IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVIDION, MIDDLEBURG (LOCAL SEAT)

Case No: 92/2022

In the matter between:

JUGGERNAUT TRUCKING CC APPLICANT

and

GROUNDWORX CONSTRUCTION CORPORATION (PROPRIETARY) LIMITED RESPONDENT
(Registration Number: 2[...])

This Judgment is granted by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Judgment is further uploaded to the electronic file Judgment is deemed to be **02 MARCH 2023.**

JUDGMENT

1. This is an opposed application for the provisional winding-up of the respondent on grounds that the respondent is unable to pay its debts when they become due and payable. Mr J van Rooyen appeared for the applicant and Mr G. J. Scheepers appeared for the respondent.

2. The applicant's standing is based on the respondent's alleged debt in the amount of R1 625 596,77 for rental of certain machinery at agreed rental conditions and tariff. The respondent disputes the applicant's legal standing to launch this application.

3. The respondent disputes:

3.1. the applicant's ownership of the machinery;

3.2. that the rental agreement was with the applicant alone and pleads that the agreement was with a joint venture of the applicant and a close corporation registered as Bathopele Plant Hire CC(Bathopele). Theo Fourie(Theo) is the sole member of Bathopele;

3.3. the terms of the agreement as alleged by the applicant and pleads that there was no consensus on the terms; and

3.4. that the respondent was liable to pay the applicant for the rented machinery and pleads that there was a set-off arrangement agreed in the rental agreement.

4. The applicant's grounds of the application and the respondent's grounds of opposition are parallel to each other.

5. The applicant relies on a quotation which the applicant issued to the respondent on 2 September 2021 for the rental of 4 Volvo A30G ADT's(the machinery), the purchase order(the order) issued by the respondent to the applicant on 17 September 2021 and invoices that the applicant issued to the respondent for the rental, for a claim that the respondent is indebted to the applicant.

6. The respondent relies on an oral rental agreement allegedly concluded between the respondent and the applicant on 24 August 2021, oral representations that were allegedly made by Theo to the respondent about the relationship between the applicant and Bathopele and whatsapp messages which were exchanged between Kirmar of the respondent and Theo Fourie(Theo) of Bathopele from August 2021 to 16 September 2021 for its defence.

7. The respondent submits that there is a real and substantial dispute regarding the *locus standi* of the applicant and that the matter can thus not be resolved on the papers.

8. Issues to be determined are firstly, whether the applicant has a legal standing to launch the present application. If so, whether the respondent has established a bona fide defence based on reasonable grounds to successfully resist the application.

9. The applicant is conducting inter alia, a plant hire business. At all material times the applicant was represented by Stanley Ernest Barbour, the sole member of the applicant. I refer to Stanley Ernest Barbour as Stan. Further, I make reference to the applicant and Stan interchangeably.

10. The respondent is conducting business in the field of earthmoving equipment supplies as well as in engaging in certain mining services and operations. At all material times the respondent was represented by Kirmar Adriaan Veldman, the sole director of the respondent. I refer to Kirmar Adriaan Veldman as Kirmar. Further, I make reference to the respondent and Kirmar interchangeably.

11. It is common cause that the respondent rented the machinery at agreed hourly rate. The rental agreement commenced in September 2021 and ended in November 2021 when it was cancelled.

12.There is a dispute over who the machinery was rented from. The applicant claims that the machinery was rented from it while the respondent claims that the machinery was rented from a joint venture of the applicant and Bathopele.

13. The applicant' s evidence is that the applicant issued a quotation for the rental of the machinery to the respondent on 2 September 2021 in response to the respondent's request. The quotation provided that the payment term was "30 days from date of invoice/statement". In anticipation of receiving a formal order from the respondent and because Stan knew the respondent from their business relationship,

the machinery was driven by the applicant's operators to Hammerkop site where they were going to be utilised by the respondent. The respondent disputes this and contends that the machinery was driven by the operators of the respondent. On 4 September 2021 the applicant received a purchase order from the respondent(the order) for rental of the machinery. The order was reflecting the payment term as "Payment Terms: As discussed". Further, the order reflected certain amended conditions from those stipulated in the quotation. The applicant rejected this order on grounds that it did not contain the applicant's conditions of hire. The applicant requested the respondent to either amend the order to include the applicant's conditions of hire or the machines should not start work, and threatened to remove the machinery from site.

14. The respondent issued an amended purchase order on 6 September 2021.with further amendments to the conditions quoted by the applicant, the expression "Payment Terms: As discussed" was retained. On 12 September 2021, the applicant rejected this order too highlighting that the amended order had failed to incorporate the payment terms of "30 days from date of invoice/statement". With no response forthcoming from the respondent, the applicant sent a reminder on 17 September 2021 requesting for an amended order. On the same date, the respondent issued a purchase order incorporating the payment term "30 days from the invoice/ statement date". The applicant accepted this order whereupon the respondent became entitled to use the machinery in terms of the rental agreement.

15. The applicant invoiced the respondent with an amount of R604 181,25 for the September 2021 rental, this amount fell due at the end of October 2021. The respondent only paid the amount of R250 000,00 on 8 November 2021. The applicant submits that this payment was made toward settlement of the debt, the respondent disputes this, and states that the payment was for finance charges of the machinery.

16. On 16 November 2021 the applicant demanded payment of the outstanding balance in the amount of R354 181,25 payable by close of business on 18 November 2021, recorded that the respondent's invoice for October 2021 stood at

R837 142.50 and accused the respondent of making a short payment in the amount of R250 000.00 towards the September invoices notwithstanding that the mine had made full payment of the respondent's invoices. The applicant threatened to cancel the rental agreement should the respondent not pay the overdue balance in the amount of R354 181,25 by 18 November 2021.

17.On 18 November 2021, the respondent replied by notifying the applicant that the respondent was cancelling the rental contract with immediate effect due to the broken trust relationship and requesting the applicant to remove the hired machinery from the site as soon as possible.

18. On the same day the 18 November 2021, the applicant's attorneys sent and invoice for the total amount of R1 214 611,25 to the respondent, which amount was constituted of the sum of the overdue amount of R354 181,25 for the September rental and the amount of R860 430.00 for the October invoices which amount would become payable at the end of November 2021. The letter stated that the respondent had on numerous occasions promised to make payments to the applicant but had failed to honour its promises.

19. Based on this background, the applicant's attorneys notified the respondent that the applicant was cancelling the rental contract due to the respondent's breach of the contract by failing to pay in terms of the agreement. The attorneys made a demand in terms of section 345 of the Companies Act 71 of 1963(the old Companies Act) for payment of the overdue amount of R354 181,25 within 5 days from 18 November 2021. On 19 November 2021, the applicant issued the respondent with a final invoice for November 2021 and the reconciliation record of each equipment for September 2021 to 18 November 2021. It appears, that at the time of writing this letter, the attorneys were not aware that the respondent had already issued the applicant with notice of the respondent's cancellation of the contract.

20.The respondent's attorneys replied on 23 November 2021 disputing the terms of agreement as stated by the applicant and raising the defence of a set off arrangement which absolved the respondent from paying the applicant. The letter

denied that the respondent was insolvent. It asserted that the respondent was “more than able to pay its debts when they became due”.

21. On 14 December 2021 the respondent issued an invoice for R7 585,73 to the applicant for certain repairs done on one of the applicant’s machinery during October 2021. The applicant accepted the invoice and passed a credit note for the account to the respondent’s account and updated respondent’s account to reflect an indebtedness of the amount of R1 625 596,77. It is on the basis of this indebtedness that the present winding-up application was launched.

22. The respondent’s evidence is that Bathopele had been conducting a business of mining activities in Driehoek until around June-July 2021 when the respondent took the business over from Bathopele. While still operating mining business, Bathopele utilized the services of the respondent and was owing the respondent an amount of R3 152 474.50 when the respondent took over the business. Theo introduced Stan, the director of the applicant and one Armand Basson(Armand) to Kimar. Stan had been rendering coal screening services to Bathopele and Armand had be doing blasting service for Bathopele, the predecessor of the respondent. The respondent retained the services of Stan and Armand when it took over from Bathopele.

23.Upon taking over the business, the respondent found a stockpile of coal(coal) already mined on site. Theo represented to Kirmar that the coal belonged to him(Theo). The respondent discovered on 28 August 2021 that the representation was false when one Van Niekerk who had purchased and paid for the coal laid a claim on the coal and cautioned Kirmar that he would be exposing himself to a crime of buying stolen goods if he were to purchase that coal from Theo.

24. The respondent, states that Stan and Armand also claimed that they owned the coal in terms of the agreement with Bathopele. They offered to sell the coal to Kirmar at R450 000.00 to each of the two. The respondent decided to resolve the dispute by giving Van Niekerk the coal, paying Armand R350 000,00 and setting off the R450 000,00 due to Stan against the Bathopele debt owing to the respondent.

Stan denies claiming ownership of the coal as stated or at all, and offering to sell same to the respondent.

25. Theo made oral representations to Kirmar that Stan and Theo were involved in a partnership for quite some time in the provision of earthmoving equipment. Arising from these representations, the respondent regarded the relationship between Juggernaut and Bathopele as a joint venture/ partnership of leasing out the machinery.

26. On or about 24 August 2021 the respondent sought to rent machinery for operations at Hammerkop mine. The respondent avers that Theo indicated that he had the machinery available for hire. The conversation about rental of the machinery and the delivery thereof is contained in whatsapp messages exchanged between the Kirmar over the period 24 and 25 August 2021. The applicant was not involved in this communication.

27. The respondent represented by Kirmar and Bathopele represented by Theo entered into an oral agreement to rent the machinery prior to the involvement of the applicant. The following were material terms of the agreement:.

27.1. the invoice amounts for the use of Bathopele's machinery by the respondent would be set off against the debt that Bathopele owed the respondent;

27.2. finance charges due on the machinery would not be included in the set off amounts; and

27.3. proof of the finance charges payable on the machinery would be provided monthly in order to determine the amounts to be allocated to finance charges and the set off respectively.

28. The above terms are the premise upon which the respondent was willing to rent the machinery from what Kirmar believed to be the joint venture of Bathopele

and the Applicant. In pursuance of the aforesaid agreement with Bathopele, the respondent issued a purchase order dated 24 August 2021 to Bathopele. Theo was responsible for the delivery of the machinery, Stan was not involved. As a result of the set-off provision, the respondent did not enforce payment of the debt due by Bathopele.

29.The respondent presented a statement dated 28 February 2022 allegedly issued to Bathopele for the period 2 March 2020 to 31 July 2021 as proof of Bathopele's indebtedness to the respondent which indebtedness was to be settled allegedly through the set off.

30. The respondent denies that it requested a quotation from the applicant and further that it received such quotation. The respondent submits that it issued the purchase order of 4 September 2021 because shortly after the rented machines commenced with operation, Theo represented to the respondent that the financiers of the machinery required that the purchase order of 24 August 2021 issued to Bathopele be made out to the applicant. The respondent issued the purchase order dated 04 September 2021 in substitution of the said 24 August 2021 purchase order. The applicant's contention is that the purchase order was issued in response to the applicant's quotation.

31. It is evident from the papers that: the applicant's quotation was sent to the respondent's correct email address and under the subject "Juggernaut Quote", and that subsequent communication between the applicant and the respondent regarding rental of the machinery was written under the same subject. The respondent's initial purchase order was sent under the email message which read "Find attached order as per quote send to us". The only quotation on record is the quotation issued by the applicant on 2 September 2021. Kirmar does not say that he received a quotation from Theo, the only reasonable inference to be drawn in that the respondent received applicant's quotation of 2 September and acted on it. and issued an order on it

32. In light of this evidence, it is found that there is prima facie evidence that the respondent received the applicant's quotation and issued the 4 September purchase orders on the basis of that quotation.

33. The applicant rejected the respondent's first purchase order on 4 September in the following terms:

> *"Kindly note that your order does not include my conditions of hire. As such either amend the order, or the machines must not start work, and will be removed from site".(emphasis added ")*. The tone of the email laid it bare that Stan of the applicant was calling the shots as far as the rental agreement terms were concerned.

34. The respondent claims that the rental agreement was concluded in August Strangely, upon receipt of the applicant's demand of amendment in September, the respondent did not object and alert the applicant that the terms of rental were already settled with Theo in August 2021. The respondent claims that it concluded the rental agreement on the basis that it was concluding the agreement with the joint venture of the applicant and Bathopele. The applicant's reference to "my conditions of hire" puts it plainly that the conditions were Stan's, in his capacity as the sole member of the applicant. Still, the respondent made no attempt to register its alleged understanding that the rental agreement was concluded with the joint venture of the applicant and Bathopele and not with the applicant alone.

35. According to the respondent, the machines had already started working when Theo allegedly requested the respondent to substitute the order of 24 August with the one issued to the applicant. The applicant's demand that the machinery should not start working before the rental agreement terms were concluded should have raised alarms to the respondent, but it apparently didn't and there is no explanation for lack of concern regarding this.

36. The respondent amended some of the conditions stated in the quotation. Of importance is that the amendments provided that deviation from certain conditions of

the quotation would be discussed between Kirmar and Stan during the subsistence of the agreement. The respondent submitted the amended order on 6 September 2021. This order too was rejected by the applicant. The rejection was communicated on 12 September 2021 in the following terms:

> *"Having read your amended order, I notice that you have failed to incorporate the payment terms of 30 days from date of invoice/statement. The clause "payment terms – as discussed" on the bottom of the order needs to reflect the actual payment terms of our hire conditions".* Emphasis added.

37. It is clear that the applicant did not just reject the respondent's order out of hand but the applicant accepted the amended conditions of hire and not the amended payment terms. The applicant directed the respondent to reflect the actual payment terms of the rental conditions on the order. Nothing stopped the respondent from putting the expression "as per set off agreement" on the purchase order".

38. In the meantime, Kirmar had a whatsapp conversation with Theo on 16 September 2021 wherein Theo informed Kirmar that Stan had said that the payment term on the order was still not 30 day and enquired whether the respondent had not effected the change. Kirmar informed Theo that he(Kirmar) had telephonically informed Stan that the payment term was 30 days and he did not understand why there was still a problem. Significantly, Kirmar did not question Theo, with whom he had allegedly agreed rental terms in August 2021, as to why the applicant was single handedly dictating the amendment of those terms and insisting on the inclusion of the payment terms of 30 days while there was a set off agreement in place.

39. While Kirmar admits that the persistence by Stan relating to the 30 days' payment terms was concerning, when called upon to *reflect the actual payment terms of hire*, Kirmar chose not to state the payment terms in accordance with his alleged understanding that there was a set off arrangement. Instead, he amended the order by inserting the *payment term of 30 days from date of invoice/statement* and sent it to the applicant on 17 September 2021.

40. At the time of this negotiation of the rental agreement terms, the respondent already had a business relationship of coal screening with the applicant, nothing stopped the respondent from addressing the issue there and then.

When the respondent received the applicant's insistent demand for inclusion of the 30 day payment term Kirmar already knew about Theo's false representation regarding ownership of the coal. On its own account, Theo's false representation about the coal cost the respondent no less than R800 000.00. It is astounding that notwithstanding the already established business relationship between Stan and Kirmar and notwithstanding the existing record of Theo;s false representation which allegedly cost the respondent a considerable amount of money, Kirmar decided not to test the veracity of Theo's claim of existing joint venture relationship and that of the setoff arrangement, with Stan. Especially when it became palpably clear that Stan was dictating the rental terms.

41. The respondent disputes that the rental agreement was negotiated by Stan and Kirmar. It insists that the negotiation was with Theo representing both the applicant and Bathopele. The trail of emails between the applicant and the respondent from 2 to 17 September 2021 as well as the whatsapp communication between Kirmar and Stan on 16 September, it is reasonable to conclude that it is Stan applicant and Kirmar who negotiated and concluded the rental agreement of the machinery and that the agreement was concluded on a 30 days payment term from the date of statement or invoice, in the result, I also conclude that the agreement was between the respondent and the applicant only.

42. When confronted with the applicant's letter of 16 November 2021 claiming that the respondent had short paid the applicant and that the balance of R354 181.25 was due by the respondent to the applicant the respondent did not deny these claims. The respondent did not dispute the applicant's assertion that the respondent had received payment in full from the mine. The respondent neither denied nor questioned the applicant's statement that the respondent's October 2021 invoices stood at R837 142.50. The respondent advanced breakdown of the trust relationship as the reason for cancelling the contract and not nonadherence to the set-off terms.

43. In reply to the 18 November 2021 letter from the applicant's attorneys on 23 November 2021 the applicant's allegation that the respondent had on numerous occasions undertaken to make payments in settlement of the debt but had failed to honour its promises was not disputed. It was also not disputed that the amount of R860 430.00 would become payable by the respondent at the end of November 2021.

44. The respondent received the applicant's invoice for September 2021 and did not dispute it. The respondent does not dispute that it rented the machinery and used it at the cost stated in the applicant's invoices issued to the respondent for the September 2021 to November 2021 rentals.

45. The respondent is disputing the applicant's ownership of the machinery. The applicant has presented the Master Finance Lease agreement issued in the name of the applicant alone as proof that the machinery is financed for the applicant. The court accepts the agreement as prima facie proof of the applicant's ownership.

46. Based on the fact that that the applicant is the registered owner of the rented machinery and that the respondent does not dispute that it rented the machinery and used it at the cost stated in the applicant's invoices issued to the respondent for the September 2021 to November 2021 rentals which amount is in excess of R100.00, I am satisfied that the applicant has successfully demonstrated prima facie on the balance of probability that the respondent is indebted to the applicant and that the applicant's locus standi to launch the present application has been established.

47. The respondent is pleading lack of consensus between the parties when they concluded the agreement, respondent submits that it never intended that full payment would have been made within 30 days. It was always the respondent's intention when entering into the agreement that a set off would apply therefore there was no consensus on the terms alleged by the applicant.

48. It is traditionally accepted that the basis of contractual liability is either consensus, that is the actual meeting of the minds of the contractants, or the reasonable belief by one contractants that there is consensus.

49. In **Kgopana V Matlala (1081/2018) [2019] ZASCA 174 (2 December 2019)** at para [10] Van der Merwe JA said the following regarding contractual liability founded on consensus ad idem as well as that founded on quasi-mutual assent. “The primary basis of contractual liability in our law is true agreement or consensus ad idem, in accordance with the will theory. In cases of dissensus contractual liability may nevertheless be founded on the doctrine of quasimutual assent, which is based on the reliance theory. In these cases the first party is contractually bound because he or she led the second party, as a reasonable person, to believe that the first party intended to contract on particular terms.”

50. The facts of this case support a finding that the respondent has by conduct especially during the negotiation of the rental agreement with the applicant, led the applicant to believe that the applicant and the respondent had contracted on the terms stated by the applicant. The respondent ‘s defence of lack of consensus can thus not prevail for purposes of this application. It is thus found that the the applicant has established prima facie evidence on the balance of probability that rental terms as stated by the applicant are binding on both the respondent and the applicant.

51. The Court is satisfied that the applicant has established prima facie proof that the respondent is indebted to the applicant in the amount of R1 625 596,77 and that the respondent is unable to pay the debt.

52. **Badenhorst v Northern Construction Enterprise (Pty Ltd 1956(2) SA 346 T** at 348B States that where, the respondent’s indebtedness has, prima facie, been established, the onus is on the respondent to show that the indebtedness is indeed disputed on bona fide and reasonable grounds. The respondent bears the onus to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.

53. The respondent states that Kirmar regarded the relationship between Juggernaut and Bathopele as a joint venture/ partnership of leasing out the machinery, it does not say that indeed such relationship was in existence. The respondent has not presented facts which show that the respondent's opinion that the joint venture was in existence, was founded on reasonable grounds. Continued total reliance on Theo's alleged representations is considered to be unreasonable especially regard being to the fact that the respondent knew as far back as 28 August 2021 that Theo had attempted to defraud him about ownership of the coal. A prudent businessperson would subsequently approach representations from Theo with caution before acting on them.

54. The respondent has not proffered the explanation for only introducing the statement of Bathopele account for the first time in February 2022 and not submitting it to the applicant or the applicant and Bathopele especially at the time when Stan was insisting on the 30 day payment term or upon receipt of the applicant's first invoice in October 2021.

55. Invoices issued to the respondent were issued in the name of the applicant as the creditor. They bore no reference to Bathopele. The respondent states that at the time of taking over from the Bathopele, Bathopele owed it an amount of R3 152 474.50. A reasonable businessman would require participation of all representatives from all entities whose revenue was meant to service that debt. Interestingly, the respondent allegedly concluded the set off agreement against income generated by the applicant or the applicant with its partner without involving the applicant. This, in my view goes to show lack of reasonableness on the part ob the respondent.

56. When the applicant described the respondent's payment of R250 000.00 for the September invoice as shortpayment, the respondent did not protest, demand the financiers' account of September for the machinery and advise that the payment was for the financing of the machinery and not for monies due to the applicant. The respondent also did not furnish the applicant with a statement of account showing allocations to the financiers and the respondent in implementation of the set off

arrangement. The applicant never discussed the alleged set off arrangement and the order of 24 August 2021 with the applicant.

57. The respondent contends that the applicant knew of Theo's involvement in the rental agreement. This contention is based on the allegation that Bathopele facilitated the delivery of the machines, that three of the machines that were among the 4 rented ADT's were found at the premises of Theo after termination of the rental agreement and that the account issued by respondent to Bathopele shows credits that were passed in setting off the stockpile coal arrangement and the set off of the Juggernaut Invoice from the Bathopele account. The applicant denies knowledge of the alleged discussions between Theo and Kirmar about the applicant and Stan.

58. The applicant admits that the machinery consisting of not not only 3 ADT's but all the 4 ADT's that was parked at the premises of Theo, explaining that the machinery was parked at Bathopele premises by arrangement pending dispatch upon receipt of other purchase orders. It is common cause that the applicant had a business relationship of coal screening with Bathopele before the respondent was introduced to the applicant. The applicant's explanation regarding storage of the machinery at Theo's premises is found to be reasonable and thus accepted. The respondent's basis of asserting that the applicant knew of Theo's involvement is not enough to link the the applicant to the order of 24 August 2021. The red flags regarding the status of the alleged agreement of 24 August 2021 started showing on 28 August when Kirmar discovered the misrepresentation of Theo. They continued to show throughout the negotiation of the rental agreement which commenced on 2 September 2021 and ended on 17 September 2021. The respondent decided to ignore the red flags throughout this episode and decided to abide by the demands of Stan.

59. The respondent's contention that the respondent represented by Kirmar and Bathopele represented by Theo entered into an oral agreement to rent the 4 ADT's prior to the involvement of the applicant in or around 24 August 2021 clearly illustrates that the applicant was not part of that agreement. The set-off claimed by the respondent relates to the agreement which was allegedly concluded with

Bathopele and which resulted in the respondent's purchase order dated 24 August 2021. There are no facts advanced to link the 24 August 2021 order with the applicant.

60. A suggestion that a rental agreement concluded between the Theo and Kirmar in or around August 2021, is binding on the applicant lacks basis and should thus not be accepted.

61. On its own evidence, the respondent states that one of the material terms of the rental agreement between the respondent and Bathopele was that the invoice amounts for the use of Bathopele's machinery by the respondent would be set off against the debt that Bathopele owed the respondent.My emphasis. The prima facie evidence shows that the applicant is the sole owner of the machinery which was rented out on the strength of the purchse order of 17 September 2021.

62. Having dismissed the argument of the effect of the a rental agreement concluded between the Theo and Kirmar in or around August 2021 is binding on the applicant, I turn to deal with the respondent's claim that it is not insolvent.

63. The respondent argues that tendering to pay for finance charges serves to prove that the respondent is able to pay its debts and is thus not insolvent. The respondent has not advanced any evidence to sustain a coclusion that it is not insolvent. It has not even produced its finances or disclosed the state of its finances under oath, especially the cash flow management accounts. The cash flow management accounts would assist the applicant with ascertaining on a prima facie basis whether the respondent is not insolvent. A bald statement that the respondent is not insolvent is not sufficient to ward off liquidation.

64. The onus of proving on a balance of probabilities that the dispute of indebtedness, the defence is bona fide and based on reasonable grounds –
Kalil v Decotex (Pty) Ltd at 980.

65. Having considered the facts, I agree that there appears to be factual disputes between the applicant and the respondent. **Badenhorst v Northern Construction Enterprise (Pty Ltd 1956(2) SA 346 T** at 347 – 348 confirmed by Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A) at 980 B – H. set out guidelines on how factual disputes regarding the respondent's indebtedness in an application such as the present be approached. The test is whether it appeared on the papers that the applicant's claim is disputed by the respondent on reasonable and bona fide grounds. In the present case the respondent is not disputing the debt arising from the rental. It is just disputing the identity of parties to the rental agreement. I am not persuaded that the apparent factual disputes are real and substantial and do find for purposes of the present application that the application is capable of being decided on the papers. It is worth repeating that the dispute must be about the indebtedness.

66. Turning to the question on how the Court should exercise its residual discretion on whether or not to grant the provisional liquidation order: Exercise of the residual discretion in circumstances where the creditor is entitled to liquidation is more about whether the Court should notwithstanding the proof of indebtedness, grant the respondent an indulgence and not order the liquidation. It is trite that a party wishing to be granted the indulgence must earn it. It is incumbent upon the respondent to take the court into its confidence and make sufficient disclosure of its assets, liabilities and cash flow to enable the court to make a proper assessment whether the Court should grant the qualifying creditor the liquidation order or not. The respondent makes a bald statement that it is a going concern which is able to pay its debts when they fall due without placing facts that illustrate on a prima facie basis that the respondent is not commercially insolvent and is able to pay its debts when they fall due. The Court is minded that in its letter of 18 November 2021 to the respondent, the applicant's attorneys stated that the respondent had on numerous occasions promised to make payments to the applicant but had failed to honour its promises. In its reply, the respondent's attorney did not dispute this statement of the respondent's promises to settle.

67. The purpose of provisional liquidation is to protect the creditors and ensure fair distribution in the event of final liquidation. The respondent has not made an

attempt to try to show and assure the Court prima facie that the applicant is commercially solvent.

68. In **Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd (542/16) [2017] ZASCA 24 (24 March 2017)** at Para 13 the Court stated that the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide generally speaking, an unpaid creditor has a right, *ex debito justitiae.* I have not come across evidence or circumstances that suggests that I would not be offending the applicant's right *ex debito justitiae* if I were to refuse its application.

Conclusion

69. The applicant has succeeded to show prima facie that the respondent should be provisionally liquidated; and

70. The respondent has failed to show that it has a reasonable and bona fide defence to avert the liquidation.

COURT ORDER

Having considered the evidence and arguments advanced, my order is as follows:

1. The Respondent is placed under provisional liquidation;

2. All persons who have a legitimate interest, including the Respondent are called upon to put forward reasons and show cause as to why this Court should not order the final liquidation of the Respondent on the 10th day of August 2023 at 10h00, or so soon thereafter as Counsel may be heard;

3. A copy of this Order is to be served on the Respondent, by the Sheriff of the High Court, at the Respondent's registered office;

4. A copy of this Order is to be forthwith published in the Government Gazette;

5. A copy of this Order is to forthwith be forwarded to each known creditor, by prepaid registered post, electronically receipted telefax transmission or electronic mail reflecting a delivery receipt;

6. A copy of this Order must be served on:

6.1. The respondent at its registered address;

6.2. The respondent's employees by affixing a copy of the application and the Order to any notice board to which the employees have access at the respondent's registered address, or if there is no access, by affixing copies to the front gate, failing which, the front door of the registered address premises of the respondent;

6.3. every trade union operating at the Respondent's premises;

6.4. Master of the High Court; and

6.5. the South African Revenue Services.

7. This order is to be published once in a local newspaper in circulation in the area wherein the Respondent's registered address is situated and once in a Government Gazette;

8. Costs are to be costs of the final liquidation application.

M RAMAGAGA AJ

On behalf of Applicant

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On behalf of Respondent

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