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

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

SIGNATURE 15/11/2022 DATE

CASE NO: 50816/2020

In the matter between

UMSOBOMVU COAL PROPRIETARY LIMITED Applicant

(Registration number: 1996/016229/07)

And

TRANSASIA MINERALS SA PROPRIETARY LIMITED Respondent

(Registration number: 2006/020576/07)

JUDGMENT

NQUMSE AJ:

[1] This is an application for a final order of winding up of the respondent on the grounds that it is unable to pay its debts as contemplated in section 344(f) read with section 345(1)(a) of the Companies Act 61 of 1973 ("the 1973 Companies Act") as read with item 9 of schedule 5 of the Companies Act 71 of 2008 ('the 2008 Companies Act').

Parties.

[2] The applicant is Umsobomvu Coal Proprietary Limited, a private company registered and incorporated in accordance with the company laws of the Republic of South Africa, with its principal place of business at 21 Botanic Avenue, Berea, Durban.

[3] The respondent is Transasia Minerals SA Proprietary Limited. A private company registered and incorporated in accordance with the Company Laws of the Republic of South Africa, having its registered address at 1257 Justice Mohamed Street, Menlo Park, Pretoria.

[4] Before dealing with the merits of this application, I find it necessary to set out the history of the application since when the matter appeared on 14 February 2022 before me and allocated to be heard on the Opposed Motion Court roll on 16 February 2022. This background is succinctly laid out on the latest heads of argument of the applicant dated 22 July 2022. I briefly set it out as follows:

[5] On 16 February 2022 the counsel for the respondent sought to move two additional applications, namely, the application for substitution of affidavits ("the substitution application ") and the application for the supplementation of the answering affidavit ("the supplementation application"). Both applications were opposed by the applicant. The defence pursued by the respondent in affidavits to be substituted and supplemented were the following:

5.1 The cost orders on which the applicant relied in pursuing the liquidation application were not ordered to be paid jointly and severally, but rather jointly, therefore the respondent is liable for only one half of those costs;

5.2 The respondent contended that it had taken cession of various costs orders obtained by various of its affiliate companies (specifically, an entity by the name Transasia 1 (Pty) Ltd, which

then stood to be set-off against the debt owed by the respondent to the applicant, and

5.3 The respondent was entitled to compensation of certain costs of arbitration it had previously paid, in the amount of approximately R65 000.

[6] As already indicated the applications were opposed by the applicant. Furthermore, the applicant contended that the unliquidated claim for the amount of R65 000 cannot be raised as a defence. Moreover, the applicant remained set on its reasons to oppose both applications for substitution and supplementation along the lines articulated in its counsel`s practise note[1] and set out in its answering affidavit in the application to substitute various affidavits[2] which were deposed to and delivered fraudulently in this application as well as prior applications on behalf of the respondent by a Ms Roytblat. I shall not deal with the said answering affidavit in this application and will only do so where it has become necessary to do so.

[7] On 16 February 2022, counsel for the applicant submitted that the respondent could move its applications under the caveat that the applicant reserves the right to argue that the applications were not properly before court and warrant to be struck from the record.

[8] Counsel for the respondent commenced with a full argument in respect of the substitution application and when afforded the opportunity to proceed with the second application for supplementation, he responded that he would prefer for the court to make a ruling on the substitution application before arguing the second leg of his applications. In effect, the respondent sought a postponement of the liquidation application pending a determination on the application for substitution. A move that was opposed vehemently by the applicant, and instead beseeched the court to hear all three applications and for the court to consider a judgment that will be all encompassing with a ruling on each application.

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[1] See Caselines 040-3
[2] See Caselines 039-3

[9] Subsequently, counsel for the respondent indicated that the respondent intended to make a tender of an amount of money to the applicant, the written tender would be made to the applicant overnight and as a consequence thereof requested the matter to stand down in order to present the proof of payment to the court. In response, the applicant`s counsel indicated that it would be considered once received. This caused the matter to stand down until Friday,18 February 2022.

[10] By noon on 17 February 2022, no tender had been received by the applicant, however, a payment of a n amount of R66 000 had been paid into the applicant`s attorneys bank account. The receipt of the payment absent a formal written tender from the respondent prompted the applicant to dispatch a letter to the respondent in which it was recorded:

"Despite your client`s volte face on the undertaking to provide us with a formal written tender with terms, it is clear from the payment received that your client has capitulated on the question of indebtedness to our client in an amount exceeding R100. Please advise whether a tender of costs will be forthcoming or whether the parties will be required to argue costs tomorrow. This is not only a matter of collegial courtesy but also a matter of courtesy to the court. We await your urgent advice in relation to the above".

[11] Prior to close of business on Thursday, 17 February 2022 the respondent`s attorney replied through correspondence marked "without prejudice" and advised the applicant that the payment of R66 000 is made "under protest" and that the respondent would tender the costs of the liquidation, the substitution application or the supplementation application. Since the applicant was not satisfied with the fact that the respondent refused to tender the costs, despite the payment that was effected, on Friday 18 February 2022, the parties argued the question of costs in full and judgement on costs was reserved.

[12] Shortly after the appearance of the matter before me on 18 February, on 24 February 2022, Transasia 1, sought to execute a writ against the applicant on one of the costs orders which had supposedly been ceded

by it to the respondent for the purposes of extinguishing the respondent`s acknowledged indebtedness to the applicant[3] . However, it must be noted that the writ of 24 February 2022 at the instance of Transasia 1 is at the backdrop of what was submitted before court by counsel for the respondent as follows:

"*your Lordship may have noted from the paper that, and I specifically referring to the replying affidavit of the respondent in the application to substitute, that contends that now look the is now R17000 that he has also been taxed; there is a dispute about a R65000, and on that basis a R47000 balance will be paid. Now my instructions are that the respondent will now pay R66000 just to put all the disputes aside. What I will ask your Lordship is just a small indulgence, to enable the respondent to make that payment, and to enable me to hand it up to your Lordship. Payment will be made now. I do not know if it will reflect immediately on the applicant's banking statement, but just properly so that your Lordship can have proof of that payment.*[4] "

[13] Furthermore, the applicant disclosed to the court further facts by way of affidavits from Mr Boitumelo deposed to on 1 April 2022 which disputes the payment of R65000 it claimed to have paid. Since the introduction of the new evidence is protested by the respondent I shall return to this aspect later in the judgement. As a result of these developments and the contentions that the respondent has misled the court regarding the payment of R65000, the applicants sought the permission of the Deputy Judge President, Ledwaba for the re-enrolment of the matter and to request me to defer any ruling on costs in order to hear the entire liquidation application and to deliver a judgement only thereafter.

[14] The Deputy Judge President advised the parties to liaise directly with myself. After hearing the request to hear the whole application I directed the parties to appear on 22 July 2022 for a full hearing. However, it has come to my attention as per the applicant that two days prior the hearing of the matter, the respondent`s attorneys addressed correspondence to the applicant`s attorneys, together with a

[3] see case lines 045-5 paragraphs 10 – 11 and at case lines 045 – 14.
[4] See proceedings of 18 February 2022 on case lines 043 – 69.

payment of R24 735, 75[5] . The payment is made under the caveat that the respondent reserves its rights to recover the amount in question. Not surprisingly, the applicant rejects the payment ostensibly on the basis that it's a conditional payment, absent any explanation or calculation of the interest amount coupled with a threat of future recovery. The applicant contends that the payment is not a payment since the respondent will seek to reverse it. Consequently, the applicant persists with its relief for a final order of liquidation.

[15] Having set out the background I now turn to the merits of the liquidation application is sought in the notice of motion.

[16] According to the applicant's founding affidavit deposed to by Lingani Kunene (Mr Kunene), the applicant's claim against the respondent arises out of taxed bill of costs which have not been settled by the respondent despite demand being made and having complied with the provisions of the 1973 Companies Act as read with the 2008 Companies Act. During June 2010, the applicant and Transasia 1 ,11Miles Investments Property Limited and the respondent "the Companies" concluded an agreement for the sale of certain prospecting rights ("the sale agreement") from the applicant as seller and the rights were to be purchased by Transasia 1 or 11Miles. Mr Kunene stated that pursuant the conclusion of the sale agreement there were numerous instances of breach and repudiation resulting in the applicant cancelling the sale agreement. Following the cancellation, the applicant demanded that the companies should vacate the properties from which the mining rights were being mined and to allow the applicant access therein.

[17] He further stated that following several requests for the respondent to allow the applicant access to the properties, those attempts were not successful and they led to the applicant and the respondent to enter into arbitration proceedings. Following an arbitration award in favour of the applicant, the applicant referred the award to the Johannesburg High Court to have it made an order of court on 29 March 2019. The

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[5] See case lines 047 – 4 paragraphs 8 – 9.

judgement of the court became a subject of appeal to the Full Bench of the Johannesburg court refused the leave to appeal. There after two applications were launched with the Supreme Court of Appeal (SCA) in terms of section 18 (4) and section 17 (2) (b) of the Superior Courts act 10 of 2013. Both applications were unsuccessful.

[18] Subsequently, the applicant prepared a bill of costs in respect of the applications that were unsuccessful in the SCA. Despite this service of the bill of costs on the companies, they never attended the taxation. According to the taxed bill of costs the respondent and 11 Miles are to make payments to the applicant jointly and severally, the one paying the other to be absolved, (copies of the taxed bills of costs were annexed as FA5 and FA6). In respect of the section 18 (4) application which was unsuccessful, the taxed bill of costs is R48 025.99 and in respect of the section 17(2)(b) application which was unsuccessful the taxed bill of costs is R49 302.41.

[19] Despite demand by the applicant for the respondent to pay the taxed bill of costs together with the accrued interest, no payment was made. According to the applicant letter of demand was in compliance with the provisions of section 345 of the 1973 Companies Act read with schedule 9 of the 2008 Companies Act.

[20] Following the taxation referred to in paragraph 19 above, the applicant attended tax bill of costs in respect of the main application. The companies were advised as per FA10 attached, and on 25 September 2020 following the taxation, the companies were liable to make payment to the applicant jointly and severally the one paying the other to be absolved in the amount of R382 415.20 (see copy of the taxed bill of costs attached as FA11). The applicant contends that although no formal demand has been made to the respondent in respect of the main application Taxed Bill of Costs, the respondent is indebted to the applicant together with interest at the prescribed rate of interest. The applicant therefore, contends that the respondent`s indebtedness amounts to the addition of the two amounts above.

[21] Regarding the bond of security, the applicant stated that the security as required by s 346 (3) of the Companies Act of 1973 will be filed of

record. It further stated that the service of the application will be served as required in terms of s346 (4)(a) of the Companies Act of 1973 and a copy of the application will be served on the respondent`s employees registered address and the trade unions of the employees (if any).

[22] Ms Lyudmyla Roytblat, the deponent to the answering affidavit, as a prefix to her affidavit stated that it is correct that the parties in dispute have a long and acrimonious history which has manifested itself in a series of high court proceedings and that both parties have been at the receiving end of adverse cost orders. It is for that reason, (so it was contended) that has caused the respondent to oppose the applicant`s frivolous application which is meant to frustrate the respondent from claiming specific performance under the sale agreement entered into by the parties.

[23] She further stated that during 2009 the applicant, represented by Mr Kunene approached the respondent to sell several prospecting rights which were due to expire, as a result the respondent paid royalties to extend the life of prospecting rights. During December 2009 the respondent exercised the option to acquire the prospecting rights sold by the applicant and that culminated on 25 January 2010 in the sale of the prospecting agreement. Following the refusal of the transfer of the rights to the respondent by the applicant, they signed an addendum to the sale agreement.

[24] The respondent avers that despite the applicant not transferring the prospecting rights, it invested an additional R280 000.000.00 into the mining site infrastructure. Notwithstanding the payment above the breach continued. As a result, the parties on 05 May 2012 negotiated and concluded a second addendum to the sale agreement. Following the signing of the second addendum the respondent avers that it pays several sums of money to the applicant totalling R14 million in payment of the mining rights sold to the respondent. However, it is stated by the respondent that despite the payment of R14 million the applicant refuses to transfer the mining rights, instead the applicant sought to cancel the sale agreement which is a subject of dispute under case

number 3163/18 P. The respondent further stated that as a result of the case between the parties, the respondent obtained costs orders against the applicant. In that regard the respondent has caused to be drafted bills of costs one of which was served on the applicant. (A copy of the bill of costs was attached and marked LR2). It is further stated that the second bill is being drafted by the consultant who is yet to be placed in possession of a full set of the documents and file notes from the respondent`s erstwhile attorneys.

[25] The respondent alleges that the unliquidated amounts owing to the respondent by the applicant are to the value of R751 520.00. Given the value of the amounts in question, the respondent`s tender to set-off the amount owed to the applicant was rejected unreasonably by the applicant, since it would extinguish the debts claimed by the applicant.

[26] The respondent contends that the application by the applicant is premature since the applicant has not tried to execute against the respondent in order to ascertain whether the respondent`s assets would be able to settle its debt. However, the respondent disputes both the bills. The respondent denies any breach of the sale agreement and instead blames the applicant and further states that the applicant chose to declare a dispute and referred the matter for arbitration whereas the purported cancellation of the agreement is subject of a court dispute. It further stated that it did attend to the taxation of the bill of costs, however, due to the history of the parties it is impossible to settle any dispute. As a result of the respondent unhappiness with the rulings of the Taxing Master, it has launched review proceedings.

[27] It was further contended by the respondent that the taxed Bill of Costs of 25 September 2020 was flawed since the party against whom the judgment was obtained was never a party to the proceedings. In this regard the respondent attached the notice of motion as LR6 and the court order marked LR7 in which it is shown that the party initially cited in the main application is Transasia 1 (Pty) Ltd whereas judgment was obtained against the respondent.

[28] However, in paragraph 23 the respondent admits its indebtedness to the applicant for the taxed Bill but contends that payment is not due as

the bill is being reviewed. Therefore, the respondent denies liability in the amount of R382 415.50 and pray that the application be dismissed with costs.

[29] In reply the applicant denies most of the allegations made in the answering affidavit and point to the respondent`s admission that it is indebted to the applicant. According to the applicant this is evident in the respondent`s failure to deny its indebtedness. It is further contended by the applicant that it is not required, prior to the institution of these proceedings to first execute against the respondent in order to ascertain whether the respondent`s assets would be able to settle its debt. Instead, so it is contended, the inescapable inference to be drawn from the circumstances, is that the respondent is unable to settle its debts.

[30] The applicant admits that the cancellation of the agreement is a subject matter of the High Court, it contends that the rest of the allegations made on this aspect are irrelevant and are denied. The applicant stated further that the respondent has failed, despite demand to make payment and is therefore deemed unable to pay its debts. There has been no proof by way of financial statements, bank statements or an asset register by the respondent in order to refute that it is unable to pay its debts.

[31] The applicant denies that it owes the respondent the amounts claimed. It further refers on the absence of evidence by the respondent as proof of its allegations. It also contends that the reliance on the set-off by the respondent was not properly pleaded, however, even if it was correctly pleaded, so it is contended, the applicant rejects the proposed set-off. The applicant further denies that the bill of costs is under review. However, according to the applicant, even if it was under review, that does not stay the payment since the debt became due upon the taxation of the bill of costs. In its reply the applicant contends that the bill of costs was taxed against the respondent and since that aspect is not for the reviewable taxation, it is irrelevant for these proceedings.

[32] The issue to be decided is whether or not the respondent is able to pay its debts.

[33] Section 344 (f) of the 1973 Companies Act, is proviso in terms which a company may be wound up in circumstances where it is unable to pay its debts as envisaged in Section 345 of the same Act which in turn provides:

" (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) .....

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the Sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts,

(2) 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."

[34] It is trite that an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent`s company / corporation that as not paid its debt. In this regard, the following was stated in **Standard Bank of South Africa v R – Bay Logistics**[6]:

"[27] There has been judicial debate about whether, for the purpose of Section 344 (f) of the Old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a

[6] 2013 (SA) 295 at 300 – 301 paragraph 27.

respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (i.e. cannot pay its debts when they fall due) that is enough for a court to find that the required case under Section 344 (f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court`s residual discretion as to whether or not, even though the applicant for such relief has established its case under Section 344 (f)".

[35] From a close scrutiny of the evidence in this matter, the applicant has been able to prove its debt owing by the respondent. Furthermore, despite the demand of payment the respondent failed to pay its debt. That much is not disputed by the respondent, however, contends that due to a set-off of its debt is extinguished, instead leaving the applicant indebted to the respondent.

[36] I now revert to deal with the further supplementary affidavit introduced by the applicant after the matter was argued on costs and subsequently enrolled for a full argument on the main application for the liquidation.

[37] A starting point on filing of further affidavits is Rule 6(5)(e) of the Uniform Rules of Court which authorizes a court in appropriate circumstances to, in its discretion permit the filing of further affidavits. The discretion for further filing of affidavits is where a consideration of fundamental issues relevant requires such affidavits to enable the true facts (relevant to the issues in dispute) to be adjudicated[7]. There should in each case be a proper and satisfactory explanation which negatives mala fides or culpable remissness, as to why the facts or information had not been put before the court at an earlier stage[8] and the court must be satisfied that no prejudice is caused by the filing of additional affidavits which cannot be remedied by an appropriate cost order as to costs.

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[7] South Peninsula Municipality v Evans 2001 (1) SA 271 (C) at 283 A-H.
[8] Transvaal Racing Club V Jockey of South Africa 1988 (3) SA 549 (L) at 604 A-E.

[38] It is therefore trite that a party seeking to introduce further affidavits in proceedings is seeking indulgence to the court. In **Bangtoo Bros and Others vs National Transport Commission and Others**[9] the court stated that where supplementary affidavits do not deal with new matters arising from the reply by an applicant or evidence which came to the parties subsequent to the filing of their affidavits, the party seeking the indulgence must provide an explanation which is sufficient to assuage any concern that the application is mala fide or that the failure to introduce the evidence in question is not due to a culpable remissness of such party.

[39] In **Standard Bank of South Africa v Sewpersadth**[10] the court stated that for a court to exercise its discretion in favour of a litigant who applies for leave to introduce an affidavit outside of the rules relating to the number of sets of affidavits and the sequence thereof, such litigant must put forward special circumstances explaining its failure to deal with the allegations therein within the parameters of the applicable rules.

[40] In the present matter there are a number of events that happened post the filing of the normal sets of affidavits, which have a bearing on the material before court in arriving at a proper determination of the matter. Of importance is that all the developments that took place and culminating in the introduction of the new evidence in the form of further supplementary affidavits by the applicant are not contested, in other words they are generally common cause.

[41] I briefly punctuate on the events following the 18 February 2022.

It is common cause that the respondent`s claim of R65 000 from the applicant stems from the email of AFSA stating that an amount of R130 000 has been invoiced for the hiring of a venue, which the respondent paid its share and demanding the refund of such payment from the applicant.

According to the latest affidavit by Boitumelo Modubu who relies on the affidavit of Ms Terk of AFSA, it has since transpired that AFSA never

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[9] 1973 (4) SA 667 (N) at 680 B.
[10] 2005 (4) SA 148 (C).

charged the parties R130 000 for the venue as alleged by the respondent. He contends that in light thereof, Transasia could not have paid the amount of R65 000 which it claims from the applicant (the affidavit of Ms Terk was attached as Annexure "A4"). According to Ms Modubu, the amount of R65 000 can therefore not be claimed by the respondent as a set-off.

[42] Notwithstanding that the applicant insist on its application for liquidation, the applicant in its latest affidavit of Ms Modubu submitted that whilst its claim against the respondent was in the amount of R479 749.90 (with interest) and since the respondent contends that its liable to applicant for only R223 650.55 and seeks to set off various amounts therefrom which are the following:

(a) Bill of Costs in the KZN proceedings: R71 046.34;

(b) Bill of Costs in the Gauteng proceedings: R76 943.71;

(c) Costs of arbitration, 6 June 2019: R65 237.50 and

(d) Mora interest at 7% on certain amounts: R6 879.09.

The applicant has relaxed its position and proposed and sought an alternative order on the following terms: for the respondent to pay its admitted debt of R223 650.55 Less (Set-off) the ceded bill of costs in the KZN proceedings, Gauteng proceedings, less the amount of R3 544.91 already paid by Transasia to the applicant and less the amount of R49 000 (made up of R66 000 less R17 000) already paid on 17 February 2022 by Transasia to the applicant which leaves a balance remaining of R23 116.59.

[43] The deponent to the supplementary affidavit contended that unless the amount of R23 116.59 is paid by the respondent, together with *mora* interest and is received prior to the matter being enrolled for further argument, the applicant will persist with its liquidation application.

[44] What transpired pursuant the affidavit of Ms Modubu which was commissioned on 1 April 2022 and uploaded on Caselines[11] is very significant. This is gleaned from the further supplementary of the applicant deposed to by Mr Kunene who alleged that on 19 July 2022

[11] Caselines 045 -1.

(2 days before the hearing of the matter) the applicant`s attorneys received correspondence together with payment of R24 734.75 which was made by the respondent in response to the contents of Ms Modubu`s affidavit. The said amount is suggested to constitute the capital indebtedness plus interest. (Correspondence from respondent`s attorneys were attached and marked LK3).

[44] According to the contents in LK3 the payment should not be construed as an admission of indebtedness. It further warned that the respondent reserves the right to reclaim same. The applicant contends that since a similar 'under protest' payment was made and later reversed the latest amount tendered by the respondent is merely to avoid the liquidation order and that the applicant cannot tolerate the situation where the payment made is later reversed. It is further submitted by the applicant`s deponent that it is in the interest of justice for the further supplementary affidavit of the applicant be admitted since the evidence proffered came to hand only after the delivery of the replying and Ms Modubu`s affidavit.

[45] The final order sought by the applicant in the event their proposal above is acceptable to the respondent is as follows:

"The liquidation application is disposed of on the basis that the respondent has paid to the applicant the amount of R24 735.75 in full and final settlement of all debts in the face of the application for final liquidation of the respondent which payment is final and irreversible".

However, the applicant`s amended order has a caveat that in the event the respondent is not agreeable to the above order, the applicant will not accept the "conditional payment" tendered and will continue to move the application for a final liquidation order.

[46] During the hearing of the matter on 22 July 2022, counsel for the respondent opposed the introduction of new evidence on the basis that no application was made to present further evidence nor was any consent sought from the respondents to present the further evidence, more so that when the matter was postponed after the arguments on costs, it was made apparent that there was a dispute as to indebtedness. Counsel for the respondent stressed the point that the

payment that has been made is no tender but a payment. In so doing the respondent has demonstrated its ability to pay its debts.

[47] He also submitted that the matter in respect of **Body Corporate of Fish Eagle v Group Investments (Pty) Ltd 2003 (5) SA 414 (W)** which was referred to by the applicant as being applicable, is according to Mr Stoep distinguishable.

[48] In **Body Corporate**[12] Malen J (as he then was) stated: -

"The deeming provision of Section 345 (1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beck`s case supra at 331F). If the respondent admits a debt over R100, even though the respondent`s indebtedness is less than the amount the applicant demanded in terms of s345 (1)(a) of the Companies Act, then on the respondent`s own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts".

[49] In **Kyle and Others v Maritz** and **Pieterse Incorporated**[13], Moseneke J (as he was then) dealing with a dispute raised by the respondent in a liquidation application stated as follows:

'Where the claim of the applicant is disputed the respondent bears the onus to establish the existence of a bona fide dispute on reasonable grounds. See Porterstraat Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C) at 606. The dispute raised by the debtor company must be in good faith. It must be genuine and honest. The dispute so raised must of course be based on reasonable grounds. Therefore, a defence that is inherently improbable or patently false or dishonest would not qualify as a bona fide dispute'.

[50] In the present matter, the respondent admits indebtedness to the applicant albeit for a lesser amount of R223 650.65 instead of the claimed amount R479 743.60. as indicated earlier, the latest payment by the respondent is an attempt to settle the R223 650.65 in line with the latest calculation of its indebtedness to the applicant, which

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[12] At 425 B-C.
[13] 2002 (3) All SA 223 (T).

effected a number of deductions from the said amount. However, as already mentioned the payment is made under protest or condition if regard is had to the respondent`s correspondence which accompanies the payment.

Save what was submitted by counsel for the respondent there is no certainty that the payment may not be reversed, something that lends credence to the fears of the applicant. More so that it has a similar experience previously where a payment made by the respondent had been reversed.

[51] On a conspectus of the body of evidence before me, I find that the respondent is indebted to the applicant and my view is further bolstered by the respondent`s own admission referred to above. Furthermore, I find that the respondent has failed to show that its defence is bona fide and reasonable.

Quite alive to the *Baderhoust* rule as formulated *in* **Kalil v Deotex (Pty) Ltd and Another**[14] in terms of which an application for liquidation should not be resorted to enforcing a claim which is bona fide disputed. In the contrary I do not find the dispute of the applicant`s claim by the respondent to be bona fide and reasonable.

[52] Finally, I find that the respondent is indebted to the applicant and has failed to honour such indebtedness when it fell due. This notwithstanding, the court cannot ignore that the respondent has made a payment to the applicant which has caused the applicant to amend the order it seeks as indicated in the latest supplementary affidavit which I am inclined to consider.

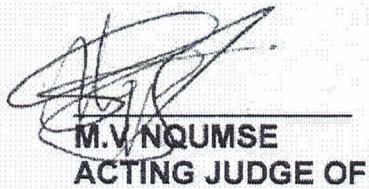
[53] In the result I make the following order:

1. The liquidation application is disposed of on the basis that the respondent has paid the applicant the amount of R24 735.75 in full and final settlement of all debts in the face of the application

[14] 1988 (1) SA 943 (A).

for final liquidation of the respondent, which payment is final and irreversible.

2. The respondent shall pay the costs of this application including the costs of applicant`s additional affidavits delivered by the applicant on a party and party scale.



M.V NQUMSE
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Ms A MILOVANOVIC-BITTER
Counsel for the Respondent	:	MR BC STOEP SC
Date of hearing	:	18 July 2022
Date of delivery	:	15 November 2022