IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 21088/2013

DATE: 23 DECEMBER 2014

In the matter between:

TIADOR 126 CC (CK2002/060736/23) Applicant

EARTHWORKS DRILLING AND EXPLORATION CC (REGISTRATION NO. 2009/012611/23) 1st Intervening Party

JEFF DRILL AND BLAST (PTY) LTD (REGISTRATION NO. 1996/017991/07) 2nd Intervening Party

and

ROCK CONSTRUCTION CC (CK1994/035040/23) Respondent

J U D G M E N T

DAVIS, J:

INTRODUCTION:

The applicant and the intervening parties have applied for the final winding up of respondent in circumstances where applicant alleges respondent is unable to pay its debts in terms of section 344(f), read together with section 345(1)(c) of

the Companies Act 1973 (the Act), alternatively that the application is made for the final winding up of respondent in terms of section 344(a)(h) of the Act, it being just and equitable that the respondent be so wound up.

APPLICANT'S CLAIM:

The applicant is a specialist in drilling and related services which services were rendered to the respondent in terms of written agreement. The respondent engaged the services of the applicant as a drilling specialist for a project at De Aar, on which project respondent was the main contractor of a company known as Construczioni Moncada South Africa (Pty) Ltd ("Moncada"). Respondent was awarded the project but as it was not a specialist in drilling operations, it engaged the services of the applicant to assist in drilling activities.

In short, the project entailed that the applicant drill holes when and where it was so instructed while the respondent planted poles associated with the establishment of a solar farm. Applicant rendered these services in terms of an agreement concluded between the parties. Accordingly it invoiced respondent for the services so rendered. From February 2013 to May 2013 payments were made by the respondent to the applicant for the services so rendered. As from May 2013

respondent only made certain payments to the applicant. It then ceased making payments for services rendered. This resulted in an outstanding amount of R11 502 348.31, which was due by the respondent to the applicant on or about November 2013.

Upon enquiry by the applicant regarding respondents' failure to pay, the only reason at that stage which was furnished by the respondent was that it had not received payment from Moncada for the services rendered by the applicant and consequently it was not in a position to pay the applicant.

THE KEY AGREEMENT

I turn to examine the agreement between the applicant and the respondent. On 25 January 2013 applicant submitted to the respondent a quotation with terms and conditions for the drilling works to be conducted by the applicant.

The quotation was accepted by the respondent but an amended version thereof was submitted to Moncada by the respondent in order to secure the award of the project to respondent. From the papers it appears that the applicant was not privy to the amended quotation submitted to Moncada, which fact was confirmed by Mr Schroeder, who was once an

employee of respondent in a supporting affidavit which was attached to the papers.

THE PROVISIONAL ORDER:

An application for a provisional order of liquidation was heard during May 2014. That application culminated in a judgment delivered by Blignaut, J on 17 June 2014. From this judgment it appears that the central issue raised by respondent was that the applicant's indebtedness to the respondent had been extinguished by its claim for damages arising out of the applicant's defective performance of the work it was obliged to perform. With reference to the damage caused by the applicant, which respondent alleged should be set off against that which it owed to the applicant, Blignaut, J held that:

> "The problem for respondent however is that the description of its damage and the quantification thereof are extremely vague. Its damage is described only in vague remarks .."

The learned Judge continued:

> "The further difficulty with the respondent's case is that there is virtually no concrete evidence to

support Adam's bold statements. He did not provide any meaningful particulars in regard to the nature and extent of the work that was done, nor any breakdown or quantification of the amount sought to be set off against applicant's claim. There are no particulars of the identity of any other contractors, if any that were involved, or the amounts paid to them. Mr Adam furthermore did not provide or identify any supporting documentation ... The quantification of the respondent's alleged damage is an essential element of its defence. He did not dispute that applicant's unpaid invoices amounted to R11 502 348.31. Applicant's claim called for a detailed defence by respondent. Respondent did not respond to this adequately at all ...Respondent's answering affidavit was deposed to on 5 March 2014. Respondent thus had more than adequate time to provide full particulars in regard to its alleged damage...In the light of these weaknesses in the respondent's defence, I am of the view that applicant established on a balance of probabilities that it was a creditor of the respondent. It follows that respondent is at least unable to pay its debts to the applicant. For the

> same reason I am *prima facie* of the view that respondent does not dispute applicant's claim on reasonable and *bona fide* grounds. I am also of the view that applicant has established on a *prima facie* basis that it would be to the advantage of creditors if respondent is liquidated. In a situation where a large debt of respondent is unpaid and its defence is *prima facie* without merit, it is important that the affairs of respondent be investigated and creditors be treated fairly and equally."

On the return day, respondent had not supplemented its papers and therefore was faced with the same problem which Blignaut, J had found fatal to its opposition to the granting of a provisional order. The return day was then extended after a hearing on 3 September 2014. At this hearing, respondent relied on the same papers that had been laid before Blignault J. It was only after the extension on 3 September 2014 that the respondent deposed to a further affidavit dated 14 October 2014. By then two intervening parties had sought to intervene after the provisional order had been granted. Finally, argument for the granting of a final order was heard by this Court on 15 December 2014.

THE RESPONDENTS' OPPOSITION TO THE GRANTING OF A FINAL ORDER:

In its supplementary papers, the respondent sets out two defences which are designed to dispute the claim which was central to the applicant's case. It disputes the veracity of applicant's invoices and it further alleges that it has a counterclaim against the applicant. Significantly, the defence alleging that the applicant's invoices were incorrect was not raised when the case was argued before this Court. Mr Hutton, who appeared on behalf of the respondent, together with Mr Spottiswoode, eschewed reliance on this defence and concentrated exclusively on the second line of defence, that is the counterclaim. It is therefore unnecessary to deal any further with the question of the invoices.

THE COUNTERCLAIM:

Respondents' counterclaim appears to be divided into different categories, namely re-drilling, standing time, holes drilled too deep or too wide, failure to reach daily targets and concrete expenses. The supplementary affidavit is not without its own difficulties. An annexure, WA5, to the papers set out a counterclaim which was dated 18 March 2014, which contains the following:

"As a direct result of the plaintiff's breach of the agreement, as set out, the defendant has suffered damages in the amount of R642 124,09 ... which is made up as follows:

10.1 The cost of additional concrete and costs associated with it, including the cost of labour and plant hire required to remedy the defective performance of the plaintiff: R4 745 994.38.

10.2 The cost occasioned by delays in drilling caused by the plaintiff's breaches of the agreement as set out above: R5 235 944,00.

10.3 Additional costs incurred by the defendant in rectifying the holes drilled by the plaintiff that were of the incorrect depth or incorrect diameter: R2 162 534,40.

10.4 Less the amount that the defendant would have expended had the plaintiff complied with its obligations under the agreement: R11 502 348,89."

However Mr Hutton informed the Court that the real counterclaim is not that contained in WA5 but in WA6.

WA6 comprises of the following claims: standing time due to

breakdowns on drilling rigs; holes drilled too deep due to lack of supervision from Tiador/Nightshift; reaching daily target as per agreement; holes drilled bigger than as per agreement, 250-270mm. The claim is then summarised thus: total claim excluding VAT R16 520 264,00. VAT R2 312 836.96. Total inclusive of VAT R18 833 100,96.

Mr Adam, who deposed to the supplementary answering affidavit on behalf of respondent, says the following in respect of WA6:

> "This second counterclaim had a factual foundation .. This document was sent to the respondent erstwhile legal representatives on 17 December 2013, as appears from a copy of my email to them of that date (annexed as WA7), attaching the document evidenced as WA6. Once again I do not know why the document evidenced as WA6 has not prior to now been presented to this Court on the respondent's behalf."

He then seeks to explain the difference between the claims set out in WA5 and WA6:

> "The second counterclaim pleaded in annexure WA5 differs from the formulation (and amount)

contained in annex WA6. In this regard the heads of damage pleaded in annex WA5 ... are not the complete extent of the damage suffered by the respondent in consequence of the applicant's defective performance of its obligations. Once again I do not know why the additional heads of damage contained in annexed WA6 were not carried through in annex WA5 by the respondent's erstwhile legal representatives. The heads of damage pleaded in annex WA5 are by no means the full extent of the harm caused by the respondent as a result of the applicant's defective performance, these are more fully set out in annex WA6.

With reference to paragraph 10.1 and 10.3 of the second counterclaim, these heads of damage arose from blocks C and D and were caused by the applicant hitting a soft subterranean river bed (after first drilling through hard ground) which resulted in tremendous depression which then needed to be filled with copious amounts of concrete ...

With reference to paragraph 10.2 this head of damage is the same as that set forth in annex WA6 under the heading 'Reaching daily target as

per agreement' in the amount claimed of R5 195 400.00. I do not know how the discrepancy in figures arose between that amount and the amount of R5 235 944,00, the correct amount is that appearing annex WA6 ...

The figure in paragraph 10.45 requires explanation and correction. This figure appears to be the same as the applicant's claim in these proceedings. This figure should not have been included at all in the computation of the counterclaim for the following reasons:

First, the figure should have been reduced by the amount of the disputed invoices...

Second and more importantly, the heads of damage contained in annex WA6 are all loss of profit values that they already take account of the cost to the respondent in placing itself in a position to earn the revenue necessary to generate the nett profit claimed. This means that no costs need to be deducted from the total amount in the appearing in annex WA6. The total is a value for net profit forgone as a result of the applicant's defective performance.

In the circumstances, the correct computation of respondent's second counterclaim and action, is

> the one set out and made up in annex WA6 ... and not annex WA5. It exceeds the applicant's claim in these proceedings."

Mr Venter, who appeared on behalf of the applicant, submitted that it should be common cause between the parties that the respondent did not and was not able to conduct any drilling work or manufacture concrete. He also noted that significantly absent from the papers was any documentary proof substantiating the respondent's alleged counterclaim for, what he desribed as the 'preposterous amount' of R25 741 629,74 (annexure WA5) together with a further amount of R6 908 528,78 insofar as concrete is concerned.

Mr Venter drew the attention of the Court not only to the absence of supporting documents, but to the approach of Blignaut, J at para 35 of his judgment:

> "The further difficulty with the respondent's case is that there is virtually no concrete evidence to support Adam's bold statements. He did not provide any meaningful particulars in regard to the nature and extent of the work that was done nor any breakdown or quantification of the amount sought to be set off against applicant's

> claim. There are no particulars of the identity of any other contractors, if any, that were involved with the amounts paid by them. Mr Adam furthermore did not provide or identify any supporting documents."

Mr Venter submitted further that the affidavit of Mr Schroeder, the previous employee of respondent's, was of particular importance. In this regard he referred to the following from this affidavit:

> "The equipment and drilling rigs of TIADOR 126 CC ("applicant") did not at any time delay the progress or construction work as there was adequate equipment, together with service and mechanical support available at all relevant times.
>
> Rock Construction was stopped doing drilling and planting of posts for a period of ± 5 weeks by Moncada, whilst busy in Blocks C and D because Block A and part of Block B was not completed with structures and glass. The relevant banking institution financing the tender would not make any payments to Moncada as a result of incompleted works by Rock Construction

("respondent") so the concrete teams were removed from planting of posts and were used to refit broken glass, fastening of bolts, aligning of structures, fixing of posts that were not planted correctly, posts damaged by construction equipment and re-drilling of holes surveyed incorrectly.

Mid September 2013 Moncada again stopped Rock Construction from drilling because the drilling rigs were ± 6000 holes ahead of the construction teams and there was incompleted field areas A, B and C that have not been completed and the posts still had to be concreted in for a period of ± 16 days.

Additional delays were experienced throughout the contract because of the shortage of survey services supplied by Moncada of ± 4 weeks, delay in the posts to be supplied by Moncada, concrete trucks breaking down because the road was not properly maintained by Moncada, delay in concrete supply due to no payment to Afrimat by the respondent. When this happened I worked during the R&R weekend to catch up with the planting of posts so that the construction works could continue when everybody returned from the

month-end weekend."

He continues:

"The only drilling contractor appointed by respondent was the applicant. The respondent did not employ any other drilling contractor and also did not do any re-drills at all done by the applicant. The respondent could not meet their daily targets because of insufficient concrete volumes due to the breakdowns on the concrete truck, delays in material supply from Moncada, the labour did not timeously make use of the transport provided and busloads would come half full and many labourers would only make use of the last bus..

The applicant was always ahead of the planting of posts done by respondent's construction by a minimum of at least 2000 holes at any given time...

Applicant completed the drilling services on 6 November 2013 and respondent completed the final planting of posts on 15 November 2013 thus showing that applicant timeously completed their duties, always far ahead of the construction

teams of the respondent."

According to Mr Venter, it was clear from the supplementary papers and the applicant's reply thereto that respondent did not and could not have done any of the remedial drilling work itself and had not employed any other contractor to so do this remedial drilling work. In his view, this disposed of the respondent's claims relating to re-drilling of holes. Insofar as the allegation that the holes were drilled too deep or too wide, he submitted that this argument was without any merit because it was refuted by the affidavit of Mr Du Toit, Mr Schroeder as well as Mr Moncada himself. In this regard Mr Moncada states as follows in his affidavit:

> "The drilling works undertaken by the applicant were satisfactory and of good quality. The re-drilling works which had to be undertaken was not due to the quality of the applicant's work and cannot be attributed to any fault on the part of the applicant. The applicant did not do any concrete work in relation to the project. The additional concrete works which had to be undertaken was not due to the quality of the applicant's work and cannot be attributed to any fault on the part of the applicant. The applicant's

> work was inspected by CMSA on a regular basis in accordance with the project schedule and CMSA always found the applicant's work to be of a good quality and free from any defects."

In response to these submissions Mr Hutton conceded that this dispute, until recently, had been bedevilled by a frustrating lack of particularity in which the respondent had raised its defences and, in particular, its counterclaim. Correctly, he noted that this frustration had been set out eloquently by Blignaut, J in his judgment. He also conceded that this frustration was always reflected in the course of argument which took place during the hearing on 3 September 2014, shown clearly from the transcribed record of that argument which is attached to the papers.

The respondent, now represented by different attorneys and counsel, adopted what Mr Hutton referred to as a somewhat less sanguine view of the matter than that taken by their predecessors, in that respondent had taken heed of the criticisms articulated by Blignaut, J. In the circumstances, respondent delivered a supplementary answering affidavit which, in Mr Hutton's view, dispelled the criticism of vagueness and lack of particularity. He submitted that respondent had now shown on its papers that it has "a genuine

and serious counterclaim that well exceeded the amounts claimed by the applicant"; that is the counterclaim described it in WA6.

Mr Hutton's view that the respondent's counterclaims are genuine and serious because they raise a triable issue, was reflected in a number of submissions that he made. For example he submitted that respondent's claim for concrete which stood to be added to the claims in WA6 and which amounted to R6 908 528,78 (see para 23.2 of the supplementary answering affidavit) was contested as follows: Mr Du Toit, on behalf of the applicant, contests the amount because the respondent had no drilling capability and did not manufacture concrete. Thus it could have no claim for concrete. According to Mr Hutton, this denial stood in sharp contrast to the evidence of Mr Enslin, who deposed to an affidavit on behalf of the respondent, to the effect that respondent had to fill collapsing holes in blocks C and D.

Mr Enslin says the following in his affidavit:

> "As regards blocks C and D, in these blocks the same problems arose as in Blocks A and B, except that a further problem arose in Blocks C and D, namely the collapsing of holes. I noticed

> this for the first time during September 2013 and I immediately drew it to the attention of the applicant's representatives, namely Jannie and Chester. For these collapsing sink holes the respondent's remedy the defective work with additional concrete.
>
> This became a huge problem in block C and D when the resultant concrete usage (paid for by the respondent) became astronomical. The applicant's representatives were well aware that these costs were being incurred by the respondent.. The result of these problems in Blocks C and D was that the respondent ended up having to fill deep holes and to find aggregate mixed with cement which was very expensive and labour intensive."

Mr Hutton submitted thus that there was now a dispute which could not be resolved on the papers and had to go to trial. He referred further to the fact that Mr Schroeder did not deny that there was additional concrete used (see paragraph 8.9.1 of that affidavit) although he blamed a third party. He then went on to state that there was "extra concrete usage by the respondent and also that the respondent was advised to allow additional concrete usage". This alone showed that the

dispute between the parties could only be resolved by way of a trial.

Referring to the respondent's claim based on the standing time due to breakdowns on drill rigs, Mr Hutton noted that this was dealt with by Mr Du Toit and by Mr Schroeder in their affidavits. Du Toit merely stated that this averment was improbable because respondent's Adam never mentioned it earlier. In short, Mr Schroeder simply denied that there were any breakdowns incurred in equipment or drilling rigs supplied by the applicant.

Again in keeping with the general tenor of his argument, Mr Hutton submitted that this constituted an irresolvable dispute of fact; either drilling rigs supplied by the applicant's did or did not break down. This was a matter for trial.

The fact that these issues have been raised in this manner compels me to examine the applicable law.

THE RELEVANT LEGAL POSITION:

In Ter Beek v United Resources (CC) 1997 (3) SA 315 (C) Van Reenen, J sought to deal with the applicable test to be applied when an un-liquidated counterclaim exceeding the amount of

the applicant's claim, is raised as a defence to a winding up application. Van Reenen, J said the following at 333H-334C:

> "The courts in England have adopted the stance that the question whether a winding up order should be made on a petition based on a judgment debt where there is a genuine counterclaim against the petitioning credit, was a matter for a judge's discretion... In South African law, as in English law...the court's power to grant a winding up order is discretionary, irrespective of the ground on which it is being sought.. Accordingly, there exists in my opinion no reason why the same approach should not be followed in South African law, subject to the qualification that by reason of the fact that the 'defence' of a counterclaim, recognises the enforceability of the obligations on which the applicant's *locus standi* is founded (there is no room for an argument that an applicant is seeking to enforce a disputed debt by means of winding up proceedings) and (b) as the existence of an applicant's claim is not challenged, the respondent should bear the onus of showing why the court should exercise a discretion not to grant a winding up order in his

favour..."

Much of the approach adopted by Van Reenen, J in Ter Beek was sourced in English Law. It is therefore necessary, at least briefly, to refer to the English case of Seawind Tankers Corporation v Bay Oil SA [1999] 1 ALLER 374 (CA). In this case it was held that the court had a greater discretion where the petition was a creditor but the company was arguing for the petition to be stayed or dismissed because of a counterclaim of an amount which was greater than the claim. The petition would still be dismissed where there was no genuine counterclaim, except in special circumstances.

In the light of this judgment, Binns-Ward, J in Absa Bank Limited v Erf 1252 Marine Drive (Pty) Ltd [2012] ZAWCHC 43 sought to revisit the issue again.

Binns-Ward, J's approach was critical of that adopted by Van Reenen, J in Ter Beek because, in his view, the latter judgment failed to come to terms with the narrow nature of the discretion that English courts possess in these cases. As the learned Judge said:

"In Ter Beek ... Van Reenen, J despite actually mentioning the decisions in Portman Provincial

Cinemas and LHF Wools Ltd, described his understanding of the position under English Law with no acknowledgment of the narrow nature of discretion available to English court and, after citing two South African cases which merely recite the trite principle that a South African court has a discretion to refuse to make a winding up order even when the applicant has proved the elements necessary to obtain such an order opined that there existed no reason why the English approach should not be followed in South African Law. With respect however in failing to appreciate its limiting effect on the breath of the applicable judicial discretion, the learned Judge appears to have misdirected himself on the import of the English law in point."

Binns-Ward, J then continued:

"Appearing to hold (though his reference to Kalil v Decotex (where the question was in fact left open) that the Badenhorst rule which pertains to the determination of 'disputed debt cases' in our law went to *locus standi*, Van Reenen, J expressed himself ... against following that approach in South African law and, to that extent, qualified his opinion that we should in general follow the

English judicial practice as he understood it to be.

I am hesitant to accept the notion that a Badenhorst rule (sic) goes to standing. After all as Corbett, JA observed in Kalil v Decotex ... it is inconceivable that a creditor could establish on the balance of probabilities that it had a claim against the respondent's claim in winding up proceedings while the respondent at the same time was able to establish the claim was disputed on *bona fide* and reasonable grounds. The applicant in such case would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The Badenhorst rule does seem to constitute a self standing (and possibly flexible) principle that winding up proceedings are not an appropriate procedure for a creditor's use when the debt is *bona fide* disputed ..."

Binns-Ward then concluded:

"It is possible to state the position in South African law without reference to the English law. There is no reason for our courts to adopt or entrench what Nourse LJ in Bayoil clearly suspected to be a mistakenly taken course in

English *jurisprudence* determined in Portman. In my view, reliance by a respondent on the genuine, serious, un-liquidated counterclaim to oppose an application for its liquidation, is a quite distinguishable basis for resisting winding up from that premised on a *bona fide* and reasonable dispute of an alleged indebtedness to a creditor applicant. As pointed out by Van Reenen, J in Ter Beek, reliance by a respondent company on a counterclaim to avert a winding up order actually entails an admission by it of the alleged indebtedness to the applicant relied upon by the creditor applicant. The allegation of the existence of the un-liquidated counterclaim is nothing more than a putting up by the respondent of a basis upon which it is able to ask the court to exercise its discretion against making a winding up order, notwithstanding that the applicant may have satisfied a technical requirement to achieve the remedy...I venture that in the majority of cases a distinction between the English approach and ours will be notional rather than real, certainly in respect of the result. A court will in the nature of things be inclined to exercise its discretion against making a winding

> up order in a matter in which it appears that there is a reasonable possibility that a counterclaim by the debtor company will upon its determination extinguish the debt relied on by the applicant in its application for a winding up."

The latter set of judicial observations provides a reason for why there is little need to read the English position as being significantly different from our law or indeed from the approach adopted by Van Reenen, J in Ter Beek, supra. The present case does not involve a determination of the genuiness of applicant's claim. As respondent's case is based upon a counterclaim that allegedly exceeds the applicant's claim, this is not a case where the applicant's claim is disputed on *bona fide* and genuine grounds which would trigger the so-called Badenhorst rule (Badenhorst V Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347-348.)

The question which is critical in determination of this case concerns the existence of a counterclaim; expressed differently, is this a counterclaim in which there is a reasonable possibility that it will extinguish the claim, if so proved? Yet again, set out in different terms: is this counterclaim set out so with sufficient particularity for a court to find that there is a reasonable possibility that it will

extinguish the claim that has already been acknowledged by the respondents?

In this context, Lord Justice Ward said in Seawind Tankers, supra, at 11:

> "There is a practice that the company should not be wound up where there is a serious and genuine cross-claim save in special circumstances."

For these reasons, I find that, however interesting the impressive learning set out by Binns-Ward J, and relied upon by Mr Hutton may be, it does not add much to the key point in this case: in exercising a discretion, how genuine is the counter-claim?

Within this context, the facts are critical, particularly the following:

(1) No mention of WA5 appears to have been made when Blignaut, J heard the application for the provisional liquidation, some two months after it had actually been signed by the very counsel who had acted for respondent in the preparation of the case as well as at the hearing before Blignault J.

(2) When the matter was initially argued before this court on 3 September 2014, respondent made no mention of WA5, which had now predated the hearing by almost six months.

(3) On 4 December 2013 an amount of R268 660.00 was paid by respondent to applicant for work done. Somehow, respondent paid this amount even though, but over a week later, respondent claims that it had a counterclaim for more than R18 million.

(4) There is some significant doubt as to when WA6 was generated. The only point that Mr Hutton could raise in support of the argument that the claim was instituted and thus WA6 existed in December 2013 (the relevant time) was an email of 12 December 2013. It reads thus: “From Francois Du Toit to Waeed Adam. Subject: FW Claim against Tiador 126 CC. Hi Adam. Most of this we can prove. This excludes holes that were drilled as we cannot prove it.”

I am not certain what this email means in the light of its exact wording. Somehow, it is averred by respondent that this email shows that there was a claim against applicant in the amount specified in WA6. There is no attachment which would reveal to which “claim against Tiador CC”, this email refers and whether in fact it was WA6.

I accept, as I was informed later, that, as I understand it, an Apple computer which was used, does not contain an attachment which is reflected on the email, but that does not remove the doubt as to what the reference in the email is directed; that is to which claim.

(5) The plethora of defences raised which have subsequently been abandoned is further cause for doubt; for example a key defence raised in the opposing affidavit of March 2013 was that applicant would not be paid by respondent until the latter had been paid by Moncada. This defence, as with the allegations regarding the incorrect invoices which were contained in the supplementary affidavit of Mr Adam of October 2014, have now been abandoned.

(6) In the opposing affidavit of March 2014, Mr Adam states as follows: "I can state that the Respondent has not caused damage to the Applicant. The truth is the opposite. The Applicant did not timeously and punctually attend to all work. The work was woefully defective causing the Respondent to have to spent significant amounts of money in order to remedy the defective workmanship. The payment to the Applicant for that work was reciprocal upon the Applicant completing its work in a proper and workmanlike

manner and this it clearly failed to do."

Not a scintilla of evidence about the counterclaim, even of the first version in the form of WA5 is mentioned, albeit that the latter was signed on 14 March 2014. See also paragraphs 29.2 and 29.3 of that affidavit.

(7) The relevant applicable agreement provided thus: "9.4.4 Where the subcontractor intends to withhold payment from any person in its employ regarding the Works, fully substantiated details of the nature of the dispute, reason for withholding payment and works that such withhold payment relates to, must be substantiated in writing."

Had there been objection to applicant's work sufficient to withhold payment, as would have been the case on respondent's version based upon the counterclaim, objections would have been placed in writing. There is no evidence thereof. One would have at least expected respondent at this late stage to have provided some proof of this required documentation.

(8) The only reason given for the late submission of a counterclaim is, as appears from the supplementary answering affidavit, the following: "This particularisation is necessary I suspect because the evidence which I now produce was either not in

existence by 5 March 2014 (the date on which I made the answering affidavit) or for reasons unclear to me the respondent's legal advisors had not put that evidence before this Court by means of my answering affidavit."

(9) Applicant calls seriously into question the claim in respect of the additional concrete. This is particularly evident by way of an email sent by Moncada to respondent on 31 November 2013 which reads thus: "Referring to the extra concrete, I remind you that this issue has never been approved. Also was denied to Chris and Francois, directly by Mr Salvatore Moncada. If Rock didn't make well, the study of the works in order to make quotation in the beginning is not our problem, had all our information to make it so don't speak about things that aren't true and speak about another company (JD) which they have never asked this extra and they continuing properly with the work. It's sure that they made correctly his study work. You have ever known that we have the Rock in different parts of the solar farm and the sand in other parts." (sic).

I accept that, on these papers, to reject the respondent's allegations, a conclusion should be reached that its allegations

are so farfetched or untenable as to be susceptible to rejection on the papers which had been presented to the Court without the benefit of oral evidence. In so examining the respondent's version, there is a need to test whether there is a reasonable possibility that the counterclaim by respondent will, upon its determination, extinguish the debt relied upon by the applicant and which in this case has finally, after much protestation and initial denial by respondent been conceded.

In a case where a provisional order was granted and the Court rejected the respondent's version because of a lack of particularity and the respondent arrived at court to oppose the final order on the same papers as at 3 September 2014, a newly developed counterclaim which emerges thereafter needs to be carefully scrutinised with forensic precision.

There is simply no explanation for the omission from respondent's case of any of these averments until October 2014, save for what has become a ritual defence of blame which is heaped upon previous attorneys and counsel who had actually signed the counterclaim particulars. At the very least, greater particularity was required to restore respondent's shattered credibility, given the manner in which it sought to conduct its opposition. No documents which were provided with the email of 12 December 2013. No explanation is given

as to what this alleged claim referred to, that is in the emails of 12 December 2013. There is no explanation as to why payments were made a week before the counterclaim was alleged to be generated, which would then have justified non-payment of R268 000,00. There is no engagement with a basis of payment in terms of Clause 9 of the agreement between respondent and Moncada.

It appears to me that, on these particular papers, the entire counterclaim as set out, continues to lack particularity or sufficient credibility. Respondent has not taken the Court into its confidence and, in my view, this counterclaim cannot be regarded as a sufficient defence to the application for a final order.

There is, in the light of the findings to which I have come, no need to deal with the persuasive arguments of the remaining intervening creditors.

IN THE RESULT A FINAL ORDER OF LIQUIDATION OF RESPONDENT IS GRANTED.

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DAVIS, J

/RG