IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE
CASE NO. 13641/2006

In the matter between:

VICTORY PARADE TRADING 74 PROPRIETARY t/a AGRI-BEST SA **APPLICANT**

And

TROPICAL PARADISE 93 (PROPRIETARY) LIMITED t/a VARI FOODS **RESPONDENT**

JUDGMENT DELIVERED ON 12 JUNE 2007

DLODLO, J

[1] This is an opposed application for the provisional winding up of the Respondent. The Applicant is Victory Parade Trading 74 (Proprietary) Limited trading as Agri-Best SA and is a company with limited liability registered and incorporated (under registered number 2005/014054/07) as such in accordance with the Company Laws of the Republic of South Africa with its principal place of business at 2nd Floor, 97 Loop Street, Cape Town, Western Cape. The Applicant carries on business as an importer and wholesale distributor of bulk butter and related dairy products. The Respondent is Tropical Paradise 93 (Proprietary) Limited trading as Vari Foods, a company with limited liability, registered and incorporated as such in accordance with the Company Laws of the Republic of South Africa with its principal place of business at Unit 5, Corner Linton

and Jan Smuts Drive, Beaconvale, Parow, Western Cape. Mr. Selikowitz appeared for the Applicant. Mr. Izak Jacobus Potgieter, the sole shareholder and director of the Respondent company, purported to appear for and on behalf of the Respondent in these proceedings. The Respondent attorneys of record filed and served a Notice of Withdrawal as attorneys of record on 23 May 2007 and fully complied with the provisions of Rule 16 of the Uniform Rules of Court. The issue for determination is whether the Applicant has established the requirements for a provisional winding up order sought. A new issue for determination is whether a shareholder and/or director of a registered company can represent and/or act on behalf of the company in litigation wherein relief is sought against the company concerned.

BACKGROUND

[2] As at 27 October 2006, the Respondent was truly and lawfully indebted to Applicant in the sum of R1 158 012.00 being in respect of bulk butter sold and delivered by the Applicant to the Respondent from time to time (and on open account) at the latter's special instance and request. Save for a cession of the Respondent's debtors, the Applicant holds no further security for its claim against the Respondent or any part thereof.

[3] The Respondent finds itself in a precarious financial position in that it is unable to make payment of its debts as and when such debts fall due for payment within the ordinary course of its business. The Respondent has, over an extended period of time, failed to make timeous payment of its indebtedness to the Applicant on account and has repeatedly been compelled to seek the indulgence of time from the Applicant within which so

to do. Despite repeated assurances and promises that payment would be forthcoming, the Respondent has failed to effect payment of its admitted indebtedness to Applicant, as a result whereof the Applicant has ceased supplying the Respondent on open account, requiring the Respondent to effect any and all purchases from a "cash on delivery" basis.

[4] The Respondent's financial difficulties first appeared in and during approximately December 2005 when, despite various undertakings, the Respondent failed to make payment of its then outstanding indebtedness to the Applicant, and was required to effect payment by means of a series of instalments. In this regard I have been referred to annexure **"DB2"** and **"DB3"**, copies of certain correspondence between the parties, the contents whereof are self-explanatory. In and during January 2006, and in the light of the Respondent's repeated failure to make payment of its indebtedness to the Applicant (and the Respondent's account having increased substantially from approximately R608 890,43 to the sum of R938 117,40), the Applicant sought security from the Respondent in the form of a cession and pledge of the Respondent's book debt and any other claims of whatsoever nature unto and in favour of the Applicant. A copy of the said Deed of Cession ("the Deed of Cession") is annexed in the Founding Papers.

[5] On or about 19 January 2006, the Respondent addressed correspondence to the Applicant, a copy whereof is annexed to the Founding Papers marked **"DB5"** wherefrom it was apparent that:

i) The Respondent was unable to make payment of its admitted indebtedness to the Applicant and required the indulgence of time within which so to do.

ii) The Respondent required to receive payment from its debtors prior to being in a position to effect payment of its then outstanding indebtedness to the Applicant.

iii) The Respondent had sought to procure additional finance from a third party and, upon receipt of approval therefore, would furnish Applicant with “a payment schedule”.

iv) The amount of loan finance to be procured by the Applicant from the third party would not be sufficient to cover the Respondent’s admitted indebtedness to the Applicant.

v) The Respondent was in need of the introduction of further working capital.

vi) The Respondent acknowledged that the Applicant, as a creditor, was partially financing the Respondent’s debtors and thus, in effect, funding the Respondent’s trading activities.

vii) The Respondent requested that pending approval for the additional loan financing and/or the raising of capital to be secured by the Respondent, the Applicant continued to supply the Respondent on a cash delivery basis.

[6] In the light of the admission on the part of the Respondent that the Applicant was in effect funding the ongoing trading activities of the Respondent, the Applicant requested that, as a show of good faith, the director of the Respondent, Mr. Izak Jacobus Potgieter (“Mr. Potgieter”), execute a Deed of Suretyship in terms whereof he bind himself as surety and co-principal debtor, jointly and severally with the Respondent up to and in favour of the Applicant. Having furnished Mr. Potgieter with a Deed of Suretyship, he refused to execute same – despite his prior undertaking to do so. As a result of the Respondent’s failure to honour its numerous undertakings to settle its indebtedness to the Applicant, the Applicant on or about 8 March 2006, sought to enforce its rights in terms of the Deed of

Cession. To this end, the Applicant requested the Respondent to furnish the Applicant with a schedule of debtors and the amounts outstanding by each debtor, pursuant to the provisions of the Deed of Cession.

[7] In and during March 2006, Mr. Potgieter, on behalf of the Respondent, advised the Applicant that the Respondent had entered into discussions and negotiations with a third party financier with a view to securing the necessary working capital finance to restore the business of the Respondent to a sound financial footing. Mr. Potgieter requested that the Applicant desist from contacting the Respondent's creditors pursuant to the provisions of the Deed of Cession, pending the outcome of the discussions with the proposed third party financier. The Applicant had, however, already contacted certain of the Respondent's creditors, many of whom placed in dispute the extent of their indebtedness to the Respondent as alleged by the Respondent. Further thereto, the Applicant established that Pick–'n-Pay had effected payment to the Respondent of an amount of approximately R1 174 403,03 on 3 March 2006, although the Respondent failed to utilize any portion of such funds in reduction of the Respondent's admitted indebtedness to the Applicant. The Applicant has no knowledge as to the manner in which the aforesaid funds were utilized and accordingly the Applicant contended this is a matter which falls to be investigated by a duly appointed liquidator in the fullness of time. Clearly should the aforesaid funds have been utilized to effect payment to any of the Respondent's creditors, such payments would have been prejudicial to the remaining creditors (including the Applicant) and may constitute impeachable transactions, which fall to be investigated and set aside by a duly appointed liquidator.

[8] Similarly, and on 15 March 2006, the Applicant's erstwhile attorneys Messrs. Schneider, Shargey and Klitzner addressed a letter to the Respondent pursuant to the provisions of Section 345 (1) (a) of the Companies Act, No. 61 of 1973 (as amended) ("the Act"). The aforesaid letter incorporates a demand for payment of the Respondent's indebtedness to the Applicant in the sum of R1 193 924,86. Pursuant to the Applicant seeking to enforce the terms of the Deed of Cession referred to hereinabove, it contacted certain of the alleged creditors of the Respondent (as alleged by the Respondent), including Jersey Fresh (Proprietary) Limited ("Jersey Fresh"), an alleged debtor of the Respondent. On or about 23 March 2006, the applicant received a telefax from Jersey Fresh, a copy whereof is annexed to the Founding Papers marked **"DB8"**, wherein they recorded as follows:

"***We do not owe any amounts to Tropical Paradise or Vari Foods whatsoever. Actually Tropical Paradise owes us an amount of R17 244,11, as per copy of first page of Summons which was issued against Tropical Paradise, attached hereto."***

[9] On or about 30 March 2006, and at Mr. Potgieter's request, a meeting was held at the offices of the Applicant's erstwhile attorneys as aforesaid together with Mr. Potgieter and Mr. Duncan Barrat (of the Applicant Company). At this meeting, Mr. Potgieter, on behalf of the Respondent, acknowledged that the Respondent was indebted to the Applicant and that the Respondent was furthermore unable to make payment of its admitted indebtedness to the Applicant. Mr. Potgieter, on behalf of the Respondent, advised that the Respondent required an extended period of time in order to allow it to generate the necessary income so as to

enable it to make payment of its indebtedness to the Applicant. The Respondent's proposals in this regard was described by the Applicant as vague and were predicated upon the Respondent's future trading success and the said proposals were not acceptable to the Applicant. As alternatives, Mr. Potgieter, on behalf of the Respondent, suggested that should the Applicant not be agreeable to the proposed payment schedule, he would be required to sell the business of the Respondent, alternatively seek to liquidate the Respondent.

[10] Subsequently in an endeavour to assist the Respondent with its financial difficulties, the Applicant agreed to grant the Respondent certain further indulgences in order to afford it yet a further opportunity to liquidate its admitted indebtedness to the Applicant. On or about 12 April 2006, the Respondent addressed a telefax to the Applicant's erstwhile attorneys, a copy whereof is annexed hereto marked **"DB9"**. The aforesaid telefax records, *inter alia,* as follows:

"***The time loss in our negotiations and correspondence has had an influence on the cash flow as previously discussed. We have not been producing any stock as it would have been ludicrous for us to buy butter for cash, produce stock, invoice the sale and the debtor would have to pay Agri-Best. In the meantime the monthly costs of electricity, phones, insurance, rental and repayment to business partners have been met, which has absorbed whatever cash flow there was."***

[11] It is apparent from the aforesaid telefax that the Respondent ceased trading, albeit for a limited period, and was unable to make payment of its debts. Inasmuch as the Respondent

requires the proceeds of future trading activities so as to enable it to make payment of historical debt, the question which arises is in what manner the proceeds of historical trading (resulting from the incurrence of the historical debt), were utilized, and why such proceeds have not been available to the Respondent to proceed with its commercial activities. These are aspects once more which fall to be investigated by a duly appointed impartial liquidator in due course. In and during October 2006, it emerged that the proposed restructuring of the business of the Respondent whereby a third party financier would procure equity in the Respondent and provide much needed working capital, did not materialize. Furthermore, no further attempts emanated from the Respondent as to the manner in which it would liquidate its admitted indebtedness to the Applicant as aforesaid. In the event, and on or about 27 October 2006, the Applicant's erstwhile attorneys addressed a telefax to the Respondent annexed to papers, marked **"DB10"**, calling upon the Respondent to revert with suitable proposal to bring the matter to a head.

[12] On 7 November 2006, Mr. Potgieter, on behalf of the Respondent addressed an e-mail to the Applicant (a copy whereof is annexed to the papers and marked **"DB11")** wherein he records as follows:

"***There is no way at present that any commitment can be made on paying any debt off. For your info, Dairybelle have dropped their tapped prices to the Bidvest Group… At this price, I have to buy the best available butter price and extend the product to at least break even. … The only way I am able to accommodate you is to sell part of all of the business to you, I would prefer to then***

get out of this business entirely and therefore propose that you buy me out for say 75% of my loan account (approx R1 mill). …At least this way, you would be able to recoup some/all of your debt over a period and be able to make the required decision without having to accommodate me – maybe move the plant to Fidji (sic) or whatever."

REQUIREMENTS FOR A PROVISIONAL WINDING-UP ORDER

[13] In the instant case, the Applicant must, prima facie establish:

i) That it is a creditor of the Respondent; and

ii) That the Respondent is unable to pay its debts.

An application to Court for the winding-up of a company may be made inter alia, by one or more of its creditors, including contingent or prospective creditors. See: **Section 346(1)(b) of the Companies Act**, No. 61 of 1973 (as amended).

The issue is thus whether the Applicant has established these requirements, and if so, whether or not the Court should exercise its discretion in favour of the Applicant. It cannot be disputed that an amount of R1 158 012, 00 is owed to the Applicant by the Respondent. The Respondent denied the indebtedness in an Answering Affidavit. However, this denial is predicated upon the identity and citation of the Applicant and not upon the allegation that no amount is owing. The Respondent alleged that it carried on business and purchased bulk butter with an entity described as "Agri-Best South Africa". The latter is the trading name under which the applicant carries on business.

[14] The Respondent's denial can be described as disingenuous, opportunistic and entirely without merit. I say so because

papers reveal that the denial arises from:

i) the incorrect recordal insofar as the Applicant's registration number is concerned in paragraph 3 of the Applicant's Founding Affidavit. Due to an apparent typographical error an additional "4" was inserted in the Applicant's registration number; and

ii) the invoices and statements issued by the Applicant (which reflect the Applicant's correct registration number) refer to the Applicant only by its trading name "Agri-Best Dairy Products", there being no reference thereon to the name by which the Applicant is registered, namely "Victory Parade 74 (Proprietary) Limited".

The Respondent's contention flies in the face of the countless discussions and correspondence between the parties as referred to in the Applicant's Founding Affidavit, including the various admissions and acknowledgements on the part of the Respondent insofar as its indebtedness to the Applicant is concerned.

[15] Further thereto, Mr. Potgieter admits having executed the Cession of Book Debt appearing at annexure **"DB4"** to the Applicant's Founding Affidavit which records a cession in favour of "Victory Parade Trading 74 (Pty) Ltd t/a Agri-Best SA". The aforesaid Cession plainly identifies the Applicant as "the creditor" and serves to secure the Respondent's indebtedness to the Applicant. The Respondent's (and Mr. Potgieter's) denial that the Applicant is the entity to which the Respondent is indebted, is simply inconsistent and irreconcilable with Mr. Potgieter having executed the aforesaid Cession on behalf of the Respondent, same serving as security for the Respondent's indebtedness to the Applicant – Victory Parade Trading 74

(Proprietary) Limited. Furthermore, the Respondent admits that, given time, it will be in a position "whereby it can pay Applicant all amounts owing."

A Respondent obviously does not discharge the aforesaid duty merely by asserting that the indebtedness is disputed. It has to set out the grounds upon which the indebtedness is disputed, in order to enable the court to adjudge the extent to which such grounds are *bona fide* and reasonable.

[16] In ***Kalil v Decotex (Pty) Ltd and Another*** 1988 (1) SA 943 (A) Corbett JA referred with apparent approval to the earlier decision of Hiemstra AJ (as he then was) in ***Badenhorst v Northern Construction Enterprises (Pty) Ltd*** 1956 (2) SA 346 (T) at 348, where the learned Judge approved a passage from **Buckley on Companies**, which included the following statement:

"***But, for course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order".*** (***Kalil v Decotex*** *supra* at 979 B-C).

The learned Judge went on to add the following at 1165:

"…***a bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court (as required in Petersen's case (supra)) to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent's affidavits must at least disclose that there are material issues in***

which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard."

In ***Meyer NO v Bree Holdings (Pty) Ltd*** 1972 (3) SA 353 (T) at 354 D-H. Margo J accepted the court's reasoning in the ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)*** case as applying, equally, to winding up proceedings and the application of the Badenhorst Rule.

[17] The above approach is sometimes referred to as the Badenhorst Rule, a reference to the case of ***Badenhorst v Northern Construction Enterprises (Pty) Ltd*** 1956 (2) SA 346 (T) where it was formulated and adopted. Professor Blackman in "Companies" in Joubert **The Law of South Africa** (Vol 4, Part 3, paragraph 113) describes the meaning of *"a bona fide dispute on reasonable grounds"* as follows:

"***A debt is not bona fide disputed simply because the respondent company says that it is disputed. The dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression 'genuine dispute' connotes a plausible contention requiring the same sort of consideration as a 'serious question to be tried'. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis that an honestly held belief that it is not payable and is not disputed merely for the purposes of delay or obstruction. 'Genuine' in this context does not mean not fabricated for the purposes of the proceedings or not just thought up or brought forward without genuine belief: there can be no genuine dispute if there are not***

substantial grounds for disputing the debt.”(Emphasis supplied) I fully align myself with all the above reasoned formulations from legal writings and case law. The Respondent’s denial falls well short of that which is required to establish that the Applicant’s claim is subject to a material, reasonable, and *bona fide* dispute.

THE SECOND REQUIREMENT – (RESPONDENT’S FINANCIAL PREDICAMENT)

[18] What appears from the Affidavits filed of record is that the Respondent finds itself in a precarious financial position. The Respondent admits receipt of demand addressed to it by the Applicant pursuant to the provisions of Section 345 (1) (a) of the Companies Act. The Respondent elected not “to pay the sum, or to procure or compound for it to the reasonable satisfaction of the creditor” as required by the provisions of the Act. The failure by the Respondent to act accordingly upon receipt of a so-called “statutory demand” within the meaning prescribed thereto in Section 345 of the Companies Act is to deem the company unable to pay its debts. (See: Section 345 (1) (a) read together with Section 344 (f) of the Companies Act). It can hardly be suggested that either of the Respondent’s response to the aforementioned demand or its Affidavit filed of record comes close to rebutting the deeming provision contained in Section 345 of the Companies Act.

[19] In addition to the statutory deeming provisions referred to hereinabove, a consideration of the Affidavits filed of record plainly reveals that the Respondent finds itself in a precarious

financial position, its trading activities having failed dismally and it having been required to fund its normal trading expenses by means of loan capital. It is apparent from the aforegoing that the Respondent is commercially, insolvent and thus liable to be wound up. The Court has, *inter alia*, taken the following factors into consideration when determining whether a company is unable to pay its debts:

i) Whether there are liquid assets or readily realizable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts; (***Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*** 1962 (4) SA 593 (D) at 597)

ii) Any delay in settlement of its debts; (***Ebrahim (Pty) Ltd v Pakistan Bus Services (Pty) Ltd*** 1964 (4) SA 146 (N) at 148H)

iii) Whether the assets of the business are needed by the Respondent to carry on its business and for the purposes of acquiring funds with which to pay its ordinary day to day cash commitments; (***Ebrahim (Pty) Ltd*** *supra* at 148)

iv) Whether the debt can be liquidated within a reasonable time (***Rosenbach & Co*** *supra* at 597)

v) A distinction is drawn between a company which can realize assets and can still carry on its business in a case where the realization of the assets would result in the company being unable to do so. (***Irvin & Johnson Ltd v Oelofse Fisheries Ltd*** 1954 (4) SA 231 (E) at 238-239).

Each of these indicators/factors is present in the current matter.

[20] A company's inability to pay its debt may be proved in any manner. Evidence that a company has failed on demand to pay a debt of which payment is due, is cogent *prima facie* proof of

its inability to pay debts. "…***for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources"***. (***Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*** 1962 (4) SA 593 (D) at 597)

As stated by Caney J in the ***Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*** 1962 (4) SA 593 (D) at 597),

"***the proper approach in deciding the question whether a company should be wound up on this ground appears to me… to be that, if it is established that a company is unable to pay its debts, in a sense of being unable to meet current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency."***

As with the remaining "defences" raised by the Respondent, the Respondent's answer to the averment that it is unable to pay its debts comprises nothing more than an unsubstantiated and unfounded denial of an inability to do so. In this regard, the Respondent fails to take me into its confidence in providing any financial information or documentation to substantiate the suggestion that it is able to make payment of its debts as and when such debts fall due for payment in the ordinary course of its business.

[21] In the current matter the Respondent, *inter alia*, admits that:

a) It is commercially insolvent in that it is unable to make payment of its debts as and when such debts were due for payment in the ordinary course of its business;
b) It has over an extended period of time failed to make timeous payment of its indebtedness to the Applicant;
c) It has been required to seek the indulgence of time from the Applicant within which to make payment;
d) It advised the Applicant that:

it is unable to make payment of its admitted indebtedness to the Applicant and requires the indulgence of time within which to do so;

it is required to seek payment from its debtors prior to being in a position to effect payment of its indebtedness to the Applicant;

it has sought to procure additional finance from third parties, whereupon it would be in a position to furnish the Applicant "with a payment schedule";

- ❖ the proposed amount of the third party loan financed to be procured would however not be sufficient to cover the Respondent's admitted indebtedness to the Applicant;
- ❖ the Respondent required introduction of further working capital;
- ❖ the Applicant is a creditor who was partially financing the Respondent's debtors and thus in effect funding the Respondent's trading activities.
    - ❖ The Respondent was compelled to advance a "payment schedule" which, if not acceptable would require the sale of the business of the Respondent, alternatively the liquidation thereof.

In the light of the aforegoing, it is apparent that on the Respondent's own version, the Applicant has discharged the onus which it bears to satisfy the Court that the Respondent is commercially insolvent and is accordingly liable to be wound up pursuant to the relevant provisions of the Companies Act. (Section 344 (f) read with Section 345 (1) (c) of Act 61 of 1973).

[22] In his well-known dictum in **DE WAAL V ANDREW THIENHAUS**, Innes CJ stated:

> "***Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."*** (***MacKay v Cahi*** 1962 (4) SA 193 (O) at 194 F-H, 195 C-E and 204 F-H; ***Ter Beek v United Resources CC & Another*** 1997 (3) SA 315 (C) at 339 A-B.

The above lucid observation, to my mind, summarizes and puts to perspective the issues involved in this matter. The Respondent clearly cannot pay its debt and there is one inescapable conclusion I reach, namely that it is insolvent. Commercial entities demonstrate their solvency by paying their debts as same fall due for payment. The annual financial statements of the Respondent, appearing as annexure **"IP4"** to the Respondent's Answering Affidavit, offer no comfort to the Applicant (understandably) whatsoever. The annual financial statements are for the year end 28 February 2006, and are accordingly in excess of a year old.

[23] During the period under consideration, the extent of the Respondent's trade creditors increased from R592 683,00 to R2 980 485,00 – an increase of liabilities in excess of 500%. During the period under consideration the Respondent made a nett trading loss before tax in the sum of R77 543,00. Certain of the Respondent's expenses increased by substantial and significant amounts during the financial year under consideration (a matter which requires further investigation by a duly appointed liquidator). It is apparent from the aforegoing that the Respondent's audited financial statements raise more questions than answers and serve to confirm the Applicant's suspicion that the Respondent continues to trade in insolvent circumstances.

RESPONDENT'S ADDITIONAL "DEFENCES"

[24] The Respondent seeks to raise two further defences, to wit, an alleged damages claim against the Applicant, and the absence of any advantage to creditors flowing from the liquidation of the Respondent. As regards the alleged damages claim, such alleged damages claim is denied by the Applicant. Moreover, the suggestion that the Respondent has an alleged damages claim against the Applicant is inconsistent and irreconcilable with the correspondence between the parties – the Respondent has never sought to suggest that it suffered any damages as a result of any conduct on the part of the Applicant, let alone that it has an actionable cause against the Applicant for damages. The Respondent fails to refer to or adduce a single piece of correspondence wherein the Respondent sought to deny its indebtedness to the Applicant either on the basis of an alleged counterclaim or damages. Indeed, the Respondent suggests it ought to be entitled to continue to trade in insolvent circumstances so as to afford it time to raise funds to effect payment to the Applicant.

[25] Any such damages claim (denied by the Applicant) is in any event unliquidated. The Respondent fails to provide the details of any attempt to even quantify its alleged damages claim, let alone, allege that any such damages claim serves to extinguish the Respondent's admitted indebtedness to the Applicant. Whilst a genuine unliquidated claim exceeding the claim on which the Applicant's *locus standi* as creditor is founded may serve as a defence to a winding up application, this approach was subject to qualification, namely:

i) there could be no room for an argument that the Applicant was seeking to enforce a disputed debt by means of

winding up proceedings;

ii) that the Respondent bore the onus to show why the Court should exercise its discretion not to grant the winding up order in its favour (***Ter Beek v United Resources CC & Another*** *supra*.

[26] Regard being had to the aforegoing, it is apparent that the defences postulated by the Respondent in the current matter, to wit, that the Respondent had a counterclaim against the Applicant on the one hand and, that the Applicant was seeking to enforce a disputed debt by means of winding up proceedings on the other hand are mutually exclusive and cannot be advanced by the Respondent simultaneously. In considering the nature of the dispute raised by the Respondent, the Court in **Ter Beek** *supra* at 336 stated the following guiding formulation:

"***In view of the aforementioned dispute between the applicant and first respondent, this matter can be decided on a consideration of the probabilities only if I am satisfied that there is no real genuine dispute of fact; that the first respondent's allegations are so far-fetched or untenable that their rejection merely on the papers is warranted; or that viva voce evidence will not disturb the probabilities appearing from the affidavits. … Although it is undesirable to endeavour to resolve disputes of fact on affidavit without the hearing of evidence and seeing and hearing witnesses before coming to a conclusion … it is equally undesirable to accept disputes of fact at their face value, because if that were done an applicant could be frustrated by the raising of fictitious issues of fact by a respondent (see Petersen v Cuthbert & Co 1945 AD 420 at 428).***

Accordingly a Court should in every case critically examine the alleged issues of fact in order to determine whether in truth there is a dispute of fact that cannot be satisfactorily determined without the aid of oral evidence." (***South Peninsula Municipality v Evans and Others*** 2001(1) SA 271 (c) at 238G); **Nampesca (SA) Products (Pty) Ltd and Another v Zaderer and Others** 1999 (1) SA 886 (C).

[27] The Respondent's third and final "defence" is predicated upon the allegation that "the liquidation of Respondent would be to no one's benefit, lest of all Applicant's." The Respondent appears content to suggest that it ought to be allowed to continue to trade in insolvent circumstances such as to enable it to "repay whichever indebtedness it may have." The Respondent appears to labour under the misapprehension that an advantage to creditors is a prerequisite for the grant of a winding up order. The requirement for an "advantage to creditors" is prescribed in Section 10 (c) of the Insolvency Act, No. 24 of 1936 (as amended), and is of no relevance in the current application for the winding up of the Respondent [which application is governed by the provisions of the Companies Act, No. 61 of 1973 (as amended). It is apparent from the aforegoing that the defences relied upon by the Respondent are without merit. By contrast, the undisputed and common cause facts appearing in the Applicant's Founding Affidavit constitute compelling evidence such as to entitle the Applicant to the relief which it seeks, namely, the winding up of the Respondent.

DISCRETION

[28] Whilst it is trite that our Courts have a discretion as to whether

or not to grant a winding up order, such discretion must be exercised judicially. Regard being had to the nature of the defence postulated by the Respondent and the complete and utter absence of any evidence to substantiate either the existence of a counterclaim or the financial soundness on the part of the Respondent, it cannot be suggested that the Respondent has placed before me any evidence to warrant the Court exercising its discretion in favour of the Respondent. Where it is established that a creditor has a debt which a company cannot satisfy, the unpaid creditor is *ex debito justitiae* entitled to a winding up order. The discretion of a Court to refuse a winding up order at the instance of the creditor is, in these circumstances, very limited. (See: ***Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others*** 1993 (4) SA 436 (C) at 440H-441B; ***Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty)*** Ltd 1962 (3) SA 424 (T) at 428 D-E; ***Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*** 1962 (3) SA 593 (N) at 597C-H; ***Absa Bank Ltd v Rhebokskloof (Pty) Ltd*** (*supra*)) at 440H-441B; ***Coughlin Ward & Son (Pty) Ltd*** 1931 NPD 153 at 153; ***Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd*** 1962 (3) SA 424 (T) at 428 B-G; ***Sammel v President Brand Gold Mining Co. Limited*** 1969 (3) SA 629 (A) at 662 D-F.

The legal position in this regard and is very simple, namely where it is established that a creditor has a debt which a debtor cannot satisfy the unpaid creditor is *ex debito justitiae* entitled to a winding up order.

DOES A SHAREHOLDER AND/OR DIRECTOR HAVE LOCUS STANDI IN LITIGATION WHEREIN RELIEF IS SOUGHT FROM HIS COMPANY?

[29] **Section 33** of the Companies Act 61 of 1973 (as amended) is a statutory statement of the *ultra vires* doctrine and it is not the only limitation on the capacity of this legal entity. There are some acts which a company cannot perform. The company cannot, for example marry or make a will. At common law, a company cannot appear in Court through one of its office bearers. This remains the position even if such office bearers are authorised by the directors or even members in general meeting. The company is obliged to conduct its case through a legal practitioner. (See: Re ***London County Council and London Tramways Co.*** (1897) 13 TLR 254; ***Scriven v Jescott (Leeds) Ltd*** (1908) 53 SJ 101; ***Tritonia Ltd v Equity & Law Life Assurance*** (1943) AC 584 586; ***Arma Carpet House (Jhb) (Pty) Ltd v Domestic and Commercial Carpet Fittings (Pty) Ltd*** 1977 (3) SA 448; ***Forhat Stud Farm (Edms) Bpk v Barclays Nasionale Bank Bpk*** 1978 (3) 118 (O); ***Ramsey v Fuchs Garage (Pty) Ltd*** 1959 (3) SA 949 (C); ***Yates Investments (Pty) Ltd v CIR*** 1956 (1) SA 364 (A)).

[30] In ***Yates Investments (Pty) Ltd v Commissioner for Inland Revenue*** case *supra*, one Prior, who was the sole beneficial shareholder (virtually like Mr. Potgieter in the instant matter) in the appellant company, appeared to argue the appeal. The Court held that he was not entitled to do so. Notably at page 365C, Centlivres, CJ said the following:

"***Mr. Prior and the appellant are different personae. A litigant is entitled to appear in person in any Division of the Supreme Court. The appellant, being an artificial person, cannot appear in person and must be represented by a duly admitted advocate. Apart from certain statutory provisions which allow attorneys in***

very exceptional circumstances to appear in a Superior Court on behalf of a litigant, only a duly admitted advocate can represent a litigant in a Superior Court. As far as the Appellate Division is concerned there are no statutory provisions which allow anybody who is not a duly admitted advocate to appear on behalf of a litigant."

[31] The above formulation represents the legal position which remains correct even today in company law. Thus Mr. Izak Jacobus Potgieter, the sole shareholder and director of the Respondent company has no *locus standi* to appear before this Court and present an argument on behalf of the Respondent. If in these proceedings he was sued in his private capacity and the Respondent had nothing to do with the matter, indeed he would have had his constitutionally enshrined right to defend himself including presenting his side of the case and arguing in person without the aid of Counsel. The Respondent, however, is not a natural person. The Respondent is an artificial person. It was given status of a legal entity by law. It cannot represent itself in a Court of law. The law requires that an admitted advocate must argue on behalf of an entity like the Respondent. The second question must therefore also be answered in the negative. It was for this reason that I pointed out to Mr. Potgieter that he may not argue (in person) this matter on behalf of the Respondent.

[32] The Respondent suffered no prejudice whatsoever when Mr. Potgieter was barred from arguing on its behalf. All opposing papers supported by Annexures had already been filed of record prior to the "departure" of the Respondent's legal team. I

proceeded to decide the matter on the papers before me. Any conceivable prejudice on the part of the Respondent is 'wiped clean" in that the decision at this stage is of a provisional nature. The Respondent can still have the matter revisited on the return date (if it then shall have grounds sound enough as to enable the Court to discharge the *rule nisi*). Even though on 28 May 2007 I granted the order (without reasons) I proceed to repeat the terms of the order *infra* for the sake of completeness.

ORDER

[33] In the result I grant the following order:

a) The Respondent is placed under provisional order of winding-up in the hands of the Master of this Court.

b) A *Rule Nisi* is issued calling upon the Respondent to show cause, if any, to this court, on 17 July 2007, as to why a final order of winding-up should not be granted and why the costs of this application should not be costs in the winding-up of the Respondent.

c) Service of this order is to be effected as follows:

i) Upon the Respondent at its principal place of business by the Sheriff of this Court;

ii) Upon employees of the Respondent in the manner prescribed;

iii) By one (1) publication in each of the Cape Times and Die Burger newspapers;

iv) On the South African Revenue Services by the Applicant's attorneys of record.

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DLODLO, J