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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A 316/2017

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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DATE SIGNATURE

In the matter between:

MAHEM VERHURINGS CC **APPELLANT**

AND

FIRST RAND BANK LIMITED **RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The Appellant (Mahem) appealed an order granted for its final winding up, by the Court *a quo*. The Respondent (First Rand) relied on a debt of R3 016 2014-30 owing to it by Mahem, which it alleged was due and payable.

[2] The debt originated from a mortgage redemption agreement (the agreement), entered into between First Rand and Mahem on 27 September 2011, the terms of the agreement were set out in a credit facility letter dated 23 September 2011.

[3] The material terms of this agreement were *inter alia* that First Rand would extend a facility of R4 000 000-00 to Mahem, which would be paid back over a period of 120 months in instalments of R33 514-60. A covering mortgage bond would be registered by First Rand over certain immovable property. All Mahem's rights, title and interest of all rentals or revenue which might accrue from the property mortgaged were ceded, transferred and assigned to First Rand. The agreement also contained a non-variation clause that prohibited any variation of the agreement, unless it was reduced to writing and signed by both parties.

[4] It was common cause that Mahem failed to comply with the terms and conditions of the agreement. It failed to make payments of the monthly instalments and fell in arrears. The debit order for the monthly payment of the instalment, which fell due on 7 December 2014 was returned as unpaid due to insufficient funds. After this failure three debit orders for January, February and March 2015 were met. The debit order of 7 April 2015 was however again returned unpaid. Koedoeskop River Farms Alpha CC (Koedoeskop) signed surety for Mahem.

[5] As a result of the aforesaid failure to comply with the agreement letters of demand were sent to Mahem to rectify the default within 7 days. Mahem failed to comply. The last payment by Mahem in terms of the agreement was during March 2015.

[6] The liquidation application brought by First Rand against Mahem was premised on the ground that Mahem should be deemed to be unable to pay its debts, by virtue of the provisions of Section 69 of the Close Corporation Act 69 of 1984 (the CC Act). First Rand, who was a creditor of Mahem, of not less than R200-00, did in terms of section 69 serve on Mahem a demand at its registered office. This demand required Mahem to pay the amount due. Mahem for a period of 21 days thereafter failed to pay the sum. First Rand then proceeded to launch the liquidation application.

[7] Mahem's attorneys reacted to the launching of the liquidation application in an email dated 15 April 2015 and averred that First Rand was not entitled to launch the application and was not entitled to call up the amount due. It was alleged that First Rand was *mala fide* and that Mahem would seek a special costs order in the application for winding up. The failure to comply with the agreement was however not disputed on the papers by Mahem.

[8] The only member of Mahem was Mr Gert Jacobus De Beer. The sureties were Lambertus Nicolas De Beer, Gert Jacobus De Beer and Koedoeskop. The De Beers and their father were in their own capacities and through trusts, the beneficial owners of Koedoeskop, Seringhoek Boerdery CC and various other legal entities. These entities were referred to as "the De Beer's Group of entities". The basis of Mahem's defence was that First Rand was not entitled to take any legal action against Mahem. This commitment not to take legal action was allegedly contained in an Undertaking (the Undertaking) that was partly in writing and partly oral. In the Undertaking First Rand allegedly undertook to refrain from taking any form of legal action, pending the finalisation of an application for business rescue and a counter application for liquidation of Koedoeskop, against any of the entities forming part of the De Beer's Group of entities, and it was alleged that Mahem formed part of the group of entities. Koedoeskop was placed under provisional liquidation on 2 March 2015 and the final order was granted on 5 May 2015.

[9] The background to the liquidation application of Koedoeskop, was that on 3 February 2015 the trustees of Sandstone Projects Trust, an entity within the De Beers Group of entities, brought an urgent application to place Koedoeskop under business rescue. On 2 March 2015 First Rand brought an application to intervene in the business rescue application and brought a counter-application for the liquidation of Koedoeskop.

[10] The parties in these applications reached an agreement, which resulted in a draft order, in which the business rescue application was postponed *sine die*, and Koedoeskop was placed under provisional liquidation, with a return day of 5 May 2015. The provisional liquidation of Koedoeskop came about as a result of a settlement, in terms of the Undertaking.

[11] The business rescue application and the liquidation application were still pending at the time of the drafting of the answering affidavit in this application. Mahem was of the view that it was a party to the aforesaid Undertaking and that the Undertaking was still operative and binding, when the liquidation application was launched and that as a result First Rand could not proceed with the application against it.

[12] Mahem stated that the purpose of the Undertaking was to enable the persons and entities within the De Beers Group of entities to keep on trading in an attempt to settle the obligations of the different entities.

First Rand however took the stance that Mahem was not a party to the undertaking, and that it was limited to the farming operations in the De Beer Group of entities.

[13] Although Mahem denied indebtedness to First Rand this denial was purely based on the terms of the Undertaking and not on the agreement that was entered into and in terms whereof First Rand lent and advanced money to Mahem. On the papers it was common cause that Mahem failed to comply with the terms of the agreement.

[14] Mahem also alleged that, its property portfolio had a value of R12 000 000-00 (twelve million rand), which exceeded its indebtedness and that as a result it was not insolvent. Mahem attached a valuation to prove this point. It must be pointed out that this valuation did not set out any details on which it was based.

[15] As a result of the allegation regarding the Undertaking First Rand in the replying affidavit, stated that at the commencement of the business rescue proceedings, it was advised by the De Beers that the property belonging to Mahem had been sold. As a result, at the time of negotiating the draft order and the Undertaking, Mahem could not have formed part of the negotiations or the Undertaking. It was further contended that the reference in the Undertaking to "*the De Beer Group of entities*" referred to the entities in the De Beer Group that was involved in farming activities. First Rand stated that Mahem was

obliged to meet its liabilities in terms of the written agreement entered into between them.

[16] The replying affidavit further revealed that the business rescue application of Koedoeskop was launched, because Koedoeskop was unable to pay Escom and consequently the irrigation of crops could not continue. First Rand supported the appointment of a liquidator and assisted to ensure that the farming activities could continue and had nothing to do with Mahem.

[17] First Rand alleged that the facility agreement dated September 2014, in terms whereof facilities were granted to Koedoeskop, the Tamboties Boerdery and Seringhoek Boerdery, was dealt with separately, and as part of the farming operations. As already indicated the agreement between Mahem and First Rand was entered into during September 2011.

[18] In the replying affidavit First Rand also set out that it had apparently, after filing its founding affidavit became aware of an application issued by Beaumont Assist (Pty) Ltd t/a T A Progressive Financial Solutions and L N De Beer N.O., G J De Beer N.O. and L N De Beer Snr N.O. (the Beaumont application) and annexed the notice of motion and founding affidavit in that matter. It transpired *inter alia* from that founding affidavit that the rentals, which were ceded to First Rand in terms of its agreement with Mahem, were also ceded to Beaumont and

that Beaumont alleged that the Respondents were indebted to it in the sum of R6 365 871-23 plus interest. It was also submitted that in this matter the deponent of Mahem's affidavit, Mr Gert Jacobus De Beer, stated that he was the sole member of Mahem, but in the agreement with Beaumont, the deponent stated that Sandstone Projects Trust was the sole member of Mahem. First Rand said that they would seek leave to intervene in that application.

[19] This was clearly new matter, but First Rand argued that it became aware of these facts only after the founding affidavit was issued and the response was actually solicited by the content of the answering affidavit. At the hearing of the matter, Mahem's representative attempted to hand up the whole file in the Beaumont matter, but the Court refused to accept it. It is important to note that Mahem, did not at any stage request leave to file any further affidavit to address the new matter contained in the replying affidavit.

[20] The Court *a quo* granted a final winding-up order and refused leave to appeal. The Supreme Court of Appeal granted leave to appeal to the Full Court.

ISSUES ON APPEAL

[21] Mahem divided the issues on appeal in two categories. The first category dealt, basically with an interpretation of what needs to be proven to succeed in a winding-up order in terms of section 69(1)(a) or

69(1)(c) of the CC Act. This category's second leg dealt with what needed to be proven in order to conclude that Mahem was unable to pay its debts. The third leg of this category relied on what Mahem regarded as the Court *a quo*'s reliance on new matter contained in the replying affidavit and the refusal of the Court to accept the Court file in the Beaumont matter.

[22] The second category's starting point concerned the Undertaking negotiated and which Mahem argued covered it as part of the so-called "*De Beers Group of entities*" and which prevented First Rand, pending the finalisation of the application to place Koedoeskop under business rescue and the counter-application by First Rand for liquidation of Koedoeskop, from proceeding with legal action against Mahem. Mahem argued that the undertaking had the effect of precluding First Rand from making demand for payment and also precluded First Rand from making statutory demand in terms of section 69(1)(a) of the CC Act and launching a liquidation application against Mahem.

[23] Mahem's view was that the undertaking suspended Mahem's indebtedness to First Rand, and as a result, it was argued that the indebtedness to First Rand was no longer "*due and payable*". It was argued that the words "*legal action*" did include liquidation applications. Mahem also argued that, by making demand for payment First Rand

repudiated the undertaking, as a result whereof further payments to First Rand seized on the basis of *exceptio non adimpleti contractus.*

THE NEW MATTER CONTAINED IN THE REPLYING AFFIDAVIT

[24] It is trite that it is not permissible to make out new grounds for an application in a replying affidavit. However, it is sometimes permissible to supplement allegations contained in an application by way of facts in a replying affidavit.[1] Courts do not normally countenance a mere skeleton of a case in a founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.[2] However each case depends on its own facts. It is impermissible to rely on a completely different cause of action to the existing cause of action as set out in in the founding affidavit.[3]

[25] The Court has a discretion to allow new matter in reply.[4] Relevant circumstances which may allow for a deviation from the general rule that a litigant cannot rely on new matter in a replying affidavit, include the complexity of the case, whether it was realistic to expect the Applicant to be in possession of all facts at the time of launching of the application, whether the particular evidence refuted what was contained in the opposing affidavit and whether one is concerned with a sequestration/liquidation application – the latter being important as the particular evidence could be highly relevant as it informs the Court

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[1]Director of Hospital Services v Mistry 1979(1) SA 626 (A) at 635 – 636
[2]Titty's Bar & Bottlestore (Pty) Ltd v ABS Garage (Pty) Ltd 1974(4) SA 362 (T) at 369 B
[3]Triomf Kunsmis (Pty) Ltd v AE & CI Bpk 1984(2) SA 261 (W) at 269
[4] Johannesburg City Council v Bruma Thirty-Two 1984(4) SA 87 (T)

as to precisely what the state of affairs were relating to the close corporation/company concerned.[5]

[26] The papers show that Mahem had First Rand's replying affidavit in its possession since 1 June 2016 and did not launch an application to strike out the new matter in reply, nor was leave sought to file a further affidavit.

[27] One must also take into consideration that at least some of the new matter in this instance was solicited by Mahem's allegation contained in the answering affidavit, namely, that First Rand was bound by the Undertaking. Secondly the facts regarding the Beaumont application only came to First Rand's knowledge, after the liquidation application was filed. This allegation required an answer from First Rand. Under these circumstances Mahem could have and should have sought leave to file a further affidavit, but failed to do so. As a result the Court *a quo's* refusal to accept the file at the hearing was not an inappropriate exercise of its discretion, Mahem, at its own peril, did not apply to file a further affidavit. The belated attempt to hand up the file was correctly refused in the light of the circumstances.

[28] Mahem's argument that the new matter in reply had to be ignored as a blanket rule is clearly incorrect. In the light of the aforesaid the Court *a quo* did not err when it took cognisance of the facts contained in the

[5] Securefin Ltd v KNA Insurance [2001]3 ALL SA 15 (T)

replying affidavit and refused to accept the court file during the hearing.

THE UNDERTAKING

[29] The starting point in the evaluation of the facts of this appeal should be the Undertaking. This necessitates an analysis of both the content and to a certain extent the background to the undertaking.

[30] The Undertaking reads as follows:

"DRAFT LETTER OF UNDERTAKING *ON BEHALF OF FIRST RAND BANK LTD AND WESBANK LTD*

In re: *LAMBERTUS NICOLAAS DE BEER N.O., GERT JACOBUS DE BEER N.O. (in their capacity as trustees of the Sandstone Projects Trust, IT 475/09) / KOEDOESKOP RIVER FARM ALFA CC (Registration number: 2006/128221/23 / FIRST RAND BANK LIMITED*

It is recorded that against the grant of a provisional liquidation order of Koedoeskop River Farm Alfa CC by agreement between the parties and (sic) the business rescue application of the company (sic) postponed sine die:

1. *"That pending the finilisation of the application for business rescue and the counter application for liquidation under case number 13506/2015:*

   1.1 *That First Rand Bank Ltd ("the bank"), the intervening Creditor under case number 13506/2015 and Wesbank Ltd ("Wesbank"), shall refrain from taking any form of legal action to collect outstanding debt against Messrs Lambertus Nicolaas De Beer (Snr), Gert Jacobus De Beer and Lambertus Nicolaas De Beer (Jnr), in their personal capacities as sureties and co-principal debtors or otherwise, or any of the entities in which they are involved, directly or indirectly including, but not limited to, Tamboties Boerdery Trust and Sering Boerdery CC or any of the sureties liable to the bank for outstanding debt;*

   1.2 *That the current business rescue proceedings in Sering Boerdery CC continue in terms of the provisions of the Companies Act no 71 of 2008, subject to the statutory rights of the parties under the provisions of the Act;*

2. *That the bank acting through its attorneys undertakes to support the appointment of Mr Hannes Muller as the provisional liquidator of Koedoeskop River Farm Alfa CC;*

That upon the appointment of the provincial liquidator, he obtaining the necessary extension of powers to borrow funds against the security as a first charge against the crops on hand or to be cultivated the bank undertakes against such security to finance and facilitate with immediate effect, the payment of what is necessary, through the appointed provisional liquidator, to ensure the supply of electricity BY Escom to the farm Koedoeskop River Farm Alfa CC, during the liquidation process". [Court's emphasis]

[31] Certain general principles regarding interpretation of documents may be important and must be considered. It is trite than when more than one meaning is possible considering the language used, each possibility must be weighed in the light of certain factors. These factors, which must be applied objectively, are: (a) the language used in the light of the ordinary rules of grammar and syntax; (b) the context in which the provision appears; (c) the apparent purpose to which it is directed; and (d) the material known to those responsible for its production.[6] It must also be remembered that "*Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.*"[7]

[32] In **Picardi Hotels v Thekwini Properties**[8], the SCA made the point that a sensible meaning must prevail over one that is not. A Court will

[6] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA) at par 18 and its restatement in Bothma-Batho Transport v S Bothma & Seun Transport 2014(2) SA 494 (SCA) at par 10 & 12
[7] Bothma-Botha par 12
[8] Picardi Hotels v Thekwini Properties 2009(1) SA 493 (SCA) at par 5

not give an interpretation that leads to impractical, unbusiness like or oppressive consequences or that will stultify the broader operation of the contract under consideration.[9]

[33] One of the issues in interpreting the Undertaking that must be considered is that it remained a "*draft*", that much is obvious from the heading.

[34] The first emphasis should then be on the word "*draft*" and its implication for the status of the document. In the Shorter Oxford dictionary the word draft is defined as follows:

"A preliminary version or rough form of something to be written or printed, esp. an official document". This undertaking was accordingly nothing more than a preliminary version of an undertaking that could or could not be accepted by the parties. Importantly it must be noted that, the Undertaking was never signed by the parties. However a perusal of the papers seem to include that First Rand accepted that it was bound by the Undertaking at least in regard to the other entities in the Group of entities. However this must be seen in the context that the agreement between First Rand and Mahem contained a non-variation clause, which reads as follows:

"*Non-variation*

No alleged terms or conditions of any facility letter shall be of any force and effect unless reduced to writing and signed by you and the Bank".

[9] Natal Joint at par 26

The conclusion in the light of the non-variation clause is that the Undertaking could not have applied to Mahem.

[35] If the aforesaid conclusion is not correct the Undertaking states that First Rand shall refrain from "*taking any form legal of action to collect outstanding debt.*" It accordingly needs to be determined whether the reference to "*legal action*" included a demand, and the subsequent institution of liquidation proceedings.

[36] The distinction between what would constitute legal action and what would merely be legal processes were dealt with in **Steelpark Estate v Vereeniging Town Council**[10] the Court stated with approval the following:

"*In Kempton Park Bombay (Pty) Ltd v Kempton Park Municipality 1956(1) SA 643 (T) MARAIS J., reviewed the authorities and summarised their effect at p 267 by saying:*

Die onderskeiding tussen 'n "action" aan die eenkant en regsprosesse aan die anderkant wat nie op 'n "action" neerkom nie, berus derhalwe nie op die onderskeiding tussen prosesse wat met 'n dagvaarding ingelyf word, en die wat in 'n ander vorm onder die aandag van die Hof kom nie. Die onderskeiding is tussen die gedinge, in welke vorm ook, waarin die doen van iets of die betaling van 'n geldsom of 'n verklaring

[10] 1963(3) SA 657 (T) at 663

van regte geëis word aan die eenkant, en daarteenoor gedinge waarin so iets nie geëis word nie. Eersgenoemde is "action", die ander nie."[11]

[37] A demand to pay an indebtedness prior to the institution of legal proceedings cannot be defined as a legal action. Such a demand is in my view a mere precursor that may or may not lead to the institution of actual legal action.

[38] The next question is to determine whether liquidation proceedings constitute legal action to collect outstanding debt. In **Collett v Priest**[12] the following was said:-

"*... The order placing a person's estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against the debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaraton of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt, before an order so serious in its consequences to the debtor is given the Court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the Court has to*

[11] Steelpark p 663 par A-C; See also Dorpsraad van Schweizer-Reneke v Van Zyl 1966(4) SA 115 (T) at 116; Prinsloo v Johannesburg City Council 1969(2) SA 355 (W) at 356

[12] Collett v Priest 1931 AD 290 [Collett]

determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the Court asked to give any judgment, decree or order against the debtor upon any such claim. It is fruitless therefore to seek to show that sequestration proceedings, which have repeatedly been demonstrated to fall outside of the words "civil suit", falls within those words. .... In sequestration proceedings there is no claim either for the redress of an injury or for the recovery of a right." [Court's emphasis][13]

[39] This reasoning was followed in various other cases.[14] Liquidation proceedings like sequestration proceedings, are by their very nature not proceedings to claim an outstanding debt, it is a legal proceeding, which ultimately only seeks to create a *concursus creditorum.*

[40] The nature of the proceedings is also illustrated by the fact, that when a Court grants a liquidation order, the Court's determination of the creditor's *locus standi* is not *res judicata* against either the debtor, his/her trustee or the Presiding Officer at a meeting of creditors in the event of the liquidator/trustee/debtor subsequently challenging the validity or extent of the creditor's claim.[15] Similarly agreements providing, for instance, that a creditor cannot proceed with *"any legal action instituted for the recovery of a debt"* does not include

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[13] Collet p 299 & 300

[14] Prudential Shippers SA Ltd v Tempest Clothing 1976(2) SA 856 (W) at 863 – 865; Hassan v Berrange NO 2012(6) SA 329 (SCA) at par 19; Investec Bank v Mutemeri 2010(1) SA 265 (GSJ) at par 27 – 35; Naidoo v Absa Bank Ltd 2010(4) SA 597 (SCA) at par 4; Firstrand Bank Ltd v Kona 2015(5) SA 237 (SCA) at par 11 – 13; Misnun's Heilbron Roller Mills Holdings (Pty) Ltd v Nobel Street 1979(2) SA 1127 (WLD) at 1128 – 1129; King Pie Holdings (Pty) Ltd v King Pie (Pinetown) 1998(4) SA 1240 (D) at 1247 – 1248; Combustion Technology v Technoburn 2003(1) SA 265 (C) at par 12 – 13; Smith v Porritt 2008(6) SA 303 (SCA) at par 11 – 12 and Arprint Ltd v Gerber Goldschmidt Group SA 1983(1) SA 254 (A) at 261

[15] Smith v Porrett 2008(6) SA p 303 at par 11 – 12

proceedings to vindicate property[16] or proceedings for sequestration/liquidation.[17]

[41] When the aforesaid principles are applied it becomes quite apparent that the Undertaking did not apply to liquidation proceedings. Although the wording of the Undertaking is so wide that it could have included Mahem, due to the references to all the entities in which the De Beers were either directly or indirectly involved, I need not come to a definitive conclusion in this regard, as the undertaking did not cover liquidation proceedings.

[42] As a result of the aforesaid conclusion that the Undertaking does not apply, this Court does not have to concern itself with the question of whether the Undertaking rendered the debt not due and payable. Mahem never disputed indebtedness in terms of the agreement, nor its failure to comply with the agreement with First Rand, but based its argument solely on the fact that the undertaking as such rendered the outstanding amounts not due and payable.

[43] As a result Mahem could not rely on the undertaking as an impediment to the bringing of liquidation proceedings.

THE LIQUIDATION APPLICATION

[16] Haak's Garage v Rademeyer 1953(2) SA 188 (T)
[17] Arprint Ltd v Gerber at 261

[44] As already stated the liquidation application was based on section 69 of the CC Act which is the equivalent of section 345 of the old Companies Act no 61 of 1973 (the old Act). Section 69 provides as follows:

"Circumstances under which corporation deemed unable to pay its debts

(1)For the purposes of Section 68(c), a corporation shall be deemed to be unable to pay its debts, if –

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than R200,00 then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any Court in favour of a creditor of the corporation is returned by a Sheriff, or a messenger of a Magistrate's Court, with an endorsement that he or she has not found sufficient disposable property to satisfy the judgment, decree or order, or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the

corporation is unable to pay its debts.

(1) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation."

[45] Prior to coming into operation of the Companies Act 71 of 2008 (the New Act), a creditor (including a contingent creditor and/or prospective creditor) could petition the Court for winding-up of a close corporation on any one of the three grounds mentioned in Section 69 of the CC Act quoted *supra*. Once a Court found that any one of the grounds mentioned in Section 69 was proven, the Court could place the close corporation under liquidation. It was not necessary to show that the close corporation was factually insolvent. The following was stated in **Boschpoort Ondernemings (Pty) Ltd vs Absa Bank Ltd[18]:**

"*[16] For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities). See, for example, Johnson v Hirotec (Pty) Ltd;[19] Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation);[20] Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd.[21]*

[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard

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[18] 2014(2) SA 518 par 16 – 19 (Boschpoort)
[19] Johnson v Hirotec (Pty) Ltd 2000 (4) SA (SCA)para 6
[20] *Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493 (A) at 502C-D.
[21] *Rosenberg & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 596F-597H.

to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money - and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets.[22] *Were the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s* 7(1) *thereof.*

[18] In view of the long established and well-settled practice in our courts that commercial insolvency justifies the liquidation of a company, it must be presumed that the legislature was aware of this fact. The principle that Parliament is presumed to be acquainted with the interpretation of earlier legislation by the court, applies where there has been a settled and well- recognised judicial interpretation before the relevant legislation was passed.[23]

[19] It has also long been a construction of interpretation of statutes that, in the absence of express wording to the contrary, the legislature did not intend to alter the law as it had previously stood.[24] *Accordingly, it must be presumed that the legislature deliberately refrained from defining 'solvency'. It must have done so with a view to ensuring that the well-oiled machinery of the courts in matters of company liquidations should not stall. The legislature must have been content*

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[22] See, for example, the observation of the court in Firstrand Bank Ltd v Lodhi 5 Properties Investment CC 2013 (3) SA 212 (GNP) para 34.

[23] See, for example, Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer 1997 (1) SA 710 (A) at 732A-B; Commissioner for Inland Revenue Estate v Hulett 1990 (2) SA 786 (A) at 798B-C and Krause v Commissioner for Inland Revenue 1929 AD 286 at 297

[24] See, for example, Ex parte Davidson 1981 (3) SA 575 (D &CLD) at 577H; Ex parte Aufrichtig 1979 (4) SA 426 (N) at 429B-C; Realisation Company v Commissioner of Taxes 1951 (1) SA 177 (SR) at 184G-H; *In re* Budgett; Cooper v Adams (1894) 2 Ch 557 at 561.

that prevailing judicial interpretations of solvency and insolvency respectively should continue to have effect. The meaning of those terms must be one that leads to a sensible and business-like result. See Natal Joint Municipal Pension Fund v Endumeni Municipality."[25]

[46] When the new Act came into operation, the provisions of the old Act dealing with the liquidation of companies were retained[26]. Similarly, when the new Act came into operation, the provisions of Section 69 of the CC Act were retained in relation to the liquidation of close corporations[27].

[47] In **Boschpoort**[28] it was ultimately held that it is not necessary for a creditor to prove factual insolvency/factual solvency when proceeding either in terms of the old Act or new Act.

[48] The following was stated in **Boschpoort:**

"[22] Consequently, in order for a solvent company to be wound-up in terms of either s 80 or 81 of the new Act, it must be commercially solvent. If it is commercially insolvent it may be wound-up in accordance with chapter 14 of the old Act, as is provided for in subitem 9(i) of schedule 5 of the new Act.

[23] The confusion which has arisen as to when a company may be woundup in terms of the new Act or in terms of the old Act is thus eliminated. The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in

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[25] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.
[26] Item 9(1) of Schedule 5 to the new Act
[27] Section 66(1) of the CC Act provides: *"The laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provisions of this Act."*
[28] 2014(2) SA 518 par 9 - 13

liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new Act or the old Act. To attribute so-called 'factual solvency' to the meaning of the term 'solvent company' in the new Act would lead to an unbusiness-like result that would not make sense.

[24] Factual solvency in itself is accordingly not a bar to an application to wind-up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See Johnson v Hirotec (Pty) Ltd,[29] *It follows that a commercially solvent company (whether factually solvent or insolvent), may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act."*[30]

[49] In view of the discussion of **Boschpoort** *supra*, it is clear that the SCA did not impose a further requirement upon a creditor to prove commercial insolvency, when one of the grounds mentioned in Section 69 have been proven. The three grounds of inability to pay debts in Section 69 namely, (i) failure to comply with a statutory demand, (ii) *nulla bona* return; or (iii) proof to the satisfaction of the Court that the close corporation is unable to pay its debts are not tied together with the word *"and"*, but indeed with the word *"or"*. This points clearly thereto that each ground is a separate ground and does not require proof of something in addition thereto.

[50] All that **Boschpoort** found, is that any of the grounds relied upon in

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[29] Johnson v Hirotec (Pty) Ltd *(supra)* para 6 [footnotes re-numbered for purposes of this judgment]

[30] Par 22 – 24 Boschpoort

Section 69, if proven, leads to the conclusion that the relevant close corporation is commercially insolvent and may therefore be wound-up in terms of the old Act or the CC Act. In this instance First Rand demanded a payment of a debt and Mahem failed to pay the amount due within the required 21 days. As a result Mahem is deemed to be unable to pay its debts, and as a result is commercially insolvent and should be liquidated.

[51] In the light of all the facts I am of the view that the Court *a quo* was correct in granting a final winding-up order.

[52] **The following order is made:**

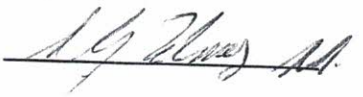
1. **The appeal is dismissed; and**
2. **The Appellant to pay the costs of the Respondent.**

R G TOLMAY

JUDGE OF THE HIGH COURT

N RANCHOD

JUDGE OF THE HIGH COURT



V NKOSI

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	24 APRIL 2019
DATE OF JUDGMENT:	27 JUNE 2019
ATTORNEY FOR APPELLANT:	RWL INC
ADVOCATE FOR PLAINTIF:	ADV G F HEYNS
ATTORNEY FOR RESPONDENT:	HARTZENBERG INC
ADVOCATE FOR RESPONDENT:	ADV L MEINTJIES