IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 18712/2019

In the matter between:

AERONTEC (PTY) LIMITED Applicant

and

SOUTH HARBOUR TANKFARM CC Respondent

Judgment: 9 February 2021

DAVIS J

[1] The applicant seeks the final winding up of respondent on the grounds that it is unable to pay its debts as and when they have fallen due for payment in the ordinary course of its business as contemplated in terms of s 344 (f) read with s 345 (1) (a) alternatively s 345 (1) (c) of the Companies Act 61 of 1973 ('the 1973 Companies Act') together with Item 9 and Schedule 5 of the Companies Act 71 of 2008 ('the 2008 Companies Act').

[2] The dispute between the parties is relatively narrow. While the applicant's contention that the respondent was commercially insolvent is denied in the vaguest terms by the respondent, the latter insists that it is not factually insolvent and that its assets exceed its liabilities. It is not disputed that respondent is indebted to the applicant. Respondent seeks to resist the granting of a final order of liquidation on the basis of the existence of an unliquidated counterclaim sourced in s 61 of the Consumer Protection Act 68 of 2008 (CPA) which, respondent contends, is a serious

and genuine claim and which, if determined, would extinguish applicant's claim against it. It is for this reason that respondent contends that this court should exercise its discretion against the granting of a final order of liquidation, notwithstanding the provisional order which was granted on 19 August 2020. The provisional order of liquidation was granted on the basis that the respondent continued to owe applicant an amount of R 414 522, 55 together with interest and costs, which amounts had not been paid, applicant's consistent demands for payment notwithstanding.

Background

[3] Applicant is a retailer which supplied goods to the respondent. The circumstances under which it supplied these goods included recommendations and advice by the applicant relating to the suitability and application of those goods; in particular in the construction of milk tankers. According to Mr Peter Blyth, who deposed to affidavit on behalf of the applicant:

> 'The applicant carries on business as a supplier and distributor of various composite materials and technology throughout South Africa. The applicant's claim against the respondent is based on the supply of goods to the respondent. It is clear from the terms and conditions of sale attached to the credit agreement which governs the relationship between the parties, that the transactions between them relate to the supply of goods.
>
> The applicant was not involved in any manner with the design or specification of the tankers manufactured by the respondent…
>
> Of this, only a fraction (R29 411.25, after taking into account the credit note issued for the 40 units returned by the respondent in February 2019) relates to the

Eposhield product which forms the core of the respondent's complaints. The following table illustrates this (all amounts include VAT):

Invoices Total	R 585, 876.77
Disputed Eposhield	R 29, 411.25
Disputed KTA	R 62, 020.54
Disputed PU Foam	R 1, 253.73
Total Undisputed Products	R 493, 191.25
Payments received	R 155, 383.16
Total interest charges	R 46, 058.93
Outstanding Balance	**R 476, 552.54**

'

[4] Before De Villiers AJ it was alleged by respondent that the Eposhield FG, which is an epoxy liner, was rigid, cracked when flexed and was unsuitable for the purposes for which respondent required it. As a result, the respondent suffered physical damage to its milk tankers which resulted in economic loss. It alleged that the harm suffered including the loss of profits of R 778 000.00, which economic harm existed independently and as a result of the physical damage. After examining this evidence, De Villiers AJ held:

> 'The applicant disputes that the Respondent has a counterclaim against it. I am not convinced that this counterclaim has any merit even on a prima facie basis.'

[5] It was accepted correctly by the parties that a different burden of proof operates at the stage of an application for a final liquidation order where an applicant is required to establish on a balance of probabilities that the grounds for liquidation have been established. See *Cunninghame v First Ready Development* 249 (Association Incorporated in terms of s 21) [2010] 1 All SA 473 (SCA) at para 1.

[6] It is for this reason that a careful reconsideration of the factual dispute is now required.

Implications of the contractual provisions governing the relationship between applicant and respondent

[7] Mr Fergus, who appeared on behalf of the applicant, referred to two clauses in the agreement entered into between the parties which, in his view, were dispositive of the present dispute. Clause 4.4 provides:

> 'Payments of all amounts due shall be made at such place or into such account, free of deduction or set off, free of exchange or other such address as we may nominate.'

In addition clause 8.1 provides:

> 'All goods and materials as supplied to and shall be accepted by the Buyer voetstoots without warrantee express or implied against patent or latent defects and on the particular understanding that we do not expressly or impliedly warrant or represent that such goods or material are suitable for any particular purpose.'

[8] Mr Fergus submitted that, pursuant to these clauses, the respondent had agreed contractually that it was precluded from relying on a counterclaim as a defence to its liability to pay amounts owing in terms of the credit facility agreement. In support of this submission he referred to the judgment of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (1) SA 261 (WCC). In similar fashion to the present dispute, the applicant in *Gap Merchant Recycling CC* had applied for the provisional liquidation of the respondent. The basis of this application was a claim for R 668 000.00 for goods sold and delivered. Respondent disputed the claim and invoked the rule that winding up proceedings are precluded where the debt, which forms the basis of the application, is *bona fide* disputed on

reasonable grounds. In particular, respondent had taken the view that certain products supplied by applicant were 'contaminated and/or unsuitable for use.' Accordingly respondent argued that it had a claim for damages against the applicant. In this case the relevant clause provided that the customer had 'no right to withhold payment for any reason whatsoever and was 'not entitled to set off any amounts due to the Customer by the Supplier against its indebtedness to the Supplier.'

[9] Rogers J carefully discussed the different approaches to the question of a disputed counterclaim for damages as reflected in *Ter Beek v United Resources CC and another* 1997 (3) SA 314 (C) and *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd* [2012] ZAWCHC. Without deciding what the proper approach was to a respondent asserting the existence of an unliquidated claim as the basis by which a court should not grant an order of liquidation, Rogers J said:

> 'I shall assume in favour of the respondent without deciding that the application in the present case should be dismissed. I find on an assessment of all the affidavits that the respondent is *bona fide* asserting on reasonable grounds that counterclaim for damages which exceeds the amount of the applicants claim.'

[10] Turning to the relevant clauses of the contract, Rogers J noted at para 47 that the 'respondent has no right to withhold payment on the basis of an alleged counterclaim. Naturally a counterclaim for damages even if it had prima facie merit would not constitute a defence as such to the claim for payment because an illiquid claim for damages cannot be set off against a liquidated claim… In such a case the court in action proceedings might nevertheless in terms of rule 22 (4) postpone the giving of judgment on the main claim until the determination of the counterclaim. However a court would be unlikely to adopt this course in the face of contractual provisions such as clauses 37 and 38.'

[11] For this reason, Rogers J concluded at para 48:

> ‘It is thus not strictly necessary to comment on the prima facie merits of the alleged counterclaim because the counterclaim is not, in the light of the contract between the parties, an objectively reasonable ground for resisting payment of the applicants claim.’

[12] On the basis of this judgment, Mr Fergus contended that the contractual relationship between the parties was dispositive of the dispute, in that, as in *Gap Merchant Recycling*, it could not be concluded that the applicant’s claim had been disputed either *bona fide* or on reasonable grounds.

Rule 22 (4)

[13] Mr Studti, on behalf of the respondent, noted, notwithstanding *dicta* in *Gap Merchant Recycling,* that the critical question was whether Rule 22 (4) had application to the present dispute, given the nature of the contractual provisions which governed the relationship between the parties. To the extent relevant, Rule 22 (4) provides thus:

> ‘If by person of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff’s claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the clam or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention.’

[14] This rule was canvassed extensively in *Consol Ltd t/a Consol Glass v Twee Jongegezellen (Pty) Ltd* 2002 (2) SA 580 (C) where the question before the court was whether a clause in an agreement relating to set off, similar to clause 4.4 in the present dispute, justified a conclusion that the first respondent had either waived or

agreed to the exclusion of the procedural benefits of Rule 22 (4). The relevant clause in the contract read thus:

> 'The purchase price shall be paid by the customer to the company without set-off or deduction for any reason whatsoever and the customer shall pay all amounts to the company upon the terms notified by the company to the customer from time to time.'

[15] In dealing with the question as to whether Rule 22 (4) was applicable, Van Zyl J referred to the contractual arrangements between the parties and concluded at para 25:

> 'I have certain difficulties with this submission. Nowhere in the set-off clause or, for that matter, elsewhere in the agreement is any express reference made to the provisions of Rule 22 (4). By the same token there is no basis on which it can be suggested that there was a reference thereto tacitly or by implication. The parties clearly did not, at the time of conclusion of the agreement, give the slightest consideration to such Rule or to any matter remotely pertaining thereto or connected therewith. There is no indication whatever that they intended to exclude the operation of Rule 22 (4) or to exclude any of its procedural benefits. It cannot be inferred from any from any express term or terms on which the parties achieved consensus, nor can it be inferred from any relevant facts or surrounding circumstances'.

[16] Applying this *dictum* to the present dispute, nowhere in the contract between applicant and respondent is any express reference to be found to Rule 22 (4). It would, given the wording of the contract, be difficult to conclude, even tacitly or by implication, that Rule 22 (4) was contemplated when the contract was entered into between the parties. For this reason, there is no basis to suggest that the parties intended to exclude the implications of Rule 22 (4) or deny one of the parties any of its procedural benefits. It is clear that respondent's counterclaim, which is

unliquidated, cannot be set off against the liquidated claim of the applicant. By contrast, as stated in Consol 'set off will come into operation only if and when judgment on the counterclaim is given in favour of the defendant.' It follows therefore that the clauses referred to by applicant as dispositive of this case do not justify such a conclusion.

The counterclaim

[17] It follows that the nature of the counterclaim now requires analysis. In describing its counterclaim, the respondent relies exclusively for its cause of action on s 61 of the Consumer Protection Act 68 of 2008 ('CPA'). Section 61 (1) of the CPA provides thus:

> 'Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of-
>
> …
>
> (b) a product failure, defect or hazard in any goods;
>
> …
>
> irrespective of where the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.'

'Defect', as employed in s 51, is defined in s 53 (1) (a) (ii) as follows:

> 'any characteristic of the goods … that renders the goods … less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.'

'Failure' is defined in s 53 (1) (b) as follows:

> 'the inability of the goods to perform in the intended manner or to the intended effect.'

[18] In essence, respondent contends, that in terms of s 61 (1) (b) of the CPA, it suffered harm as a result of defects and/or failures in three of the goods supplied by the applicant, being the Eposhield, the KTA 313 hardener which was applied to the two dairy road tankers of the respondent and which appeared to be unsuitable and had to be removed and the supply of PU foam. According to the answering affidavit of Mr Bennetto 'two tanks built by the respondent using KTA 313 hardener / SR 12 resin had to be finally scrapped in September 2019 after 8 months of repairs having been done.' The third claim based on the value the PU (Polyurethane) foam product, which was applied to the two dairy road tankers, proved unsuitable and had to be removed and replaced with a denser micro balloon and resin mix. Mr Bennetto stated that 'the PU … foam was recommended by the applicant as the filler in the corners of the tanks, where milk, 'butter fat' and 'milk stone' and wash water would not build up has a low density and a high air content… Under the weight of 15 00 kilogram of milk per square meter on the floor of the tanks PU foam compressed and collapsed.'

[19] It is appropriate to note at this stage that the litigation in this application appeared to be a legal version of a moving feast, in subsequent to the initial papers, two supplementary answering affidavits and two supplementary replying affidavits were filed. The point made by applicant concerning the shifting case of respondent was that, other than the claim based on the Eposhield, the balance of the claims were never raised in the initial papers. I shall return presently to the implications of this argument.

[20] This observation by applicant is coupled with a number of further issues raised about the manner in which the respondent conducted its case. It appears that the respondent first raised the alleged counterclaims after receipt of the applicant's

letter of demand in terms of s 345 (1) (a) of the 1973 Companies Act. Prior thereto, the issue of a counterclaim was not raised. Furthermore, the first time a reference to a possible counter claim appears is to be found in an email on 24 April 2019, in which Mr Bennetto wrote to Mr Blyth:

> 'We would like to discuss payment arrangements to Aerontec account in the light of the three material setbacks which we have experienced'. At this point, he referred to the use of Eposhield, in what he referred to as 'the delamination / dry jointing we are now experiencing …' and 'the processes recommended and monitored in making the 'in house per- preg material (resins and imported KTA 313 hardener.'

[21] By 30 December 2018, respondent had breached its obligations in terms of the agreement, by failing to make payment of R 299 842.52, when such payment was due owing and payable to the applicant. This is admitted by respondent in the answering affidavit of Mr Bennetto in which the following appears:

> 'I admit that the respondent did not pay the amount of R 299 842.52 by 30 December 2018, but I do however deny that the respondent was in fact indebted to the applicant at that juncture for the amount claimed. I also deny that the respondent was in breach of its obligations to any extent. I aver that the respondent was fully within its rights to withhold payment to the applicant, given the counterclaims which the respondent had against the applicant which had already arisen at the juncture.'

[22] The sharp point of this evidence is that, as at December 2018, there was no suggestion of a counterclaim which the respondent might bring against applicant. The answering affidavit does not provide a credible explanation about the silence of a counter claim as at the end of December 2018. Indeed, the possible existence of a counterclaim was indicated for the first time on the record when, on 24 April 2019, an allegation was made by the respondent that, for example, Eposhield was an unsuitable material for the purpose envisaged by respondent. In that email Mr

Bennetto says: 'By losing three months on our first delivery we had a "loss of profits" of at least R 1.4 million.' There is no direct averment at this stage that the applicant is liable therefore.

[23] There can be no doubt that the case developed around the counter claim transmogrified from these vague assertions contained in the email of 24 April 2019 to a full blown reliance on s 61 of CPA, by way of the filing of the supplementary answering affidavits. This chronology also needs to be evaluated in terms of the material evidence as it appears on the record. Of particular significance is an email of 8 March 2019, in which Mr Bennetto sent to Mr Malan Conradie, who was the composites expert that Mr Bennetto had approached to be the technical partner in the project, and who was required to advise and assist him with composite tank options for a tanker. So much is clear from an email from Mr Conradie of 14 August 2019 to Mr Deon Perold, who was then acting on behalf of the applicant. In that email Mr Conradie says the following:

> 'I have looked at the letter from Bennetto and believe that the information is not a true reflection of the events.
>
> Please see my summary of the project.
>
> 1. Peter Bennetto approach me to advise and assist him with the composite tank options for a ReturnHauler road tanker. No payment were offered for design, advice, introductions and connections that I had built up in the industry since 1992. He did offer a 15% share in ReturnHauler projects that included patents in various countries as well as a long term benefit with this project. I did not know Mr Bennetto's personal financial position at the time.
> 2. I did designs based on some guidelines, dimensions and details provided by Bennetto and Dawid Pepler from Parmalat. My initial design were based on a hull (tank bottom) and deck (tank top) to be bonded together with tank special

joining flange similar to a boat and high up were there were low pressure and minimum change of leaking.'

[24] This version is supported by email from Mr Bennetto to Mr Conradie on 8 March 2019. The following passages are particularly relevant:

'As the "Responsible Person" in the project, I was not ever consulted on this decision.

With road tanker background – which you do not have – I would have warned against weakening the tank ends.

Tank ends are critical components.

Even though I carry commercial responsibility of the project – I was not consulted.

Nor was Simera ever consulted on this design change – as the FEA engineers.

Third Road Test (Sun. 24 Feb)

After the 10 days of repairs / modifications the semi was transferred to Truck Craft.

I did invite you to witness this third road test.

But received no response from you on this.

And you did not attend this road test.

Disappointing – you have your reasons, not that I understand them.

Probably like your reasons not to attend other road tests.

You were responsible for the detailed composite design.

But at no stage did you raise the alarm that his detailed design was not being adhered to in the build

We now sit with the embarrassment of failure, and are carrying some of the costs of repairs/modifications.'

[25] I shall deal now with the significance of this correspondence within the context of an overall evaluation of the available evidence set out in the papers including the supplementary affidavits.

Conclusion

[26] While there is considerable dispute on the papers as to the various allegations and counter allegations concerning the counter claim, the email exchange between Mr Conradie and Mr Bennetto is instructive. In particular, the email on 8 March 2019 from Mr Bennetto to Mr Conradie and the other correspondence, to which I have referred from Mr Conradie, makes it clear, on the probabilities, that the tankers had failed and then underwent numerous weeks of expensive repair which was neither due to the Eposhield nor the KTA 313 hardener but rather due to poor design, deviations from the design and possible manufacturing problems. The least one could have expected was a version from the respondent to significantly gainsay the implications of this correspondence. Instead in the email of 8 March 2019 the following appears:

> 'We faced two broad options – to abandon the project and be sued by Parmalat for performance.
>
> Or work to remedy the failures.
>
> Very fortunately John Oehley has stood his ground on the product, and not 'run for the hills' as lesser people would have done in the circumstances.
>
> We of course were totally financially committed as the spreadsheet attached indicates by the time the failures / omissions came home to roost.
>
> It is in our interest to see the product work to avoid being sued by Parmalat.
>
> We also believe in the future of the product – if we can get past the very clear omissions in manufacture.'

[27] This brings me back to the instructive judgment of Binns-Ward J in *Absa Bank Ltd, supra*. In my view, Binns-Ward J correctly distinguished the so called

Badenhorst Rule (*Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348) which articulates the idea that winding up is not an appropriate procedure to be availed of by a creditor whose claim against a respondent is *bona fide* disputed on reasonable grounds. However, in a case where there is opposition to an application for a liquidation order on the basis of an unliquidated counterclaim, a court is entitled and indeed justified to exercise its discretion against the granting of a winding up order, where it appears that there is a reasonable possibility that a counterclaim by the debtor company will, upon its determination, extinguish the debt relied upon by the applicant which forms the basis of the application for the winding up. See *Absa Bank, supra* at 26.

[28] A court should follow this distinction made by Binns-Ward J in his judgment. The present case thus triggers a decision as to whether to exercise a discretion in favour of respondent which has raised a counterclaim as a basis for an exercise of the court's discretion in its favour. But as Binns-Ward J said at para 27:

> '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.'

[29] In the present case the counter claim was not raised as a defence to the demand for payment in December 2018, which respondent concedes was in fact due. Thereafter, for a considerable period during 2019, as the evidence reveals, there was a startling lack of particularity in respect of alleged breaches of s 61 of the CPA. Finally, this provision became the central pillar of respondent's opposition to the application for the winding up order.

[30] There has, on the evidence, been insufficient particularity provided by respondent to show that the applicant was in any way responsible for the alleged defects in the Eposhield products supplied by it to respondent, including that the product did not perform in the manner intended by respondent. The evidence reveals further that applicant had very little, if any, control over the quality of the process which was employed in the use of the KTA 313 product. In the email of 9 December 2018, which Mr Bennetto addressed to Mr Parsons, he referred to work done by Mr John Oehley of AFF, a composite engineering firm and said:

> 'Johan has done an extensive trial now the SR 1280 / KTA 313 resin combination using Saertex Triax 820g Glass … Comparative test done … yielded slightly better results on the AFF prepreg so we have no cause to not use the KTA 313'.

[31] In summary, the evidence on the papers is indicative of a conclusion that the overall difficulties encountered by respondent in the manufacturing of tankers was structural in nature, stemmed from design and/or manufacturing defects, a point which had been made clearly by Mr Parsons, applicant's director to Mr Bennetto in February 2019 as follows:

> 'Thank you for inviting me to the meeting today reviewing the structural issues with the tanker. I'm confident that the tanker can be repaired. One of the key advantages of composite products over metals, is they can typically always be repaired by bonding on more material , but typically at the expense of additional weight and thickness. I'm concerned though that the build seems to have deviated from design in many areas, which could produce further nasty surprises in service.' (my emphasis)

[32] As noted in *Tiador 126 CC v Rock Construction CC (Earthworks Drilling and Exploration CC and Jeff Drill and Blast (Pty) Ltd* Intervening Parties) 2015 JDR 0234 WCC), the key question in the determination of an exercise of a courts discretion is

how genuine is the counterclaim. The answer must emerge from the papers, for as was stated in *Tiador*:

> '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.'

[33] In the present dispute, the counterclaim was considered by De Villiers AJ to possess insufficient weight to resist the granting of an order of provisional liquidation. Subsequent thereto, the respondent sought to amplify its arguments in justification of its counterclaim. The problem was that much of the amplification should, if it was to reach the standard of a counterclaim which justified the exercise of a court's discretion in its favour, have added significantly to the case which had have been raised in the initial papers. This was not done. By contrast, the need for amplification was replaced by a repackaging of the initial case. Any amplification, to the extent viable, was met by evidence which cast severe doubt on any merits which the counterclaim may have possessed. In addition, the entire basis of the counterclaim was not raised until, at the very least, 5 April 2019, more than three months after respondent had clearly breached its obligations in terms of the relevant agreement by failing to make payment of R 299 842.52. Equally significantly, no plausible explanation was given for the contents of the email of 8 March 2019 which Mr Bennetto sent to Mr Conradie and which gainsaid much of respondent's case that structural decision issues were not the cause of any loss which it may have suffered.

[34] In summary, there is no evidence to gainsay applicant's argument that the respondent is commercially insolvent and has been unable to pay the amount due to the applicant. That amount is undisputed. There is no plausible basis to exercise a

discretion and stay a grant of a final order. It must therefore follow that the respondent is found to have been unable to pay its debts as and when they fall due for payment in the ordinary course of business as envisaged in s 344 (f) read with s 345 (1)(c) of the 1973 Companies Act.

[35] In the result, the respondent is placed under final liquidation in the hands of the Master of the High Court Cape Town. The costs of the application shall be costs in the liquidation.

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DAVIS J

CORAM	**:**	**DAVIS J**
JUDGMENT BY	**:**	**DAVIS J**
FOR THE APPLICANT	**:**	**ADV S FERGUS**
INSTRUCTED BY	**:**	**ENS INC**
FOR THE RESPONDENT	**:**	**ADV B STUDTI**
INSTRUCTED BY	**:**	**NIXON & COLLINS ATTORNEYS**
DATE OF HEARINGS	**:**	**25 NOVEMBER 2021**
DATE OF JUDGMENT	**:**	**09 FEBRUARY 2021**