THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 17349/2015

SPECIALISED EDIBLE OIL AND FATS (PTY) LTD **APPLICANT**

and

EEZI FOOD IMPORTS AND EXPORTS (PTY) LTD **RESPONDENT**

Coram: ROGERS J

Heard: **24 NOVEMBER 2015**

Delivered: **10 DECEMBER 2015**

JUDGMENT

ROGERS J:

Introduction

[1] This is the extended return day of an order for the respondent's provisional liquidation. Mr van der Schyff appeared for the applicant and Mr Lawrence for the respondent.

[2] The applicant issued the application on 7 September 2015 for hearing on 11 September 2015. It was opposed and postponed to 5 October 2015 with a timetable. Answering and replying papers were filed. The matter was argued on 9 October 2015 before Fortuin J (sitting in Third Division). She granted a provisional order returnable on 30 October 2015. Reasons for the provisional order have not been requested or furnished. On 30 October 2015, and following the belated filing of supplementary opposing papers, the return day was by agreement extended to 24 November 2015 with a direction that the applicant file any supplementary replying papers by 6 November 2015. The respondent's directors were ordered to pay the wasted costs. The applicant chose not to file supplementary replying papers.

Background

[3] One Liyaquat-Ali Ebrahim ('Ebrahim') is a director of the respondent and the deponent to its opposing papers. His brother is the other director. The applicant's sole shareholder and managing director is one Haroon Essack ('Essack', referred to in the papers as Uncle Haroon). Essack's son is married to Ebrahim's sister. Business dealings between Ebrahim and Essack started in early 2012. The details are contentious. It is common cause, however, that Essack's company, the applicant, began supplying rice to Ebrahim's company, the respondent.

[4] On 31 October 2014 the applicant sought and obtained an ex parte order for the respondent's provisional liquidation ('the first liquidation application'). The papers in that case are not before me but it appears that the applicant alleged that the respondent owed it R3,317 million in respect of rice supplied. The respondent opposed the confirmation of the order. Its directors also brought an application that

they be authorized to conduct the respondent's business pending the finalisation of the liquidation application. On 9 December 2014 Kuschke AK dismissed the relief sought by the directors and extended the provisional order to 25 February 2015.

[5] On 11 February 2015 Ebrahim filed a supplementary answering affidavit in the first liquidation application, stating that according to his detailed calculations, particulars of which he gave, the respondent owed the applicant no more than R703 621. He alleged that the respondent had been in the process of settling this balance by payments of more than R200 000 per month and that but for the ex parte provisional order the indebtedness would have been settled by the end of January 2015.

[6] The parties agreed to argue the first liquidation application on 18 March 2015, which they did before Riley AJ. On 6 May 2015 he handed down judgment, discharging the provisional order with costs.

[7] On 2 June 2015 the applicant's attorneys dispatched two demands in terms of s 345(1)(a) of the Companies Act 61 of 1973. The one demand was for R703 621 for rice allegedly supplied over the period December 2013 to October 2014. The other demand was for R2 481 244 for rice allegedly supplied over the period March 2012 to December 2013. The two demanded amounts were in total the sum alleged in the first liquidation application to have been owing.

[8] The respondent's attorneys replied by letter dated 17 June 2015. They referred to Riley AJ's observation in his judgment that the disputes between the parties should be resolved by action proceedings. They stated their instructions to be that, as a result of the applicant's 'malicious application', the respondent had suffered substantial damages which it was still in the process of quantifying but which currently stood at R950 000. The respondent denied the alleged indebtedness of R2 481 244. In regard to the indebtedness of R703 621, the counter-claim exceeded that sum by an amount in excess of R246 378. Finally, the respondent's attorneys reminded the applicant's attorneys of Riley AJ's view that the papers did not support a finding that the respondent was unable to pay its debts. Accordingly, if the applicant considered it had a claim, it should pursue it by way of action.

[9] Undeterred, the applicant issued the present application on 7 September 2015. The applicant annexed and relied upon the statutory demand for R703 621.

The correct legal approach

[10] Because we are concerned here with a final rather than a provisional order, the applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the *Plascon-Evans* rule (*Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings Pty Ltd & Another* 2015 (4) SA 449 (WCC) para 9 and cases there cited).

[11] The applicant's claim for R703 621 is not seriously disputed.[1] It is also common cause that the respondent did not, in response to the statutory demand for that sum, pay it or secure or compound for it to the applicant's reasonable satisfaction.

[12] The respondent's answer to the second liquidation application is in essence (i) that it has a counter-claim for damages and for legal costs exceeding the admitted claim of R703 621; (ii) that, to the extent that it is currently unable to pay the admitted claim (which the respondent does not concede), the temporary inability has been brought about by the disruption following the first liquidation application.

[13] In terms of the so-called *Badenhorst* rule, winding-up proceedings should not be used as a way of enforcing payment of a debt the existence of which is bona fide disputed on reasonable grounds (see *Orestisolve* para 8 and cases there cited). The *Badenhorst* rule is not directly implicated in the present case because the applicant's claim is admitted.

[1] Mr Lawrence did not press or develop the allegations in para 49.3 of the answering affidavit where Ebrahim says that his calculation of R703 621 did not take into account that Essack had over-charged for rice supplied. It is not apparent why, if the over-charging complaint was sound, Ebrahim would have ignored it in his previous calculations. Ebrahim also refers to a salary claim against the applicant of R260 000 but this claim (if justified) vests in Ebrahim and his brother, not the respondent. Mr Lawrence likewise did not rely on Ebrahim's allegation in para 51 that the indebtedness of R703 621 was not payable on demand but as and when the respondent on-sold the supplied rice and received payment from its customers.

[14] In *Ter Beek v United Resources CC* 1997 (3) SA 315 (C) Van Reenen J considered that South Africa should follow the English practice, which he understood to be that the court has a general discretion to refuse a liquidation order where the respondent asserts a genuine and serious counter-claim equal to or exceeding the amount of the applicant's claim. This general discretion was more flexible than the *Badenhorst* rule because the liquidation application would not have to be dismissed merely because the respondent asserted a *bona fide* counter-claim on reasonable grounds (at 333C-334C).

[15] In *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd & Another* [2012] ZAWCHC 43 Binns-Ward J said that the English cases did not recognise the wide discretion assumed in *Ter Beek*. The English cases in effect applied our *Badenhorst* rule (which we adopted under the influence of English decisions) by holding that, save in exceptional circumstances, a liquidation application should be refused where the respondent *bona fide* asserts on reasonable grounds a counter-claim for damages equal to or exceeding the applicant's claim. Binns-Ward J considered that there was no reason to adopt this approach in South Africa. He concluded that the *Badenhorst* rule did not apply to an illiquid counter-claim. He held that a respondent is not entitled to have a liquidation application dismissed merely because it *bona fide* asserts on reasonable grounds a counter-claim for damages exceeding the amount of the applicant's claim (para 14):

'In my view reliance by a respondent on a "genuine and serious" unliquidated 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 an unliquidated counterclaim is nothing more than the 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 the technical requirements to achieve the remedy. There is accordingly no basis in our law in such circumstances to treat the application for winding-up as an inappropriate procedure, as a court would, applying the *Badenhorst* rule, in the circumstances of a claim for winding-up by a creditor when the existence of the debt in

question is reasonably and *bona fide* disputed. For the same reason there is no reason in our law for a court, as a matter of principle, to adopt a general disposition against the granting of the remedy just because the existence of an unliquidated counterclaim is alleged by the respondent.'

[16] Binns-Ward J went on to observe, however, that in most instances the difference in approach would not affect the outcome:

'I venture that in the majority of cases the 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 counter-claim by the debtor company will upon its determination extinguish the debt relied on by the applicant in its application for a winding-up. The exercise of a broad discretion by South African courts in closely analogous circumstances is well established, and as mentioned, in respect of actions, reflected in the provisions of rule 22(4). It is for the respondent to persuade the court to exercise the discretion in its favour by showing on the papers that its counterclaim is what the English judges would call a 'genuine and serious' one. This requires more of a respondent than is needed if its basis for opposition is the existence of a disputed indebtedness. If the respondent fails in this respect the court is unlikely to exercise the discretion in terms of s 347(1) of the Companies Act in its favour.'

[17] Except that Van Reenen J in *Ter Beek* may have erroneously assumed that the approach he espoused accorded with English law, there seems to be little difference between *Ter Beek* and *Marine Drive* in regard to the approach to be followed in South Africa. I would simply add, in regard to the court's discretion, a reference to my observations on this question in *Orestisolve* paras 17-21. There are no inflexible limits on the court's discretion. In para 21 of *Orestisolve* I suggested that a circumstance which might favour an exercise of the court's discretion against winding-up was that, despite a deemed inability to pay debts created by s 345(1)(a), the evidence showed that the company was not in fact commercially insolvent; and that it might be relevant in that regard that the company's failure to pay was attributable to a genuine dispute regarding the claim, even if the court considered the grounds of dispute ill-founded.

The counter-claim for costs

[18] The first liquidation application was dismissed with costs. Since there has been no appeal, the costs order is final. The respondent has not yet taxed a bill. In the supplementary answering affidavit Ebrahim says that the respondent has paid legal costs of R95 425. Ebrahim has not provided a breakdown of this sum so one does not know whether these costs include those incurred in relation to the ancillary proceedings in which Ebrahim and his brother were ordered to pay the costs. It is nevertheless obvious that the respondent will be entitled to recover some amount from the applicant in respect of costs and I doubt whether it would be less than R50 000.

The counter-claim for damages - legal basis

[19] The proposed counter-claim for damages arises from what is alleged to have been the applicant's malicious conduct in obtaining an ex parte provisional order in the first liquidation in circumstances where the respondent's liquidation was not warranted. I was not addressed on the legal basis for the proposed cause of action. The institution of civil proceedings may, as in the case of criminal proceedings, constitute a delict giving rise to the actio injuriarum. Although it is customary to describe such conduct as malicious proceedings, it appears that the plaintiff need not allege and prove malice. What must be alleged and proved is that the proceedings were instituted without reasonable and probable cause (which includes the lack of a subjective belief that they are justified) and that the defendant intended to injure the plaintiff (see *Moaki v Reckitt and Colman (Africa) Ltd & Another* 1968 (3) SA 98 (A) at 103E-104D; *Young v McDonald* [2010] ZAWCHC 537 (WCC) para 17; Visser & Potgieter *Law of Damages through the Case* 2nd Ed p 475).

[20] The actio injuriarum assumes a claim for non-pecuniary damages. Pecuniary loss may naturally be claimed in the same circumstances under the lex aquilia. Whether the lex aquilia lies where unjustifiable proceedings were negligently instituted would depend on policy considerations relating to wrongfulness, a matter on which I need express no opinion.

[21] In respect of sequestration and liquidation proceedings, claims for pecuniary damages have been given statutory recognition in s 15 of the Insolvency Act 24 of 1936 and s 347(1A) of the old Companies Act. The latter provision reads:

'Whenever the court is satisfied that an application for the winding-up of a company is an abuse of the court's procedure or is malicious or vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and awarded such compensation as the court may deem fit.'

I do not think it desirable, in the absence of argument, to express a definite opinion on whether the statutory remedy is wider than the common law cause of action (the actio injuriarum) though one can see an argument for that view.

The counter-claim for damages - merits

[22] The respondent refers to various passages in Riley AJ's judgment in support of an assertion that it will be entitled to claim damages for malicious proceedings. These include the following findings: that Essack's basis for launching ex parte proceedings (a supposed fear that the respondent would conceal rice stocks) could not be true; that there was merit in the respondent's contention that Essack had adopted ex parte proceedings as a deliberate strategy to prevent the respondent opposing the liquidation; that Essack's was motivated by 'bad faith and malice aimed at the respondent's director; that his conduct exhibited 'elements of malice' and was 'clearly intended to cause prejudice to the respondent and its directors'; that the applicant amended its papers on several occasions regarding the amount allegedly due and advanced 'unacceptable and improbable explanations' for the amounts in question; that Essack was 'not exactly frank and forthright' when he deposed to the founding affidavit and was 'extremely selective'; the applicant failed, in the ex parte proceedings, to disclose that the respondent was in the process of making monthly payments of about R200 000; that if the court which heard the ex parte application had been placed in possession of all the facts it would probably not have granted the provisional order; that Essack's malice was demonstrated by his attendance at the respondent's premises when the sheriff served the provisional order and by his conduct in taking calls at the respondent's business premises during which he informed customers that the respondent was bankrupt and that he

had liquidated it; and that Essack had interfered with the provisional liquidator's discretion by insisting that the respondent's business operations be shut down;

[23] The papers in the first liquidation application have not been placed before me. I am not in a position to assess for myself whether these various findings are justified in all respects. I also need not determine to what extent the applicant will be bound by any of these findings in future proceedings between the parties. (Essack says that the findings were not warranted and that it was only to avoid further delay and expense that the applicant refrain from pursuing an appeal.) However, for purposes of exercising my discretion in relation to the alleged counter-claim, I am entitled, I think, to accept that Riley AJ's remarks represent at least one reasonable or plausible assessment of the facts.

[24] The requirement that the allegedly malicious proceedings should have been finally determined in the claimant's favour is satisfied.

[25] I thus consider that the respondent has a reasonable prospect of making out its cause of action on the merits.

The counter-claim for damages - quantum

[26] The respondent's initial answering affidavit identified various ways in which it had suffered damages without (save in one instance) quantifying their financial effect. The malicious proceedings were said to have caused damages as follows: (i) loss of profit in the period of just over six months during which the respondent was under provisional liquidation; (ii) loss of profit from two packaging contracts which the respondent had recently won; (iii) forfeiture of a deposit of R87 000 in respect of a consignment of rice from Bangkok; (iv) the costs of fumigating its premises and servicing equipment after the six-month shutdown; (v) spoilt stock (split peas and beans); (vi) the difficulty in recovering amounts (many too small to warrant litigation) from pre-liquidation debtors whose relationship with the respondent was broken by the liquidation or who have sold their businesses.

[27] In regard to the Bangkok shipment, Ebrahim alleged that the deposit of R87 000 was paid to the supplier, Ameritec, at the end of September 2014, the shipment being scheduled to arrive in November 2014. By the time the shipment arrived the respondent was under liquidation and it did not take possession of the rice. (According to the respondent, Essack pressured the provisional liquidator into not continuing with the respondent's business.)

[28] According to letters attached to the answering affidavit, the two packaging contracts were with Surrey Field Packaging and Crystal Foods. In terms of the contracts the respondent was to package these clients' bulk rice into smaller packages. Ebrahim says that the respondent secured these contract in August 2014 and started packaging during September 2014. He alleges that when, after the provisional liquidation, Essack heard about these packaging contracts, he insisted that the respondent's doors be shut. Ebrahim claims to have been told by the provisional liquidator that Essack used profanities and swore at him when the liquidator enquired about continuing to trade. Ebrahim says that as a result of the provisional liquidation the clients awarded the packaging contracts to other companies.

[29] In the supplementary answering affidavit Ebrahim annexed a summary of the respondent's alleged losses. Excluding the legal costs of R95 425, which is to my mind a separate claim arising from the costs order, the alleged damages total R943 057 made up as follows:

- loss of net profit (R55 000 pm x 6) – R330 000
- loss of Bangkok deposit – R87 828
- loss of contract packaging (30 000 pm x 6) – R180 000
- Wesbank finance charges for six months – R62 314,74
- Telkom – R6056
- Accounting – R6270
- Directors' salaries – R240 000
- Insurance (R4134,44 x 6) – R24 788,64

- licensing of motor vehicles (x 3) – R5800

[30] Ebrahim also attached the respondent's financial statements for the year ended 28 February 2015 and for the seven months from 1 March 2015 to 30 September 2015. The applicant did not file a supplementary replying affidavit but in argument Mr van der Schyff criticised the financial statements because the accounting officer (Mr Samsodien of the accounting firm S Samsodien & Associates) reported that no audit had been conducted and that no opinion was expressed on fair presentation. The reason for the absence of an audit is not, however, sinister. In all probability the respondent, as a private company, is not obliged by s 84(1)(c) of the new Companies Act to have its financial statements audited.[2]

[31] In the same report Mr Samsodien stated that he had satisfied himself that the financial statements were in agreement with the company's accounting records and had been prepared in accordance with the requirements of the Companies Act; that he had so satisfied himself by adopting procedures and conducting enquiries as he considered necessary in the circumstances; and that he had reviewed the accounting policies applied in the preparation of the financial statements and considered them appropriate to the business and in conformity with generally accepted accounting practice. Ebrahim said that Mr Samsodien was meticulous in his preparation of the financial statements and required copies of all vouchers and related documents. I thus consider that the financial statements have some evidential weight in these proceedings.

[32] The financial statements for the year ended February 2015 reflect a net profit of R342 040, ie R28 503 per month. Included in the computation is depreciation of R280 218. Since depreciation is a fixed non-cash item which is in effect funded as a provision against gross profit, it may well be that in assessing damages in the form of lost profit the provision should be disregarded, in which case the profit per month would rise to R51 854.

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[2] Only private companies whose 'public interest score' exceeds certain thresholds have to prepare audited financial statements (regulation 28(2)(c) read with regulation 26(2)). The attached financial statements suggest that the respondent's public interest score is well below 100.

[33] The financial statements for the seven months ended 30 September 2015 reflect a net profit of R98 425. Because the respondent was in provisional liquidation until 6 May 2015, this would not be a fair indicator of its true profitability – it only traded for five of the seven months but had expenses for the full period. Furthermore, the legal costs of R95 425 have been included in expenditure. Since the legal costs are the subject of a separate claim and are a once-off item, they should be disregarded in assessing the respondent's profitability. The profit would thus be R193 850. Expressed as a profit per month over seven months, this is R27 692. If the depreciation allowance of R209 961 is also reversed, this rises to R57 687 per month. Since there were only five months of trading but seven months of expenses, this might understate the profit.

[34] The figures in the financial statements will obviously be interrogated in any future proceedings between the parties. At this stage, however, the foreshadowed claim for loss of profit of R330 000, based on R55 000 per month over six months, does not strike me as implausible. The computation, furthermore, assumes that there was no loss of profit once trading resumed on or after 6 May 2015. Ebrahim alleges that the respondent lost a number of customers following the provisional liquidation and has been working to regain market presence. It had 13 employees at the time of its provisional liquidation and has only been able to get back five of them to date.

[35] Ebrahim has explained how the Bangkok deposit of R87 828 was lost. Prima facie this represents a legitimate component of the damages.

[36] Ebrahim has not provided details regarding the lost packaging profit of R180 000 over six months. Since the first packaging only started in September 2015, the profits from these two contracts would not be reflected in the financial statements (ie there is no risk of double-counting). It is fair to assume that the respondent would not have undertaken the contracts unless it expected to make profit from them. The letters attached to the answering papers indicate that the provisional liquidator was willing to continue with the contracts (Ebrahim says Essack put a stop to this). Furthermore, by limiting the computation to six months, the respondent is disregarding any loss flowing from the fact that the two packaging

clients have taken their business elsewhere. I will thus take into account that some profit has been lost, bearing in mind, however, that evidence of its extent is deficient.

[37] The other components of the damages represent various expenses allegedly incurred by the respondent. Where a company has fixed expenses which it must cover whether or not it is trading, those expenses represent loss additional to a claim for lost net profit since, but for the interruption in trading, the expenses in question would have been funded from gross profit. The largest such item is the claim of R240 000for the salaries of Ebrahim and his brother. Although they are the respondent's controllers, I do not see why their legitimate salaries, which would in the ordinary course have been met out from the company's gross profit, should not represent a loss to the company. Ebrahim and his brother are not obliged, by virtue of their control of the company, to waive their right to their reasonable salaries. According to the financial statements the directors' salaries totalled the R360 000 for the year ended February 2014 and R300 000 for the year ended February 2015. The lower figure for 2015 may be explicable on the basis that because of the provisional liquidation the directors were not paid for the months November 2014 to February 2015. The 2014 figure equates to a monthly salary for each director of R15 000, which is not unreasonable. Although the papers refer to a monthly salary of R20 000, I shall use the lower figure of R15 000, which translates to R180 000 for the two directors over the six-month period of the provisional liquidation.

[38] The amounts discussed thus far (R330 000 for lost profit, R87 828 for the lost deposit and R180 000 for wasted salary expenditure) total R597 828. An assumed recoverable amount of R50 000 in respect of legal costs takes one to R647 828. This leaves a shortfall of R55 793 on the capital of the admitted claim of R703 621. Although the respondent has provided inadequate evidence of the quantification of its lost profit on the two packaging contracts, its claim in that respect and for the other miscellaneous items of wasted expenditure which I have not specifically addressed (some of which are in line with the financial statements, others of which appear to be on the high side) may well take its claim above the admitted capital.

There are also the fumigation and servicing costs, spoilt stock and irrecoverable debtors which have not yet been factored into the quantification.[3]

[39] Mr van der Schyff criticised the respondent for not having yet instituted its claim for damages. Mr Lawrence responded that the family connection made this an awkward exercise for the respondent. Ebrahim said in his answering affidavit that the institution of proceedings might have an adverse effect on his sister and children who reside in Durban (the sister is married to Essack's son). I am not particularly impressed with this excuse for inaction. However, the delay has not been very great. The first liquidation application was dismissed on 6 May 2015. Less than a month later the applicant issued statutory demands foreshadowing a second liquidation application. The second liquidation application followed on 7 September 2015, only four months after the dismissal of the first application. Since time and expense on legal proceedings might have been futile if the respondent were liquidated, it was not unreasonable for the respondent to await the outcome of the second application. The provisional order was granted on 9 October 2015. Once the respondent was under provisional liquidation, Ebrahim and his brother could not cause action to be taken in its name.

Commercial insolvency

[40] The respondent denies that it is commercially insolvent. This is a relevant factor in the exercise of my discretion. According to the financial statements previously mentioned, the respondent was factually solvent as at February 2015 and September 2015 (its assets exceeded its liabilities). As at February 2015 its current liabilities (R1 009 249) exceeded its current assets (R853 663) but as at September 2015 its current assets (R 1 162 382) slightly exceeded its current liabilities (R1 109 438). The greater part of the current liabilities comprises the applicant's claim of R703 621. Ebrahim says that the respondent has a currently unutilised credit line with a Mr Parker, whom he describes as a partner in the business.[4]

[3] I leave out of account the respondent's heavily disputed allegations regarding supposed passing-off perpetrated by the applicant.
[4] See also para 20 of Riley AJ's judgment where reference is made to this gentleman.

[41] Most of the respondent's current assets take the form of stock and receivables. While these might be able to be converted quite quickly to cash, the respondent would need to apply a significant part of that cash to meet its expenses and acquire new stock in order to continue trading. I doubt whether, without borrowing money, the respondent could promptly pay the applicant's claim and remain in business. However, since the respondent is apparently a profitable enterprise, it may well be able to raise finance from Mr Parker or elsewhere. According to the respondent, it is not paying the applicant because it believes it has a counter-claim exceeding R703 621.

[42] There is no evidence that the respondent has defaulted on its commitments to any other creditors. If I were to make the provisional order final, I would be terminating the life of an apparently viable enterprise.

Conclusion

[43] In summary, the respondent alleges on reasonable grounds that it has a counter-claim against the applicant. That counter-claim could plausibly exceed the applicant's claim. On the evidence before me the respondent is operating profitably though if pressed it might battle to pay the applicant's claim promptly unless it could borrow money for that purpose. The present application was preceded by a statutory demand issued less than a month after the applicant's previous application was dismissed with costs. As a matter of common sense, the six-month period of provisional liquidation would have disrupted the respondent's trade relations, making its position in the second half of 2015 more challenging than it would otherwise have been.

[44] In all the circumstances, I consider it just to exercise my discretion against confirming the respondent's provisional liquidation. It is essential, however, that the respondent should now pursue its claim. It cannot sit back and wait. While I do not intend to give any directions (even if I could), I would expect a court to have little sympathy for the respondent in any future liquidation proceedings if it has not by the end of January 2016 issued summons (unless by then the applicant has issued summons, in which case the respondent could pursue its claim in reconvention).

[45] Insofar as costs are concerned, I take into account that I will be refusing a final order in the exercise of my discretion and despite the fact that the applicant has established its claim and the respondent's deemed inability to pay its debts arising from the unsatisfied statutory demand. On the other hand, the applicant was heavily criticised in the previous proceedings and has rushed into a second application after being forewarned that the respondent would allege a counter-claim exceeding the admitted indebtedness. I thus think the fairest order is for the parties to bear their own costs.

[46] I make the following order: (i) The provisional order of liquidation is discharged and the application is dismissed. (ii) Save for the costs of 30 October 2015, in respect whereof an order has already been made, the parties shall bear their own costs.

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ROGERS J

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