IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2016.03.03 JM Mabuse

DATE **SIGNATURE**

CASE NUMBER: 86600/14

DATE: 3 March 2016

AFGRI OPERATIONS LIMITED Applicant

V

HAMBA FLEET PROPRIETARY LIMITED Respondent

JUDGMENT

MABUSE J:

[1] The applicant, a public company registered with limited liability in accordance with the company statutes of this country and having its principal place of business in Centurion, seeks an order in terms of which the respondent, also a company with limited liability registered in accordance with the company laws of this country, is wound-up.

[2] The applicant's cause of action arises from the respondent's inability to pay the applicant a sum of R156,796.64 which the respondent owes to the applicant and which arose from the applicant's taxed bills of costs.

[3] The above debt of R156,796.64 has its origin in the following circumstances. In the year 2009 the respondent instituted two actions against the applicant based on certain agreements concluded between the parties during 2003 and 2005. During 2013 the defendant filed its amended particulars of claim under one of the two cases namely case number 9431/2009. On 25 March 2013, the applicant, which was unhappy with the formulation of the contemplated pleading, complained about the improper formulation of the respondent's amended particulars of claim. The applicant then gave the respondent an opportunity to amend its pleading but the respondent failed to do so. So on 6 May 2013, the applicant filed an exception to the respondent's amended particulars of claim.

[4] By agreement between the parties, the exception was set down for hearing before Claassen J, on 4 February 2014. On the said date Claassen J. granted the following order again by consent between the parties:

"*4.1 the matter was adjourned sine die;*

4.2 the respondent was ordered to pay the applicant's costs, including the cost of two counsel; and

4.3 the respondent was granted leave to apply for the amendment of its particulars of claim within 21 days."

A copy of the relevant court order is attached to the founding affidavit and marked 'PB3'.

[5] Following the said order of costs the applicant proceeded to prepare its bills of costs. Copies of same were subsequently served on the respondent and the taxation thereof was fixed for 22 July 2014. On the appointed date and at the taxation of the applicant's bills of costs, the parties were each represented by their tax consultants. The applicant's bills of costs were taxed and allowed in the sum of R156,796.64.

[6] Despite three letters, including a letter in terms of s 345(1)(a) and or s 345(1)(c) of the Companies Act 61 of 1973 ("the Act"), calling upon the respondent to pay the said amount within twenty-one (21) days of 5 September 2014 at the pain of being deemed to be unable to pay its debts and at the pain furthermore of being wound up for that reason, the respondent has failed, or is unable, to pay the debt. The applicant tried to enforce the court order by issuing a writ of execution. On 24 August 2014 the sheriff could not execute the said writ at the respondent's registered office by reason of the fact that the respondent had reportedly abandoned its registered address and its whereabouts were unknown.

[7] The said demand, in terms of s 345 of the Act, was prepared on 5 September 2014 and forwarded to the sheriff for service at the respondent's registered office. Service of the said demand was effected on the respondent on 15 September 2015 by affixing a copy thereof to the respondent's principal door. On 16 September 2014, Zehir Omar Attorneys, acting for the respondent, responded to the said demand and wrote the following letter to the applicant's attorneys. The said letter reads as follows:

"*We refer to your letter dated 5 September 2014 delivered to our client, Hamba Fleet (Pty) Ltd. Our client had terminated the mandate of Werkmans Attorneys and has (sic) instructed our offices to act as it's (sic) attorney of record. A notice of substitution will be served and filed shortly.*"

A perusal of the bill of costs that was apparently settled between you and our client's former attorney revealed that:

Your client has claimed the entire cost of the action of 2009 to date. Our client instructs that your client has not secured judgment against our client. In fact on 4 February 2014, the matter was seized for trial in the South Gauteng High Court. The matter was postponed sine die by agreement between the parties with the plaintiff undertaking to pay the defendant's cost, including the cost of counsels (sic). Please let us have a copy of the court order that was relied upon to tax the bill in the manner that it was taxed.

Our client denies being liable for the taxed bill. Please provide us with an explanation for the foregoing. We hold instructions to review the decision of the taxing master, and to bring an application to stay any execution steps or liquidation proceedings against our client.

Further with regards to the thrust of liquidating our client's company, you are advised to hold off (sic) on such threats. If your offices had (sic) acted irregularly in taxing the bill, your winding-up our client will only exacerbate your wrongdoing.

We await your response thereto."

[8] It is clear from the said letter, in particular by reference to *"your letter dated 5 September 2014"*, that the respondent had received the demand in terms of s 345 of the Act. The concerns that the respondent had raised in its attorney's afore going letter were addressed by the applicant's attorneys in their letter dated 29 September 2014 which was forwarded to the respondent's attorneys. The said letter reads as follows:

"1. We acknowledge receipt of your letter dated 16 September 2014 received on 19 September 2014.

2. There is no trial pending in the South Gauteng High Court as alleged in your letter. Presumably you intended to refer to the action pending in the High Court of South Africa, Gauteng Division, Pretoria, under case number 9431/09.

3. The bill of costs does not pertain to "the entire cost of the action from 2009 to date." The bill of costs pertains to an exception taken by our client to your client's particulars of claim. On 4 February 2014, the date upon which the exception was set down for hearing, your client's legal representatives conceded the merits of our client's exception. Judge Claassen made the following order:

3.1 the matter was postponed sine die;

3.2 your client was ordered to pay the cost of the exception including the cost of two counsel;

3.3 your client was granted leave to apply to amend its particulars of claim within 21 days.

4. We attach hereto a copy of the bill of costs which was scheduled between our client's respective cost consultants.

5. We do not have a copy of the court order to hand but we will obtain a copy of the court order and will furnish you with a copy of same.

6. We are proceeding to prepare an application to wind-up your client."

A copy of the said letter has been attached to the founding papers as annexure 'PB14'.

[9] Neither the respondent nor Mr. Omar, the respondent's attorneys, had responded to the said letter by 27 November 2014. The applicant contends that as it has complied with the requirements of the law relating to the liquidation of companies it is entitled *ex debiti justitiae* and by virtue of the provisions of s 344 of the Companies Act 61 of 1973 for a

final winding up order. Quite correctly all that the applicant must do in order to succeed with its application is to satisfy the Court that it has *locus standi*, in other words that it is the creditor of the respondent in an amount of not less than R100.00; secondly that it has complied with the provisions of s 345(1) and that the respondent is unable to pay its debts. This has to be done on a balance of probabilities. In my view the applicant has satisfied these essential requirements.

[10] Needless to state it, the respondent opposes the application for its liquidation and has for that purpose delivered an opposing affidavit deposed to by one Sunnyboy Ndlovu ("Ndlovu"), its managing director. The respondent has, in the said opposing or answering affidavit raised three defences that:

(i) the applicant relies on the Companies Act 61 of 1973 and not on the provisions of the Companies Act 71 of 2008;

(ii) that a Court has a discretion, irrespective of the grounds on which the order for the winding-up of a company is sought, to grant the order; and

(iii) that the applicant has failed to admit or deny and/or confess and avoid the facts contained in, among others, paragraph 17 of the respondent's answering affidavit.

[11] The applicant relies on the Companies Act 61 of 1973 instead of the Companies Act 71 of 2008.

Relying on the contents of paragraph 17 of its answering affidavit, the respondent contends that it has assets of a substantial value and is for that reason a solvent company. Because of the fact that it is a solvent company it is contended on behalf of the respondent that the Companies Act 61 of 1973 does not provide for the liquidation of a solvent company and furthermore that as the applicant's application to wind-up the respondent is based solely on the Companies Act 61 of 1973 and not on s 81 of Act 71

of 2008, which provides for the winding-up of solvent companies, the application must fail.

[12] S 81(i)(c)(ii) of Act 71 of 2008 provides that a court may order the winding-up of a company if it is just and equitable for the company to be wound-up. It is not clear to this Court why the respondent contends, and why it is argued by Mr. Omar, the respondent's legal representative, that the applicant may not rely on the provisions of the Companies Act 61 of 1973 if it seeks the winding-up of the respondent on the grounds that it was just and equitable for the respondent to be wound-up. Nowhere in its affidavit does the applicant seek an order on the basis of s 81(i)(c)(ii) of Act 71 of 2008, let alone on an allegation that *"it was just and equitable"* to wind-up the respondent. It is crystal clear in paragraph 22 of its founding affidavit that:

"The applicant seeks an order of winding-up the respondent on the grounds of the respondent's inability to pay the debts within the meaning of s 344(f) read with s 345(i)(c) of the Companies Act 61 of 1973 ("the Act"). It is also clear from paragraph 36 of the founding affidavit that the application for the winding-up of the respondent is founded on the provisions of s 344(f) read with s 345(i)(a) and s 345(i)(c) of Act 61 of 1973."

2. I do not think that this point merits any serious consideration. The inevitable finding by this Court is that this point must fail.

[13] <u>That a Court has a discretion to grant the winding-up order</u>

The respondent's defence that the Court has a discretion, irrespective of the grounds on which the application for winding-up is sought, to grant the order. The respondent contends that it has is a counter claim or claim against the applicant. In my view, this point requires earnest consideration. This defence is connected to whether in motion

proceedings a respondent can raise a counter-claim or a claim against the applicant as a defence against an application for its winding-up and if so how the Court should deal with such a matter. It is crucial, in my view, to point out at the outset that although in his letter dated 16 September 2014, Mr. Omar had written that:

"Our client denies being liable for the taxed bill ..." the debt is not denied in the answering affidavit. In fact it is now common cause between the parties that the respondent indeed is indebted to the applicant in the sum of R156,796.64 in respect of the taxed bill of costs and that the respondent company has, after lawful demand in terms of s 345 of the Act, to pay the said amount.

[14] I now turn to investigating whether the Court should exercise its discretion in favour of the respondent by reason of the fact that it has a counter claim or a claim against the applicant. In doing so, a Court must investigate the counter-claim or claim, decide whether it is spurious or genuine and whether there is substance in it. If the Court should find that the counter-claim or claim is substantial, genuine and exceeds the applicant's debt, the Court should exercise its discretion by dismissing the application for liquidation and if the counter-claim or claim is insubstantial, the Court should grant the application for liquidation.

[15] The case made by the respondent may be summarised as follows. On or about 1 July 2003 and at Centurion the parties, duly represented therein, entered into a written Road Transportation Agreement. In terms of this agreement, the parties agreed that the respondent would, at an agreed fee, provide the applicant with transportation services and deliver the applicant's monthly output at Kinross Mill to various destinations. For purposes of brevity, this agreement may be referred to as the Kinross Transportation Agreement. Clause 4.1 thereof provided that:

"Subject to the provisions of this Agreement, the price to be charged by Hamba for Delivery of Feed is R7.95 per kilometre, plus VAT."

[16] During 18 June 2004 and at Centurion, the respondent and the applicant, who were duly represented at all material times thereto, concluded a written Group Courier Service Agreement in terms of which the parties agreed that the respondent would provide the applicant with transport services, collect and deliver various items to various destinations and in terms of which the applicant undertook to pay the respondent an agreed fee for services. A copy of this agreement is attached to the answering affidavit as Annexure 'SN3'. Clause 4.1 thereof provides that:

"Subject to the provisions of this Agreement, the price to be charged by Hamba for the Delivery of the items is R1.89 per kilometre, plus VAT."

[17] On or about January 2005, and still at Centurion, the parties herein, who were duly represented, concluded an oral Road Transportation Agreement. In terms of this oral agreement, the parties had agreed that the respondent would render certain transport services to the applicant who would in turn pay the respondent an agreed fee for such services. The said transportation services consisted in the respondent delivering the applicant's monthly products from the applicant's Bethlehem Mill to various destinations. This Transportation Agreement may be called the Bethlehem Transportation Agreement.

[18] On 1 July 2003, the parties herein, both represented at all material times, entered into a Management Agreement in terms of which the respondent agreed to appoint the applicant to manage its, the respondent's, business affairs. A copy of the written agreement of management has been attached to the answering affidavit as Annexure 'SN4'. In terms of 'SN4', the applicant agreed, on certain terms and conditions, to act as

the administrator of the respondent and to oversee the business and operations of the respondent's various contracts the respondent had concluded and might conclude. Following the said agreement the respondent gave the applicant full executive and management control of its business. The respondent agreed to pay the applicant an agreed fee on a monthly basis for the applicant's services.

[19] It was a tacit term, so it is contended, of the Management Agreement that the applicant would act honestly in dealing with the business affairs of the respondent, including the handling of the respondent's financial affairs. During November 2015, and whilst studying the bank statements of the respondent, Ndlovu discovered certain unauthorised transfers in the respondent's bank account. His investigation revealed that an amount of R13,606,574.85 had been siphoned out of the respondent's bank account. Ndlovu and Sipho Mkhwebane ("Mkhwebane"), the respondent's operational director, prepared a list of amounts that had been debited from the respondent's particular account, being account nr 4058272691. Also reflected in the said accounts were the dates on which certain amounts were transferred to certain parties whose names appeared in the said document. The document is attached to the answering affidavit as 'SN5'. The list of such unauthorised transaction commences on 12 November 2003 and ends on 29 October 2005. The amounts transferred vary. SN5 is dated 9 November 2005. The said document was forwarded to one Mr. Herthon Smith, the General Manager of the applicant and the applicant was requested to respond thereto.

[20] The respondent contends firstly that it had not authorised the opening of the bank account from which the respondent's monies were paid to different entities as reflected on Annexure 'SN5'; secondly that it had not authorised payment of the respondent's

money to the entities reflected in Annexure 'SN5'; and thirdly and lastly that none of the entitites reflected in 'SN5' was known to it.

[21] A meeting was arranged between the parties. This meeting took place on 14 November 2015 at Centurion. Present were Mkhwebane and Ndlovu who attended the meeting on behalf of the respondent on one side and Esli Rall, Frans Delport, Marius Pienaar and Jaco Burger who all had attended the meeting as the representatives of the applicant. At the said meeting the applicant's officials simply refused to provide an explanation for the missing funds. It is contended by the respondent that Absa Bank was also unable to explain how the transactions had been effected without the respondent's authorisation.

[22] After the aforementioned meeting the said Ndlovu went to see the respondent's attorneys of record, at the time Werksmans Attorneys. Their attorneys informed them that following the steps that Ndlovu had taken to investigate the banking transactions relating to the said bank account, the applicant's representative had cancelled all the agreements. The said cancellation was contained in a letter dated 14 March 2016 from the applicant's attorneys to their attorneys. The respondent contends that the said cancellations were unlawful as the applicant was not entitled to cancel any of the contracts with the respondent. There was no breach of any material term of the contract by the respondent. At the time of the said cancellation, the applicant retained all the records and documentation relevant to the respondent's business affairs including the bank statements, invoices, statements, delivery notes, etc.

[23] On 14 March 2006 and acting on the contents of a letter from its attorneys, the applicant ejected the respondent from its, the applicant's, offices and at the same time took possession of numerous assets belonging to the respondent. Ndlovu has listed in

paragraph 17 of the answering affidavit, all the assets of the respondent it is contended he applicant removed. They are too numerous to be listed in this judgment. The estimated value of the said assets is R3,035,200.00.

[24] During the period 2005 to 2007 Ndlovu discovered that during the subsistence of the said Management Agreement, the applicant's representatives had unlawfully and intentionally and without the respondent's knowledge transferred funds out of the respondent's bank account; that the applicant had intentionally failed to ensure that the respondent was remunerated for services rendered by the respondent to the applicant, alternatively failed to render invoices for services rendered by the respondent to the applicant; that the applicant had intentionally failed to inform the respondent's board of directors of the aforementioned unauthorised transfers in the monthly management reports; that more specifically, in the period 12 November 2003 to 22 March 2006, the applicants failed to disclose that it had:

1. effected unauthorised transfers from the respondent's bank account totalling R12,308,080.03;
2. effected transfers totalling R10,523,816.04 to various entities that had no business relations with the respondents and/or without lawful cause;
3. annexures 'SN5' is a schedule reflecting a breakdown of the amount referred to;
4. as a result of the aforementioned unlawful transfers the respondent suffered pecuniary loss of R22,831,896.17.

[25] On 10 March 2009 and under case no. 13220/09 the respondent issued summons against the applicant for payment of the amount of R22,831,896.17 in respect of claim A; the amount of R3,035,200.00 in respect of claim B; a sum of R5,857,803,60 in respect of claim C; R9,329,759.00 in respect of claim D and lastly, R4,772,536.30 in

respect of claim E. It is this action that was referred to earlier herein. The said action is still pending. Although the debt in this matter arose from the taxation of the applicant's bills of costs in matter number 9431/2009, and although the applicant has referred to that matter in its founding affidavit, for inexplicable reasons no copy of such a matter was attached to either party's papers nor, to exacerbate matters, did the respondent refer to the said case in its answering affidavit. Of course the applicant made it clear that for fear of making the papers cumbersome, it did not attach copies of either of the two actions that the respondent has launched against it. No explanation was forthcoming from the respondent why it did not refer to the said case.

[26] In its replying affidavit the applicant admits that it had concluded written and oral road transportation, group courier and management agreements with the applicant. The applicant disputes though the respondent's claims against it. The applicant denies the allegation that funds that were transferred from the named bank account were so transferred without any authorisation from the respondent. In addition it contends that any claim with regard to such amounts which had been transferred would by now have become prescribed. Finally, the applicant denies that it ejected the respondent from its premises and that when it did so it removed the respondent's assets from such premises. Esli Rall, it is so contended by the applicant, is said to have no recollection of the meeting that Ndlovu claimed he attended on 14 November 2005 at Centurion.

[27] The following important facts are therefore common cause between the parties or not in dispute:

1. that the parties had concluded the agreements referred to in the preceding paragraph;

2. that, for a certain period, the applicant had full control and management of the business and financial affairs of the respondent;
3. that certain amounts, rightly or wrongly, were transferred from the named account to the entities named in annexure 'SN5';
4. that a meeting was held in Centurion on 14 November 2015 between the parties;
5. that the respondent has issued summons against the applicant in which it claim payment of a sums referred to in paragraph 25 *supra* and that the said action is still pending before the Court.

[28] The question now is should the Court stay or dismiss the application on the ground that the respondent has a genuine and a serious counter-claim or claim in an amount exceeding the applicant's debt? In his heads of argument, Mr. Omar referred the court to the English case of **Re: Bay Oil SA Seawind Tankers Corp v Bay Oil SA 1999(1) All ER 374 ("Re Bay Oil")**, where it was held by the Court that:

"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 section 125(1) of the Insolvency Act 1986."

In the Re Bay Oil SA case, the court made reference to another English case of **Re: Portman Provincial Cinemas (Pty) Ltd (1964) 108 SJ, 581**, which was a cross-appeal.

[29] The facts of the Re: Portman Provincial Cinema matter were set out in the Re Bay Oil SA matter as follows at page 377H:

"... the petition was based on an undisputed debt of £40 831 owing in respect of principal, interest and costs secured by a mortgage. In May 1963 the creditor (Baldwins) demanded payment from the company of that sum. In July 1963 the

company issued a writ against Baldwins claiming damages for breach of an oral agreement alleged to have been made in or about 1955. After the pleadings in the action were closed, but before it could be tried, Baldwins presented its petition. Plowan J dismissed it. On Baldwins' appeal to this Court, Lord Denning MR thought that the company's cross-claim had no substance at all. He would have allowed the appeal. Harman and Russell LJJ, on the other hand, thought that it could not be said that there was no substance in the cross-claim and accordingly dismissed the appeal."

What is of supreme importance in the Re Portman matter was the observations made by Lord Denning MR and Harman LJ with regards to the test to be applied. The test is encapsulated in the following remark by Lord Denning MR:

"(The company says that) they have a cross-claim which overtops the amount due to Baldwins. The question is whether the debt of Portman is a "disputed" debt. It would be, I think, if there was real substance in the cross-claim."

[30] Lord Denning MR continued as follows after giving the *expose* of the matter:

"As I understand the law on the matter, it is this. If this is a genuine cross-claim with substance in it, then let it be tried out in the Queen's Bench Division: this petition must be rejected. But if there is no substance in the cross-claim, then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross-claim. We were referred to ***Re Welsch Brick Industries Ltd [1946] 2 All ER, 197****, where even though the defendant company had put in affidavits and got leave to defend under RSC Ord 14 (thus showing there was a triable issue), nevertheless the court looked into the matter even so; and held there was no substance in the defence; and therefore it was not a ground for refusing a winding-up order."*

Harman LJ was even clearer in his observation. He had this to say about the matter:

"Now the fact that there is a cross-claim of that sort, not being a realised claim, is no answer in law to the petitioner's claim under the Act and it quite clearly appears from the case cited by Lord Denning MR of the Re Welsch Brick Industries Ltd in 1946 that it is not a bar to a claim, but of course it is a matter for the discretion of the judge. The judge here rejected the petition on the modern practice. You do not now, as you used to do, stand over the petition to see if the action will succeed or no. If you find the action making the cross-claim is on foot and it is a serious action you reject the petition. The question is whether the judge rightly exercised his discretion."

His final remark was that:

"I think the judge was right to say that the matter ought to go to trial, and therefore according to modern practice, the petition should be dismissed, and I would so hold."

The majority judgment under the circumstances was that Baldwin's petition for the winding-up of the company should be dismissed.

[31] The law regarding a counter-claim or a claim in the face of an application for winding-up established in the Re: Portman Provincial Cinemas Ltd case and followed in Re: L.H.F. Wools, Ltd [1969] 3 All E.R. 882, is a clear authority for the proposition that the petition ought to be dismissed in counter-claim or claim cases, except in special circumstances. The petition may be dismissed, barring special circumstances:

a. if the counter-claim or claim is genuine, and

b. if it has substance.

The application for winding-up should be granted if the counter-claim or claim has no substance.

[32] Does the law as set out in Re Portman Provincial Cinemas Ltd *supra* and followed in Re: L.H.F. Wools Ltd *supra,* apply in this country? Against this background it must be

remembered that our courts have always, as in other branches of our law, and where Roman Dutch law provides no such authority, in the past sought guidance in English law as illustrated by *inter alia*, **Evans & Co. v Silbert 1911 WLD 216:**

"Even where no rule of private international law instructs a South African court to apply foreign law, foreign law in particular the judgments of the courts of other countries often feature in legal argument before our courts and in judicial decisions. Extensive reliance on foreign law as a persuasive source has long been a particularly notable feature of the practice of South Africa Superior Courts."

See Wille's Principles of South African Law 9th Edition by Francois du Bois et al at page 110. The reliance of our courts on foreign law is best illustrated by **Copestake v Alexander 2 SC at pages 147 to 148** and **Evans & Co. v Silbert** supra. Finally the justification of our Court's reliance on foreign law was further emphasized by O'Regan J, when she made the following observation in **K v Minister of Safety and Security 2005(6) SA 419 CC at paragraph 35:**

"It will be unduly parochial to consider that no guidance, whether positive or negative, could be drawn from other legal systems grappling with issues similar to those with which we are confronted. Consideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further. It is for this very reason that our Constitution contains an express provision authorising courts to consider the laws of other countries when interpreting the Bill of Rights. It is clear that in looking to the juris prudence of other countries, all the dangers of shallow comparitivism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of learning and wisdom to be found in other jurisdictions. Our Courts will look at other jurisdictions for enlightenment and assistance in developing our own law."

[33] Our Courts too have adopted the approach that the Court's power to grant the winding-up order is, irrespective of the grounds upon which the order in sought, a discretionary power which must be exercised on judicial grounds. See in this regard **FNC Building Construction Co. (Pty) Ltd v Macsheil Investments (Pty) Ltd 1959(3) SA 841 [D & C.R.D.] at 844 B-C.** This is what the Court had to say in this matter:

"Sec. 111 sets out the various grounds upon which a company may be wound up by the Court, and it is plain in my view that it was never intended that whenever any of the grounds there set out are established, the Court must grant the order. Not only does the word "may" ordinarily indicate a discretion, but a glance at the grounds set out will show that they could not all have been intended as founding an absolute right to a winding up order."

The discretion whether or not to grant a winding-up order brought on any grounds must be exercised on judicial grounds. See in this regard **Irvin & Johnson Ltd v. Oelofse Fisheries Ltd 1954(1) S A 231 (E) at p. 244.**

[34] To conclude on this point I accept that in South African law, as in English law, the power of the Court to grant a winding-up order is discretionary, irrespective of the grounds on which such order is sought. See in this regard **Ter Beek v United Resources CC and Another 1997(3) SA 315 CPD at 333I-J.** The Court then continued at page 334A-B and had this to say:

"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 counter-claim 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 982 F); 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 its discretion not to grant a winding-up order in his favour."

[35] **The duty lies on the respondent to show the Court why the Court should exercise a discretion in its favour**

The respondent's defence of a counter-claim or claim must be seen against the background that, there is before Court, no such application for counter-claim but only reference in both the founding and answering affidavits that the respondent has indeed sued out summons against the applicant. This has also been admitted by the applicant. The source of such an action has been fully set out. It is clear therefore that the respondent's claim against the applicant is genuine and substantial.

[36] Quite clearly the applicant has a number of concerns against the respondent's action. I have noted those concerns but under the circumstances this Court is not at liberty to deal with them or the respondent's claims at this stage and in these proceedings. If the application to wind-up the respondent and the respondent's claims for payment of the amounts it has claimed in the action against the applicant were contained in one application or the same papers, this Court would have adopted the approach set forth in **Truter v Degenaar 1990(1) SA 206 TPA at page 210 H:**

"Die uitgangspunt sowel as konklusie is dus in ooreenstemming met ons gemenereg. Eis en teeneis behoort Pari passu bereg te word maar die Hof het 'n onbeperkte

diskresie om anders te gelas, welke diskresie uit die aard van die saak om goeie redes uitgeoefen sal word."

At page 211 D-F the Court as per Van Dijkhorst continued as follows:

"Die regsposisie is dus soos volg: Hoewel Reël 22(4) slegs tot aksies beperk is, het dit nie die bestaande reg wat van toepassing was op sowel aksies as mosies gewysig nie. Daarkragtens was die uitgangspunt dat eis en teeneis gelyktydig bereg behoort te word en dat waar die eis onbetwis is vonnis daarop opgeskort word hangende afhandeling van die ongelikwideerde teeneis. Die Hof het 'n diskresie om van die Reël af te wyk. Die diskresie is nie beperk tot gevalle waar die teeneis beuselagtig of kwelsugtig is en ingestel word bloot om vonnis op die eis te vertraag nie. Die diskresie is wyer en die goeie redes wat 'n Hof daartoe bring om dit uit te oefen ten gunste van 'n eiser is nie vooraf vatbaar vir definisie nie. Trouens, om as voorvereiste te stel dat bevind moet word dat die teeneis beuselagtig of kwelsugtig is, sou die diskresie prakties gesproke kragteloos maak aangesien 'n Hof kwalik die eindbeslissing op die teeneis vooruit sou wou loop en sonder behoorlike ondersoek bevind dat die teeneis ongegrond is. Die uiteenlopende oorwegings wat in die verlede 'n rol gespeel het by die uitoefening van die diskresie blyk onder andere uit die sake hierbo aangehaal."

[37] In this matter, unfortunately, the respondent's action is not contained in the same papers as the current application. It is therefore, apart from other factors not necessarily mentioned herein, difficult for this Court to deal with both the application and the respondent's claim against the applicants. Finally the parties did not have the opportunity to seriously and intensively ventilate all the ingredient issues relating to the respondent's claims. Having considered the respondent's claims against the applicant it is my considered view that the Court should, for the following reasons, exercise its discretion in favour of the respondent:

37.1 the respondent has issued summons against the applicant in which it has claimed an amount that in excess of its debt to the applicant;

37.2 the respondent has set forth the source of its claims against the applicant and for that reason the respondent's claims against the applicant are not spurious or are genuine;

37.3 there is substance in the respondent's claims against applicant and accordingly the claims need to be investigated;

37.4 the respondent's cases or claims against the applicant are still pending;

37.5 at the hearing of these proceedings to parties had no opportunity to deal fully with the respondent's claims; and,

37.6 finally, the respondent is by law entitled to raise its claims against the respondent as a defence against the application to have it wound-up.

[38] The applicant has failed to admit or deny and/or confers and void the facts contained in, among others, paragraph 17 of the respondent's answering affidavit

This is the third and last point that constitutes the respondent's defence against the application. In paragraph 17 of its answering affidavit Ndlovu has levelled certain allegations against the conduct of the applicant. Among these allegations made are that the applicant ejected the respondent from its premises; that the applicant took possession of the respondent's assets and finally that, notwithstanding demand, the applicant has failed to return such assets. And in the same paragraph, Ndlovu proceeded to list all such assets it is alleged the applicant took possession of and their values. It is these allegations that the respondent contends that they were not denied or admitted by the applicant.

[39] The contention that the applicant did not deny or admit or confess and avoid the facts contained in paragraph 17 of the answering affidavit is, in my view, not correct for the applicant has dealt with them in paragraph 31.3.3 of its replying affidavit. Whether or not it is true, and this remains an allegation which this Court in this matter is not bound to investigate, in paragraph 31.3.3 the applicant did not only deny that the applicant ejected the respondents from its premises but also contended that there was no veracity in respect of the allegation that the applicant obtained possession of any assets belonging to the respondent. The applicant also stated that the respondent's purported attribution of value of R3,035,200.00 of the said assets lacked any foundation.

[40] In the premises it is clear that the applicant has appropriately dealt with the contents of paragraph 17 of the respondent's answering affidavit. Any contention to the contrary lacks merit.

[41] In the result I make the following order:

1. The application for the winding-up of the respondent is hereby dismissed with costs.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. JP Vorster (SC) & Adv. CP Wesley*
Instructed by:	*Fluxman's Attorneys*
	c/o Friedland Hart Solomon Nicolson
Counsel for the First Respondent:	*Z Omar (Attorney)*
Instructed by:	*Zehir Omar Attorneys*
	c/o Liebenberg Malan Liezel Horn Inc.
Date Heard:	*26 August 2015*
Date of Judgment:	*3 March 2016*