant's undertaking to replace 29.584 defective tonnes. The replacement amount is R529.224.42. The respondent referred to the relevant clause in the written agreement between the parties which reads:

"In the event of the goods being lost or damaged or should the customer fail to return the goods to the respondent, the respondent's current catalogue price for such lost or damage goods as liquidated(sic).

[39] In support of the above the respondent referred to the catalogued price of the goods in a document titled "sale by loss quotation". The respondent submitted that the amount reflected in the document of R529.224.42 is a liquidated amount as per the written credit application between the parties.

[40] I have regard to the averments made in page 14, paragraph 5.19 of the applicant's founding affidavit. The applicant stated that it was unable to return approximately 200 tonnes of scaffolding to the respondent. The applicant was however able to return 99 tons and concluded an agreement with the respondent that it would collect scaffolding from current sites where it was no longer needed and return it to the respondents. Alternatively the applicant could instead of replacing the scaffolding, rather replace the stock owed to the respondent with boards and related material incidental to the scaffolding as long as the tonnage returned remained the same.

[41] The applicant adhered to its undertaking and supplied 97 tons of scaffolding, boards and related material to the respondent. The applicant argued that the court should find that the applicants returned damaged goods, in the event that the respondent does not succeed on the alternative of a liquidated rental claim. The respondent persists that the scaffolding so supplied is of sub-standard quality. The applicant denies the allegation.

[42] The court's difficulty with the applicant' bare denial that the scaffolding is defective is that the applicant stated on its own accord that it collected scaffolding from current sites where it was no longer needed and gave it to the respondents. It is reasonable to assume that any item that is no longer needed is probably defective, particularly an invaluable equipment such as a construction tool. The applicant does

not even attempt to offer an explanation as to why it submits "the no longer needed scaffolding" is up to standard.

[43] The applicant argued that the respondent should sue for damages and present admissible evidence to prove its allegations about the defective scaffolding. The applicant submitted that the allegation that the scaffolding was defective creates a substantial factual dispute which cannot be resolved through motion proceedings.

[44] The applicant further argued that the claim is not liquidated and that no evidential value can be attached to annexures submitted without accompanying affidavits of the expert. The applicant's submission essentially is that the respondent is not entitled to claim damages in motion proceedings. The applicant further submitted that its denial that the respondent is entitled to claim damages creates a further factual dispute.

[45] I find the applicant's blameless approach based on its undisputed claim opportunistic. The applicant does not appreciate that the counter application by the respondent overlaps its undisputed claim and therefore is a defence on the part of the respondent. I have also regarded the applicant's undertakings in respect of the defective material. The applicant by its own admission returned the respondent's scaffolding by replacing it with the unwanted scaffolding. It seems as if it is the applicant's view that the respondent must be satisfied with the

defective scaffolding despite the applicant's acknowledgment of providing the respondent with unwanted material.

AD DISPUTE OF FACTS

[46] The applicant submitted that the disputes of fact concerning the alleged damaged scaffolding was known to the respondent before it launched its counter application. If a party makes use of motion proceedings despite knowing that a dispute of facts, exists his application will, as a general rule be dismissed with costs.

[47] The applicant further submitted that the correct approach in applying the ***Plascon Evans Paints*** *Rule (**Plascon- Evans v van Riebeeck Paints 1984(3) SA 623(A) at 634G-I,**)* is that the applicant is the respondent in the counter application and as such applicant's version should, for purpose of motion proceedings, be preferred over the version of the respondent.

[48] I allowed the parties to file further heads of argument dealing with the Plascon Evans Rule. The applicant in support of the reversal application of Plascon- Evans Rule referred to the case of ***Luster Products Inc v Magic Style Sales CC*** *1997 (3) SA 13 (A) at 21* wherein the learned Plewman JA, at page 22 , held that where, in an application for a final interdict, the respondent has brought a counter-application for certain relief, there is a dispute of fact and the rule in

applications, having a certain overlap and being argued at a combined hearing, but separate and independent applications nonetheless.

[49] The proper approach in such circumstances is that while the respondent's version must be looked insofar as the main application is concerned the reverse is the case with the counter- application. The applicant also referred to ***Livanos NO and Others v Oates and Others*** *2013 (5) SA 165 (GSJ)* wherein Wepener J followed the approach in **Luster Products** above.

[50] The respondent's counsel argued that the Plascon Evans Rule is not applied in reverse. The counsel for the respondent referred to ***Ngqumba/Damons NO/Jooste*** *1988 (4) SA 224*. The Ngqumba reasoning is that the applicant knows when he embarks on motion proceedings that if there are disputes he is at risk due to the nature of the proceedings. It does not matter if the dispute takes the form of a counterclaim. It still amounts to defence, that the respondent is not obliged to pay for reasons sets out in its counterclaim.

[51] In support of the above the respondent's counsel also relied on ***National Director of Public Prosecutions v Zuma*** *2009(2) SA 277 SCA at 290D-291C*. The respondent further submits that the rule is not applicable when deciding whether the counterclaim should be referred to trial.

[52] In principle I am inclined to follow the honourable Plewman JA and Wepener J's approaches, however I am also enjoined to examine the merits of this case. It is not in the interest of justice to accept the applicant's version blindly. In my view the applicant's version should be tested. I say so because of the rigorous factual argument, namely the applicant admit that it collected used scaffolding alleged to be defective and therefore the court need to test the allegations. The court should also consider the issue of the replacement stock with boards, and related material incidental to the scaffolding.

[53] The respondent is not satisfied with the quality of the replaced scaffolding, hence there was an understanding between the parties, in a letter dated 14 March 2012 addressed to the respondents by the applicant to continue with the rent of the scaffolding in order to address the issue of defective scaffolding. When the respondent raises the issue of the defective scaffolding as its defence the applicant elects to deny this notwithstanding that the applicant made written undertakings in this regard.

[54] The difficulty in accepting the applicant's version is that the substance of the respondent's counterclaim revolves around the unreturned scaffolding and/ or the returned but defective scaffolding. The applicant's argument is not satisfactory regarding the rental undertakings in lieu of the defective scaffolding. With regards to the

through action proceedings, it is common cause that the applicant knew about the respondent's position regarding set-off before the applicant launched this application.

[55] The applicant's version that the respondent's claim is unliquidated despite the applicant being party to an agreement which stipulates that the catalogue price for lost or damaged goods constitutes a liquid document is not acceptable. The applicant's argument that the respondent should have foreseen the disputes of facts before bringing a counter application, could also applicable to the applicant; because in its founding affidavit for its undisputed claim in page 4, paragraph 4.2 the deponent states:

"*despite a substantial period of time passing by the Respondent has failed and or refused to pay the indebted amount. The Respondent claims the liquidated company is indebted to it, and as such it appears that the respondent is applying a set-off. The joint provisional liquidators hold the view that set-off may not be applied against a liquidated estate and that the Respondent should lodge a claim for any monies that is allegedly owed to it*".

[56] The general rule established in ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** *1949(3) SA 1155 at 1162,* is that the application may be dismissed with costs when the applicant should have realised when launching the application that a serious dispute of fact was bound to develop. It does not follow that the application will

fact was bound to develop. It does not follow that the application will always be dismissed with costs in such a case. There may still be circumstances that will persuade a court not to dismiss the application but to order the parties to trial together with a suitable order as to costs.[2]

[57] I am of the view that there is a lot of dispute facts in relation to the counter application, namely whether the replacement material is defective or not, interpretation of rental agreements, proof of claims, etc.

Accordingly I make the following order:

1. The matter is referred to trial.
2. The notice of motion shall stand as a simple summons and the answering affidavit as a notice of intention to defend.
3. A declaration shall be delivered within thirty (30) days as from the date of this order.
4. The Uniform Rules dealing with further pleadings, discovery and the conduct of trial shall apply.
5. The costs of the application be reserved for determination by the trial court.

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[2] Herbstein & van Winsen volume 1, fifth edition – The Civil Practice of the High Court page 460

MALI, AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of applicant:		Adv. J. Vorster
Instructed by	:	JI Van Niekerk Attorneys
Counsel on behalf of defendant:		Adv. GM. Young
Instructed by	:	Meltz- Le Roux- Motshekga Attorneys
Date Heard	:	11 February 2014
Date Delivered	:	~~8~~ 09 May 2014