IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 22866/2019

In the matter between:

JOCHEN BÖHNKE N.O.	First Applicant
JANA SABINE CLAUDIA VOGEL N.O.	Second Applicant
TIM FABIAN BÖHNKE N.O.	Third Applicant
DUNCAN REY NEL N.O.	Fourth Applicant
KATJA MARIA HERR N.O.	Fifth Applicant

in their capacities as trustees for the time being of
the Yes Please Trust (Number: IT 2155/2010)

and

JW BLUE CONSTRUCTION MANAGEMENT Respondent

Matter heard on 12 May 2020

JUDGMENT : HANDED DOWN ELECTRONICALLY ON 20 MAY 2020

HOCKEY, AJ

[1] This application is brought by the trustees of the Yes Please Trust ("the applicant") for the provisional winding-up of the respondent, JW Blue Construction Management Proprietary Limited ("the respondent"). In the alternative, the applicant asks for an order directing the respondent forthwith to

implement and give effect to the adjudication determination issued on 21 November 2019 and to pay the applicant the sum of R869 257.22 ("the claimed amount"), inclusive of VAT, together with interest thereon at the prescribed rate from 21 November 2019.

[2] The alternative relief was introduced by way of the applicant's replying affidavit attached thereto as "KMH 23".

[3] The provisional winding-up order is based on a demand issued by the applicant addressed to the respondent in terms of section 345(1)(a)(i) of the Companies Act 61 of 1973 ("the 1973 Act"), which demand the respondent failed to accede to.

[4] The claimed amount is part of an award issued by an adjudicator who was appointed and made his determination under the provisions of a JBCC Minor Works Agreement ("the JBCC Agreement") entered into by the parties.

[5] The respondent opposed the relief sought and instead contends that the bringing of the application for its winding-up is an abuse of process and should be dismissed, alternatively it should be postponed *sine die*, at least until the finalising of the arbitration proceeding currently ongoing relating to the dispute which was determined in the aforementioned adjudication proceedings. The arbitration process is being conducted in terms of the dispute resolution provisions of the JBCC Agreement.

[6] At this point, it is apposite to sketch the background leading up to the present proceedings.

[7] During February 2018, the parties concluded the JBCC Agreement, in terms whereof the respondent had to refurbish a property owned by the applicant.

[8] The JBCC Agreement contains typical dispute resolution provisions for these kinds of construction contracts, providing for a two-tiered dispute resolution mechanism, firstly for a dispute to be referred for adjudication, and thereafter, should a party give a Dissatisfaction Notice against the adjudicator's determination, for a referral to arbitration.

[9] During 2019 certain disputes arose between the parties. The first of these disputes was referred to adjudication which commenced before Adv Beyers of the Cape Bar.

[10] Before the first dispute was determined, on 23 April 2019, the JBCC Agreement was terminated. This is common cause.

[11] Adv Beyers issued his determination on 1 July 2019. The applicant was found to be indebted to the respondent in the amount of R238 245.32 ("the Beyers Determination"). Despite issuing a Dissatisfaction Notice against the Beyers Determination, thereby initiating arbitration proceedings, the applicant nevertheless settled the amount as determined therein.

[12] On 2 July 2019, the respondent issued a second Notice of Adjudication in respect of a different dispute ("the second dispute") from that which was dealt with by Adv Beyers. The applicant objected to the referral of the second dispute, and on 4 July 2019 its attorneys responded to the new referral stating that *"[G]iven that the agreement has been terminated, the proper route should be one of arbitration rather than adjudication"*

[13] The applicant's contention was rejected by the respondent and further correspondence ensued regarding the competency to refer the dispute for adjudication. No agreement was reached and as a result the respondent referred the matter to the Association of Arbitrators, who on 3 September 2019 directed that *"[T]he dispute resolution clause of the agreement between the parties (Clause 22) exists independently of the agreement. There is a dispute. In terms of the applicable Rules an Adjudicator must be appointed. The Association of Arbitrators is the appointing authority."*

[14] The adjudication of the second dispute then proceeded before Mr Daniel van Tonder. The applicant instituted a counterclaim against the respondent. Mr Van Tonder issued his determination ("the Van Tonder Determination") on 21 November 2019, directing the respondent to pay the claimed amount to the applicant. The Van Tonder Determination included a final account and a final certificate.

[15] The award in the Van Tonder Determination contained a typographical error in paragraph 9 thereof in that it directed the claimant to pay "the claimant", instead of "the respondent". This was corrected in a further ruling on 26 November 2019. The applicant filed an affidavit attaching the further ruling of the adjudicator correcting the error on 11 May 2020. In any event, there can be no doubt that both parties understood the intention of the ruling, as the respondent issued a Notice of Dissatisfaction on 22 November 2019, the day following the day that the ruling was issued. The respondent raised this as an issue in these proceedings, but in my view, nothing further turns on this.

[16] The Van Tonder Determination, as well as the Beyers Determination are now, as agreed between the parties, subject to a single combined arbitration which is yet to be finalised.

[17] On 22 November 2019, the attorneys for the applicant sent a letter of demand for settlement of the claimed amount to Mr Terry Brown who, although not a legal practitioner, is an alternative dispute resolution practitioner who at all relevant times of the disputes hereto acted on behalf of the respondent.

[18] In his response to the letter of demand, Mr Brown did not dispute the debt as per the Van Tonder Determination, but merely took issue with the time frame for payment.

[19] On 29 November 2019 the applicant's attorneys addressed a further letter of demand to the respondent but this time in terms of section 345 of the 1973 Act in terms of which the respondent was advised that if the claimed amount was not settled within three weeks from the date of delivery of the letter, the respondent would be deemed to be unable to pay its debts in terms of section 345 of the 1973 Act.

[20] The respondent failed to make payment as demanded which resulted in this application being brought.

[21] The respondent opposes this application on the contentions that the Van Tonder Determination is not enforceable as the JBCC Agreement had been cancelled, that the debt relied on by the applicant is disputed and has been referred to arbitration, that the application is an abuse of process calculated to quell the arbitration proceedings and furthermore that the application was brought on the incorrect form, on short notice in circumstances in which no proper case for urgency was made out, and for this reason also it is an abuse of process.

[22] Let me deal with the contentions that this application is an abuse of process and was brought in the wrong form first.

[23] This application was indeed brought as one of urgency with a request that it be heard as such and for the court to dispense with the forms and requirements of the Rules of court in terms of Rule 6(12)(a).

[24] In relation to sequestrations, Meskin, in *Insolvency Law* at 2-38 comments:

> *"It is submitted that any application for sequestration merely as such contains an element of urgency: if a case for sequestration can be made, ex hypothesi, a removal of his property from the control of the debtor and a suspension of enforcement of creditors' rights of action and execution in the ordinary course should occur as soon as possible. Accordingly, in all cases the Court, acting under Rule 6(12) of the Rules of the Supreme Court, should permit the making of the application under Rule 6(4)(a) of such Rules, read with Form 2 in the First Schedule thereto, subject to the applicant's giving informal notice of the application to the debtor in terms of section 9(4A)(a)(iv), save in cases where in the exercise of its discretion in terms of the section the Court considers it to be in the interests of the debtor or the creditors to withhold such notice."*

[25] It is not unusual for applications of this nature to be brought as one of urgency on a short form of notice of motion. Where such an applications is opposed, the party opposing is given opportunity to do so either by agreement between the parties or by the court at the first appearance. This was indeed so in this case. The matter was first enrolled on 7 January 2020, on which date an order was obtained by agreement for the parties to file further papers within certain timelines. The matter was accordingly postponed for hearing on 12 May 2020. No party suffered prejudice.

[26] In *Commissioner for SARS v Hawker Aviation Services (Pty) Ltd* [2006] 2 All SA 565 (SCA), the Supreme Court of Appeal held at p 569:

> *"Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."*

[27] Because liquidation proceedings are by their very nature urgent, I am satisfied that the applicant used the correct procedure in bringing this application.

[28] I next deal with the respondent's contention that the award of the adjudicator is not enforceable because the JBCC Agreement had been cancelled and furthermore that the debt is not enforceable because it is subject to challenge in ongoing arbitration proceedings.

[29] Counsel for the respondent relies on the judgment of Fourie AJA in *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016), where it is stated:

> *"In essence, the matter serves as a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds. This has become*

known as the 'Badenhorst rule' after Badenhorst v Northern Construction Enterprises (Pty) Ltd *& 1956 (2) SA 346 (T) at 347-348.*

[30] It is common cause that the JBCC Agreement was terminated on 23 April 2020. The respondent was aware of the cancellation when it instituted the adjudication proceedings which resulted in the Van Tonder Determination. In fact, it was the applicant who initially objected to the Van Tonder process being instituted and the respondent who persisted therewith. After a ruling by the Association of Arbitrators on 3 September 2019, both parties submitted to the adjudication proceedings, even though the applicant raised its objection to the referral to adjudication in front of Mr Van Tonder. It was only when the outcome of the proceedings was unfavourable to the respondent that it now wants to reprobate the Van Tonder proceedings. The applicant argued, and I agree, that in doing so, is not only legally bad, but demonstrates a lack of good faith.

[31] The adjudication proceedings conducted by Adv Beyers (as in the case with the Van Tonder proceedings) also concluded after the JBCC Agreement had been cancelled. The respondent in that instance insisted on immediate payment of the award in its favour despite that fact that the applicant had issued a Notice of Dissatisfaction against the Beyers Determination thereby initiating arbitration proceedings. The respondent relied on the terms of the JBCC Agreement whereby the determination remains in force and implementable until overturned by an arbitration award. The applicant settled the debt accordingly.

[32] At this juncture it is apposite to set out the relevant dispute resolution provisions of the JBCC Agreement:

"22.4 Where a dispute is referred to adjudication:

22.4.1 The adjudicator, who shall not be eligible for subsequent appointment as the arbitrator, shall be appointed in accordance with JBCC® Rules for Adjudication current at the time when the dispute was declared. The adjudication shall be conducted in terms of such rules.

22.4.2 A determination given by the adjudicator shall be immediately binding upon, and implemented by the parties.

22.4.3 Where the adjudicator has given a determination, either party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the determination. Where the adjudicator has not given a determination within the time period allowed or extended time period provided in the JBCC® Rules for Adjudication, either party may give notice to the other party and to the adjudicator that if such determination is not received within ten (10) working days of receipt of such notice the appointment is thereupon automatically terminated and such dispute is then referred to arbitration.

22.5 Where the dispute is referred to arbitration:

22.5.1 The resolution of the dispute shall commence anew. The arbitration shall not be construed as a review or appeal from any adjudicator's determination and that any such determination by the adjudicator shall remain in force and continue to be implemented until overturned by an arbitration award.

22.5.2 Neither party shall be entitled to legal representation unless otherwise agreed by both parties and the arbitrator.

22.5.3 The arbitrator shall be appointed in accordance with the Rules of Arbitration current at the time when the dispute was declared by agreement between the parties within fifteen (15) working days of notice by either party inviting the other to do so, falling which on application by either party, the Chairman for the time being of the Association of Arbitrators (Southern Africa).

22.5.4 The arbitrator shall have the power to finally determine the dispute including the power to make, open up and revise any certification, opinion decision, determination, requisition or notice relating the dispute as if no such certificate, opinion, decision, determination, requisition or notice had been issued or give.

22.8 This clause [22.0] shall, to the extent necessary to fulfil its purpose, exist independently of this agreement [3.2]."

[33] The query whether it was competent for the dispute to be referred to adjudication had been dealt with both by the Association of Arbitrators as well by Mr Van Tonder. In both these instances it was the applicant who argued against the referral and the respondent who argued in its favour. In both instances it was ruled that it was competent to have the dispute adjudicated despite the termination of the JBCC Agreement. It is not for this court to critique the Van Tonder Determination in any detail.

[34] Of importance to note is that the termination clause (clause 21) of the JBCC Agreement does make provision for either party to recover damages from the other post termination. This, together with the provision in sub clause 28.2, providing that *"[T]his clause [22.0] shall, to the extent necessary to fulfil its purpose, exist independently of the agreement."* Furthermore, this is not a review of, or an appeal

against the Van Tonder determination. For these reasons, I am of the view that the termination of the JBCC Agreement had no bearing on the proper referral to adjudication, and no bearing on its outcome.

[35] In support of the contention that the adjudication award is not enforceable as it is under dispute and has been referred to arbitration, counsel for the respondent relies on the judgement in *Blue Circle Projects (Pty) Ltd v Klerksdorp Municipality* 1990(1) SA 496 (T), where it was held by Coetzee J that *"....it cannot be said that the mediator's award, while arbitration proceedings are pending is final. It is significant that clause 69(2) says that the opinion expressed by the mediator is only final and binding upon the parties 'unless and until otherwise ordered in arbitration proceedings under sub clause (3) of this clause"*

[36] The approach in the *Blue Circle* case, however, was expressly rejected by Van Dijkhorst J in *Stocks & Stocks v Gordon* 1993 (1) SA 156 (T) where it was held:

> *"The scheme of clause 26 of the contract is conducive to finality and dispute resolution. The last provision of clause 26.3 is included to ensure continuation of the work pending arbitration which occurs generally speaking after the completion of the work and to obviate tactical creation of disputes with a view to postponement of liability. This cuts both ways. The contractor may be dissatisfied with the opinion of the mediator about the quality of his workmanship which may lead to that work having to be redone or the rejection of his claim for interim compensation which may cause a cash-flow problem. The employer may be dissatisfied with a mediator award of compensation to the contractor. Yet to ensure that the work does not become bogged down by a dispute about this, this, the contract provides that effect is to be given to the opinion. Should arbitration or litigation determine that the mediator's opinion was wrong, the matter is rectified and the necessary credits and debits will have to be passed in the final accounts"*

[37] The position adopted in *Stocks & Stocks* have now become settled in our law and has been followed in various cases, including in *Rodon Projects (Pty) Ltd v NV Properties (Pty) Ltd* and another [2013] 3 All SA 615; *Tabular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ); the unreported judgment of Spilg J in *Esor Africa (Pty) Ltd/Franki Africa (Pty) Ltd V Bombela Civils JV (Pty) Ltd* (GSJ case number 2012/7442); and in the as yet unreported judgment in this division by Jamie AJ in *Tenova Mining and Minerals (Pty) Ltd v Stellenbosch Municipality & Another* (28 February 2019), case number 9816/18.

[38] In *Rodon Projects*, it was held in the Supreme Court of Appeal per Nugent JA in paragraph 4, that:

> *"It has now become common internationally - in some countries by legislation - for disputes to be resolved provisionally by adjudication.* In Macob Civil Engineering Ltd V Morrison Construction Ltd [BLR 93 at 97] *adjudication was described as:*
>
> > *"…a speedy mechanism for settling disputes [under] construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement….But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process."*

[39] The language in the dispute resolution clause of the JBCC Agreement is clear and unambiguous. It was correctly interpreted and understood by the respondent when it insisted on settlement of the Beyers Determination and also when it argued in favour of referral for adjudication of the second dispute.

[40] Sub-clause 22.4.2 of the JBCC Agreement provides that *"[A] determination given by the adjudicator shall be immediately binding upon, and implemented by the Parties."* Sub-clause 22.5.1 provides for the scenario where a dispute which had been adjudicated is referred to arbitration. It states that *"[T]he resolution of the dispute shall commence anew. The arbitration shall not be construed as a review or an appeal from any adjudicator's determination, and that any such determination by the adjudicator shall remain in force and continue to be implemented until overturned by an arbitration award."*(my underlining)

[41] As the law now stands, contractual clauses, such as those of the JBCC Agreement quoted above, that provide for immediate enforcement of an adjudicator's award, even where the award may be subject to a further dispute resolution process by way of arbitration or litigation, are not inconsistent with the *pacta sunt servanda* principle. The applicability of this principle in our law was confirmed by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323, where it was held at paragraph 57 that:

> *"...parties should comply with contractual obligations that have been freely and voluntary undertaken. This consideration is expressed in the maxim* pacta sunt servanda, *which as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate owns own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."*

[42] The respondent admitted that *"technically"* the amount determined by Mr Van Tonder is owing but argue that since it has been referred to arbitration, it is a factor which this court should take into account in exercising its discretion to refuse the provisional winding-up of the respondent. In paragraph 94 of the

answering affidavit, Mr Jon Addy De Roubaix, the sole director and shareholder of the respondent states;

> *"In the circumstances I respectfully point out that while it may technically be so that there is an amount of R896 257.22 owing to the Applicant, this is very much disputed and has been referred to arbitration. This dispute subsists notwithstanding the fact that the Adjudication is binding and enforceable. It is a factor which the Honourable Court may take into account for the purpose of exercising its discretion."*

[43] This is the opportune time to deal with the court's discretion to refuse the provisional winding-up order.

[44] It is clear that the claimed amount is due and payable. The applicant has accordingly sent a letter of demand to the respondent in terms of section 345 of the 1973 Act. In terms of this section;

> *"A company or body corporate shall be deemed to be unable to pay its debts if-*
>
> *(a) a creditor by cession or otherwise, to whom the company is indebted in a sum of not less than one hundred rand then due-*
>
> *(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due;…*
>
> *and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor"*

[45] The applicant was entitled to resort to section 345 of the 1973 Act by sending a letter of demand to the respondent in accordance with these provisions. The respondent failed to either settle the debt or to secure or compound for it.

[46] The SCA has affirmed that a creditor under these circumstances has a right *ex debito justitiae* to a winding-up order against the company who has failed to discharge its debt. See *Lamprecht v Klipeiland (Pty) Ltd* [2014] JOL 32350 (SCA). at paragraph [16] where the following was stated:

> *"[16] I have already found that the agreement [that] was made an order of court by Kruger AJ was valid. This leads me to find that the respondent conceded that the appellant had locus standi, that he was a creditor for a sum no less than R100 and further that it was due and payable. There is no dispute that although the section 345(1)(a) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdictional requirements set out in section 345(1)(a) have been met."*

[47] More recently, the SCA held in *Afgri Operations v Hamba Fleet (Pty) Ltd* [2017] ZASCA (24 March 2017) that, *"generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt"*

[48] The above is not to say that the court does not have discretion to refuse a winding-up order. Such discretion must be exercised judicially.

[49] Counsel for the respondent relies on the so-called "Badenhorst Rule" in his argument to persuade this court to exercise its discretion against the granting of a provisional winding-up order. Reference is made to the judgement by Fourie AJA in the SCA, where it was held;

"In essence, the matter serves a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor company disputes on bona fide and reasonable grounds. This has become known as the 'Badenhorst rule' after Badenhorst v Northern Construction Enterprises (Pty) Ltd *1956 (2) SA 346 (T) at 347 – 348 (see also* Kalil v Decotex (Pty) Ltd and another *1988 (1) SA 943 (A) at 980 B-D, as well as the authorities referred to in* Kalil *at 980 D-F)."*

[50] In relation to the Badenhorst rule, the SCA held in paragraph 6 in the *Afgri* matter that;

"[W]here, however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds."

Later, in paragraph 13, the court held;

"As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects the court a quo applied 'the wrong principle[s]'. There must be no room for any misunderstanding: the onus is not discharged by the respondent merely by claiming the existence of a counterclaim. The principles of which the court a quo lost sight are: (a) as set out in Badenhorst and Kalil, once the respondent's indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and (b) the discretion of a court not to

grant a winding-up order upon the application of an unpaid creditor is narrow and not wide."

[51] Counsel for the applicant raises cogent argument that the respondent fails at the first hurdle of "bona fides" and also that of reasonableness as required by the Badenhorst rule. In advance of the argument, he states that the respondent had previously approbated the adjudication process as provided for in the JBCC Agreement, and derived the benefit therefrom with the outcome of the Beyers Determination, and successfully argued for the competence of the referral of the second dispute to adjudication, both with the Association for Arbitrations and in front of Mr Van Tonder. It cannot now reprobate precisely the same adjudication proceedings. In doing so is not only legally bad, it demonstrates lack of good faith.

[52] In the exercise of my discretion, I must be mindful that the discretion is a narrow one, and that once the debt has been established to exist as in this matter, the applicant has a right *ex debito justitiae* to the winding-up order. Despite these factors, it is still required of this court to exercise its discretion judicially. The *ex debito justitiae* maxim is not an inflexible limitation to such discretion. In the words of Rogers J in Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings(Pty) Ltd and another 2015 (4) SA449 (WCC);

"*The* ex debito justitiae *maxim, I venture to suggest, conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order (and see Blackman op cit vol 3 at 14 – 91). To borrow another judge's memorable phrase, the court 'does not sit under a palm tree'. There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld."*

[53] In terms of the JBCC Agreement, the respondent is contractually bound to satisfy the Van Tonder Determination despite having referred it to arbitration. By entering into the JBCC Agreement, it has undertaken to do so and the *pacta sunt servanda* principle is applicable to it. I agree with the argument of counsel for the applicant that the respondent's contententions that the enforceability of the debt is negated by its challenge to the Van Tonder Determination by way of arbitration is not advanced on reasonable grounds and is contrary to the respondent's previous conduct (ie the demanding and receiving of payment of the debt owed by the applicant under the Beyers Determination, despite the applicant's challenge to that determination through arbitration proceedings).

[54] I would have expected the respondent to do more in trying to persuade the court to exercise its discretion in its favour than to base its defence on the non-binding argument of the Van Tonder Determination. In this regard, the respondent's papers lack any indication of its solvency nor that any of its employees would lose their livelihood in the event of its winding-up. Such reticence, together with the fact that the respondent's failure to have responded to the section 345 notice, lends itself to a conclusion that it would not be in the interest of justice to refuse the provisional winding-up of the respondent.

[55] I am satisfied that a *prima facie* case has been established on a balance of probabilities that a provisional winding-up should be granted.

[56] There are other two further issues that I have to deal with. I do so briefly:

> [53.1] The applicant requested that I condone the late filing of a further supplementary affidavit dated 11 May 2020, in terms of which the error in the Van Tonder Determination was corrected. I already indicated that the error was an obvious one and both parties understood it as such. There is no reason not to condone the late filing of the said affidavit.

[53.2] The applicant further requested that I grant the amendment of its notice of motion, as per KMH 23 of its replying affidavit. The amendment provides for the alternative relief sought, namely for an order directing the respondent to forthwith implement and give effect to further the Van Tonder Determination. For reasons set forth herein, it is not necessary to further deal with the alternative relief. In any event, the respondent suffered no prejudice, and there is no reason why the amendment should not be granted.

In the result I make the following order:

1. The applicants' request for leave to file the supplementary affidavit dated 11 May 2020 is granted.

2. The applicants' request to amend their notice of motion in accordance with annexure KMH 23 to the applicant's replying affidavit dated 21 February 2020 is granted.

3. The respondent is placed under provisional liquidation.

4. A *rule nisi* is hereby issued calling upon all interested parties, to show cause, if any, on Monday 27 July 2020 why the following order should not be made;

    4.1 the respondent is placed under final liquidation;

    4.2 the costs of this application, including the costs of two counsel, are to be costs in the liquidation of the respondent.

5. The provisional winding-up Order is to be served by the Sheriff upon;

5.1 the respondent at its registered office, being 161 Westhoven Street, Edgemead, Cape Town, Western Cape;

5.2 the employees of the respondent at its principal place of business, being Unit 3, 9 Montague Garden Drive, Montague Gardens, Milnerton, Cape Town, Western Cape;

5.3 every trade union that, as far as the applicants can reasonably ascertain, represents any of the employees of the respondent; and

5.4 the South African Revenue Service, Project 166, 22 Hans Strijdom Street, Cape Town.

6. The order is to be published one each in each of the Cape Times and Die Burger newspapers.

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S HOCKEY

Acting Judge of the High Court

APPEARANCES:

For the Applicant:	Adv Matthew Blumberg SC Adv Gregory Solik
Instructed by:	Mr Peter Whelan Bowman Gilfillan Inc.
For the Respondent:	Adv Paul Tredoux
Instructed by:	Mr Nilssen N.M.E. Nilssen & Associates