THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 2480/2014

In the matter between:

GAP MERCHANT RECYCLING CC **APPLICANT**

and

GOAL REACH TRADING 55 CC **RESPONDENT**

Coram: ROGERS J

Heard: **27 MARCH 2014**

Delivered: **15 APRIL 2014**

JUDGMENT

ROGERS J:

Introduction

[1] This is an opposed application for the provisional liquidation of a close corporation. Mr R Randall appeared for the applicant and Mr T du Preez for the respondent.

[2] The applicant bases its standing on an alleged claim against the respondent of R668 553,42 for goods sold and delivered. The principal question is whether this claim is *bona fide* disputed on reasonable grounds.

[3] I record that on completion of argument on 27 March 2014 I informed counsel that I would give judgment at 11h30 the next day (28 March 2014). I was ready to hand down this judgment by that time. However, on the morning of 28 March 2014 I was notified by counsel that the parties were in discussions and on this basis I was asked to defer judgment. On 14 April 2014 counsel requested that I proceed to deliver judgment.

Factual background

[4] In the latter part of 2011 the applicant began supplying waste plastic material to the respondent for recycling. The applicant would source waste material from various customers and on-sell the material to the respondent. The respondent collected the material either from the applicant's premises or directly from the applicant's customers.

[5] The email correspondence between the parties in 2012 reflects that the respondent sometimes battled to make timeous payment to the applicant. For example, in an email of 14 June 2012 the respondent's Mr Muller told the applicant's Mr Paterson that he did not expect the applicant to act as the respondent's bank and would make payment as his cash flow allowed but was not going to over-extend himself. Muller's email of 9 October 2012 also reflects that the respondent was experiencing cash flow difficulties though Muller attributed this to inconsistent and contaminated material supplied by the applicant.

[6] Paterson said in the applicant's founding papers that during the latter part of 2012 he had become increasingly concerned about the respondent's failure to settle its outstanding debt. Muller provided him with two blank cheques (which were annexed to the founding affidavit) as security but later pleaded with Paterson not to bank the cheques as they would bounce due to an insufficiency of funds.

[7] Initially the respondent did not have any formally approved credit facilities with the applicant. However, on 18 April 2013 the respondent (in the person of Muller) signed a credit application. The credit application consisted of eight parts, of which part 7 comprised the applicant's standard terms and conditions of trade. Part 3 of the credit application stated that the respondent required maximum credit of R300 000 per month with a total credit limit of R600 000. Clause 3 of the standard terms and conditions embodied a standard suretyship to be signed by the shareholder or member if the customer was a company or close corporation. Muller initialled this clause in the space provided for that purpose. He also signed at the end of the document (part 8).

[8] Paterson stated in the founding affidavit that he told Muller during March 2013 that the respondent would have to make a credit application in the prescribed form if the respondent wished the applicant to continue supplying material to it on credit. Paterson said in the replying affidavit that the applicant had become concerned by the increasing indebtedness of the respondent and by emails suggesting that the respondent was commercially insolvent. He said that Muller was initially reluctant to sign the credit application but subsequently did so after a meeting between the two of them in which Paterson made it clear to Muller that the applicant would not supply any further material unless the credit application was submitted and accepted.

[9] The standard terms and conditions, which comprised part 7 of the credit application, included the following:

[a] The purchase price for goods supplied would be due, in the case of an account approved customer, within the credit period specified in the account application or not later than the end of the month in which a tax invoice was issued by the supplier

(clause 34). No different period for payment was specified in the respondent's credit application.

[b] 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' (clauses 37 and 38).

[c] The supplier gave no warranty concerning the suitability of the products for any particular purpose (clause 11). The products were sold 'voetstoots with no warranty against latent defects' (clause 13). The customer agreed to establish, immediately upon delivery, that the products on the delivery note, tax invoice or other documentation correctly represented the products and prices agreed to and were free of defects (clause 24). Any defective product was to be returned to the supplier by the customer at the latter's cost (clause 28). Claims under the agreement would only be valid if the customer, within three days of the alleged breach or defect, gave the supplier 30 days' written notice by prepaid registered post to rectify the defect or breach (clause 29).

[10] The applicant continued to supply material to the respondent until November 2013. The applicant annexed to its founding affidavit an account reconciliation covering the period March to November 2013. This reconciliation reflected that over that period the applicant supplied material to the respondent at a total price (inclusive of VAT) of R2 075 568,87, of which R1 047 015,45 was settled either by payment or by the setting-off of the purchase price of recycled material purchased back by the applicant from the respondent. The shortfall of R668 553,42 is the applicant's claim.

[11] Some of the email correspondence between the parties during this period was annexed to the founding and answering papers. On 25 April 2013 Muller complained to Paterson about the non-supply of material from Blackbird, which was apparently one of the customers from whom the applicant sourced material for the respondent. It appears that Muller was at this stage wanting waste material for the purpose of producing recycled product for sale back to the applicant. He said that unless he received more raw waste material, he would have to sell the recycled

product to another customer. In his reply of the same day, Paterson expressed understanding and agreed that Blackbird was very inconsistent. He assured Muller that he was doing everything he could from his side.

[12] Later that same day Muller wrote to Paterson to say that he had 'a problem with material landing at month end' because the applicant wanted prompt payment but the respondent did not have enough time to recycle and on-sell the material. This seems to have been a reference to the requirement in clause 34 of the standard terms and conditions that the price of goods supplied should be paid by not later than the end of the month in which a tax invoice was issued by the supplier. Muller's complaint was that he could not be expected to generate turnover for purposes of paying the applicant if he had to pay for the material within only a few days of receiving it towards the end of the month. He concluded the email by stating that 'we have to turn the cycle around or cut off on the 25 [sic] of each month as the material I sell after the 25 [sic] is normally only paid the next month'.

[13] On 3 July 2013 Muller wrote to Paterson in response to the applicant's insistence that the then outstanding amount be paid. He said that he was trying his utmost to repay the outstanding amount but that his situation was 'unfortunately not as easy as it seems'. He said that his recycling plant processed on average four tons per day and that if he did not have enough raw material he could not fill his orders and repayment then became difficult. Also, most of his customers were not paying him on time. He said the position would probably only rectify itself in August or September when business picked up again. He also complained that he was getting material too late and had to carry it over to the next month, and 'thus I never catch up'. Another complaint was that the material from some of the applicant's sources was unusable. He concluded:

'As I am a man of my word I also cannot tell the landlord that I am vacating as I made a commitment to him. I also made a commitment towards you and will keep to it, but you have to understand that I am in survival mode at the moment as I do not get enough material that I need to make money off.

I trust you understand my situation.'

[14] As already mentioned, the outstanding balance by the end of November 2013 was, according to the applicant, R668 553,42. The applicant then stopped supplying the respondent. On 6 December 2013 the applicant's attorneys (Marlon Shevelew & Associates – 'MSA') wrote to the respondent concerning the outstanding amount. In this letter MSA gave notice to the respondent in terms of s 68(c) of the Close Corporations Act 69 of 1984 read with s 69(1)(a) that, if the respondent failed to pay the outstanding amount within 21 days of delivery of the letter, the applicant would bring an application for the respondent's winding-up on the grounds that it was deemed to be unable to pay its debts.

[15] On 20 December 2013 and 8 January 2014 the respondent's attorneys wrote without-prejudice letters to MSA. The applicant did not annex the letters to its founding affidavit but quoted extracts. Although no objection was taken in the answering papers, I doubt whether it was permissible for the applicant to place the reliance it did on the two letters in question and I shall thus disregard the quoted extracts.

[16] On 14 January 2014 the respondent's attorneys wrote an open email to MSA, stating that they had consulted with counsel and with their client and that their instructions were the following:

'1. Our client disputes that he is indebted to your client. Our instructions are to request a detailed calculation from your client as to how he came to the amount of R668 553,54, alternatively the balance referred to in your letter dated 6 January 2014.

2. Our instructions are further that your client was paid in advance for certain products which were contaminated and/or and unsuitable for use and our client is in the process of calculating the amount due to him in damages by your client as a result hereof.

3. We confirm our instruction to defend/oppose any application/action brought by your client.'

[17] The present application was launched on 13 February 2014.

The parties' contentions in summary

[18] The applicant's case is that its claim of R668 553,42 is not *bona fide* disputed on reasonable grounds. The applicant, apart from disputing the correctness and *bona fides* of the respondent's complaints regarding the applicant's performance, relies on the provisions of clauses 34, 37 and 38 of the standard terms and conditions forming part of the credit application. The applicant contends, further, that in terms of s 69(1)(c) of the Close Corporations Act the respondent is deemed to be unable to pay its debts; and that on the facts the respondent is in any event commercially insolvent.

[19] The respondent's case is that the claim is indeed *bona fide* disputed on reasonable grounds. The respondent denies that its contract with the applicant is on the terms set out in the credit application dated 18 April 2013: Muller says that the document was blank when he signed it and that the applicant in any event did not accept the credit application. The respondent adds that the applicant is not, to the best of its knowledge, registered as a credit provider in compliance with the National Credit Act 34 of 2005. The respondent, with reference to an email of 27 August 2012, claims that the agreement between the parties was that the applicant would supply the respondent approximately 60 tons of material per month, comprising approximately 45-50 tons of a product described as HD and 10 to 15 tons of a product described as PP. The respondent asserts that it has paid for all the usable material supplied by the applicant (ie that the amount allegedly outstanding relates to contaminated or unusable material for which the respondent is not obliged to pay); and that the respondent has a counter-claim for damages exceeding R1 million because of the applicant's failure to deliver 60 tons of usable material per month. (I phrase the defence in this way, though it is unclear from the answering affidavit to what extent the respondent relies on the fact that the alleged outstanding amount is not owing because of defective performance and to what extent the respondent excuses its non-payment by virtue of the alleged counter-claim.) The respondent also denies that it is commercially insolvent, stating that it 'has a number of contracts in place and is a profitable business and in no way insolvent'.

Claim *bona fide* disputed on reasonable grounds?

The legal test – disputed claims

[20] The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is *bona fide* disputed on reasonable grounds is part of the broader principle that the court's processes should not be abused. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the 'Badenhorst rule', after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348C. A distinction is thus drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage, the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and *bona fide* grounds; a court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (*Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G-I). However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds (*Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218D-219C).

[21] There was some debate before me as to how far a respondent need go in order to discharge the burden of proving that a debt which is *prima facie* due and payable is *bona fide* disputed on reasonable grounds. Both parties referred me to statements made by Thring J in *Hülse-Reutter supra*. It is desirable that I quote fully what the learned judge said at 219F-220C:

'I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claims, and do so *bona fide*, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their

direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their and their company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial. This is not an application for summary judgment in which, in terms of Supreme Court Rule 32(3), a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a *bona fide* defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefor"…. It seems to me to be sufficient for the trustees in the present application, as long as they do so *bona fide*, and I must emphasise again that their *bona fides* are not here disputed, to allege facts which, if approved at a trial, would constitute a good defence to the claims made against the company. Where such facts are not within their personal knowledge, it is enough, in my view, for them to set out in the affidavit the basis on which they make such allegations of fact, provided that they do so not baldly, but with adequate particularity. This being the case, they may, in my judgment, refer to documents and to statements made by other persons without annexing to their affidavits such documents or affidavits deposed to by such persons, subject of course to the qualifications which I have mentioned and, in particular, to the Court being satisfied, as it is in this case, of their *bona fides*.'

[22] As Mr Randall for the applicant emphasised, Thring J made it clear in this passage that *bona fides* was not in issue and that what he was discussing was the test for determining whether a respondent who has *bona fide* disputed the applicant's claim is doing so on reasonable grounds. Even in regard to reasonable grounds, the learned judge warned that it would not suffice to make bald allegations lacking in adequate particularity. His reference to hearsay evidence is not germane to the present case, because such facts as are relevant to the respondent's defence are within the personal knowledge of its deponent Muller.

[23] Mr Randall reminded me that in the present case the applicant did not accept the *bona fides* of the respondent in raising its defence. Both *bona fides* and reasonableness were in issue. With regard to the requirement of *bona fides*, Mr Randall referred me to the judgment of Marais J in *Standard Bank of SA Ltd v El-Naddaf & Another* 1999 (4) SA 779 (W). That case concerned an application for

rescission. One of the requirements for successful rescission was that the defendant had to demonstrate the existence of a *bona fide* defence. Marais J referred to the well-known judgment of Colman J in *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) concerning summary judgment. He pointed out that in *Breitenbach* Colman J held that the requirement of *bona fides* was separate from the requirement that the defendant satisfy the court that he has a defence and separate from the requirement that the defendant 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor'. *Bona fides* has to do with the belief on the part of the litigant as to the truth or falsity of his factual statements; it is a separate element relating to the state of the defendant's mind (*El-Naddaf* at 784G-785B, quoting from *Breitenbach*).

[24] Marais J then quoted (at 785D-F) the passage in *Breitenbach* appearing at 228B-E. In that passage Colman J said, with reference to rule 32(3), that the duty 'fully' to disclose the nature and grounds of the defence was not to be taken literally and that the statement of material facts should simply be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. Importantly, Colman J added the following (and it was this passage in particular which Marais J in *El-Naddaf* highlighted):

'What I should add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of *bona fides*.'

[25] Marais J said that this explanation regarding the requirement of *bona fides* applied with equal force to the requirement in rescission proceedings that the defendant demonstrate a *bona fide* defence, emphasising in particular that *bona fides* cannot be demonstrated by making bald averments lacking in any detail [785H-I).

[26] I see no reason for adopting a different approach when considering, in liquidation proceedings, whether the applicant's claim is *bona fide* disputed on reasonable grounds. *Bona fides* relates to the respondent's subjective state of mind while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless

inter-related because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not *bona fide* in asserting those facts. As *Hülse-Reutter* makes clear, the objective requirement of reasonable grounds for a defence is not met by bald allegations lacking in particularity; and, as appears from *Breitenbach* and *El-Naddaf*, bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is *bona fide*.

[27] The foregoing discussion treats the *Badenhorst* rule as laying down a rigid legal test: if the application is *bona fide* disputed on reasonable grounds, the application must as a rule of law be dismissed. That is far from being settled in our law. In *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (A) Corbett JA, after listing a number of decisions in which the rule in slightly varying formulations had been adopted, said the following (at 980F-I):

'This rule would tend to cut across the general approach to applications for a provisional order for winding-up which I have outlined above as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while at the same time the respondent established that its indebtedness to the applicant was disputed on *bona fide* and reasonable grounds. Whether the *Badenhorst* rule should be accepted then as an exception to the general approach relating specifically to the *locus standi* of the applicant as a creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the winding-up procedure by using it as a means of putting pressure on the company to pay a debt which is *bona fide* disputed (see the English case of *Mann & Another v Goldstein & Another* [1968] 2 All ER 769 at 775C-D) need not, however, be decided in this case. The point was not argued before us and, as I shall show, it seems to me that for various reasons the *Badenhorst* rule should not be applied here.*'*

[28] In *Absa Bank Ltd v Erf 1252 Marine Drive Pty Ltd & Another* [2012] ZAWCHC 43, which was the return day of a provisional liquidation, Binns-Ward J said the following in para 15 (footnote omitted):

'I am hesitant to accept the notion that the *Badenhorst* rule goes to standing. After all, as Corbett JA observed in *Kalil v Decotex supra*, at 980, it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent company in winding-up proceedings, while the respondent at the same time was able to establish that the claim was disputed on *bona fide* and reasonable grounds. The applicant in such a case

would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The *Badenhorst* rule would thus seem to constitute a self-standing (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is *bona fide* disputed. Availment of the procedure in circumstances in which the *Badenhorst* rule applies can be an abuse of process. It is so, however, only when the creditor knew, or should reasonably have foreseen, that the debt was disputed on *bona fide* and reasonable grounds at the time of the institution of the proceedings…'.

The expression of opinion in this passage, to the effect that the *Badenhorst* rule may not go to standing and that it is rather a self-standing and possibly flexible principle, received support by the full bench in *Nedbank Ltd v Zonnekus Mansions (Pty) Ltd* [2013] ZAWCHC 6 para 43. A flexible approach, particularly at the provisional stage, also seems to have found favour with a full bench in Gauteng in *Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC* [2012] ZAGPJHC 211 paras 13-15.

[29] The decisions in *Erf 1252 Marine*, *Zonnekus Mansions* and *Total Auctioneering* were not mentioned in argument. I do not find it necessary, for purposes of the present case, to determine [a] what flexibility there is (if any) in the *Badenhorst* rule; [b] whether it applies only where one can conclude that the launching of the application was an abuse of the liquidation process; and [c] whether, in the latter event, it is necessary for the respondent company to show that at the time the liquidation application was launched the applicant was aware that the indebtedness was *bona fide* disputed on reasonable grounds or whether it suffices for the reasonable and *bona fide* dispute to emerge for the first time in answering papers. I shall assume in favour of the respondent, without deciding, that the application must be dismissed if, on an assessment of all the affidavits, I conclude that the applicant's claim is now disputed *bona fide* on reasonable grounds.

The legal test – disputed counterclaim for damages

[30] I have thus far been considering the case where the petitioning creditor's claim is disputed. Although that is one of the matters which arises in the present case, there is also an allegation by the respondent that it has a substantial claim for damages against the applicant. Counsel appear to have assumed that essentially the same test applied, namely that the court would ordinarily dismiss a liquidation application if the respondent company *bona fide* asserts a counterclaim for damages on reasonable grounds, at least where such counterclaim exceeds the amount of the applicant's claim. That does not appear to be the legal position.

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

[32] Be that as it may, in *Erf 1252 Marine Drive, supra,* Binns-Ward J subjected *Ter Beek* to trenchant criticism. He pointed out that the English cases did not appear to confer the wide discretion assumed by Van Reenen J. The English cases in effect applied our *Badenhorst* rule (which we adopted under the influence of English decisions) by holding that, save in exceptional circumstances, a liquidation application should be refused where the respondent *bona fide* asserts on reasonable grounds a counterclaim for damages equal to or exceeding the applicant's claim. Binns-Ward J considered that there was no reason to adopt this approach in South Africa. He concluded that the *Badenhorst* rule did not apply to an illiquid counterclaim. He held that a respondent is not entitled to have a liquidation application dismissed merely because it *bona fide* asserts on reasonable grounds a counterclaim for damages exceeding the amount of the applicant's claim (para 14):

'In my view reliance by a respondent on a "genuine and serious" unliquidated counterclaim to oppose an application for its liquidation is a quite distinguishable basis for resisting

winding-up from that premised on a *bona fide* and reasonable dispute of an alleged indebtedness to a creditor-applicant. As pointed out by Van Reenen J in *Ter Beek*, reliance by a respondent company on a counterclaim to avert a winding-up order actually entails an admission by it of the alleged indebtedness to the applicant relied upon by the creditor applicant. The allegation of the existence of an unliquidated counterclaim is nothing more than the putting up by the respondent of a basis upon which it is able to ask the court to exercise its discretion against making a winding-up order, notwithstanding that the applicant may have satisfied the technical requirements to achieve the remedy. There is accordingly no basis in our law in such circumstances to treat the application for winding-up as an inappropriate procedure, as a court would, applying the *Badenhorst* rule, in the circumstances of a claim for winding-up by a creditor when the existence of the debt in question is reasonably and *bona fide* disputed. For the same reason there is no reason in our law for a court, as a matter of principle, to adopt a general disposition against the granting of the remedy just because the existence of an unliquidated counterclaim is alleged by the respondent.'

[33] Since counsel did not refer me to and argue the competing merits of the decisions in *Ter Beek* and *Erf 1252 Marine Drive*, I shall assume in favour of the respondent, without deciding, that the application in the present case should be dismissed if I find on an assessment of all the affidavits that the respondent is *bona fide* asserting on reasonable grounds a counterclaim for damages which exceeds the amount of the applicant's claim.

Applying the legal test to the facts of this case

[34] In the present case I consider that the applicant has shown that the debt *prima facie* exists (ie that the balance of probabilities on the papers is in its favour on that point) and that the respondent has not demonstrated that the debt is *bona fide* disputed on reasonable grounds or that it *bona fide* asserts on reasonable grounds a counterclaim exceeding the amount of the applicant's claim.

[35] The first point to address is the contract between the parties. The applicant annexed to its founding affidavit the credit application signed on the respondent's behalf by Muller. Muller did not deny his signature. He nevertheless attempted to escape the terms embodied in the credit application by contending [a] that the credit

application was a blank form when he signed it; [b] that the credit application was never accepted by the applicant; [c] that the applicant was not registered as a credit provider in terms of the National Credit Act.

[36] All three points are manifestly without merit. As to the first, Muller said the following in para 8.2 of his affidavit: ‘At the time I signed “GAP3”, it was not completed and lacked certain critical information. It was expected from me to sign a “blank document”.’ The natural reading of this assertion is that none of the handwriting that appears on the first three pages of the credit application form or on the last page (apart from Muller’s signature) was the writing of Muller or anyone else on behalf of the respondent. Mr du Preez, when he addressed this aspect in oral argument, indicated in response to a question from me that he indeed understood that none of the writing was that of Muller. This appeared somewhat implausible to me, given the nature of some of the handwritten information and also the style of writing and signature on the last page. It seemed to me that it ought to be possible to resolve without difficulty whose writing was on the document. I suggested that during the tea adjournment counsel take instructions from their respective clients’ principals (Paterson and Muller). I also indicated that I might require short affidavits from each of them if there was a dispute on the point.

[37] After the tea adjournment I was informed by Mr du Preez, with Mr Randall’s consent, that upon further enquiry it appeared that all the handwriting on the credit application form was indeed Muller’s. The blank credit application form had been handed to him at a meeting at Paterson’s home. Muller had taken it away with him, filled it out in his own hand, signed it (this was at his business premises in Blackheath) and then returned it to Paterson. Mr Randall confirmed that his instructions were that the writing of the document was certainly not that of Paterson or anyone else on behalf of the applicant.

[38] This turn of events demonstrates why courts are not readily persuaded by bald allegations that a good defence in law exists and that it is advanced in good faith. Muller’s allegation in para 8.2 of his affidavit was sparse. It was possible for him, when he made his affidavit, to identify the handwriting on the document and to say at what point it was inserted on the document. This particular basis for denying

a contract on the terms contained in the credit application form disintegrated as soon as Muller was required to be more specific.

[39] In the light of the fact that Muller filled out the document and then signed it, it is unnecessary to consider what the position would have been if he had signed it in blank and it had then been completed by the applicant.

[40] As to the second point (alleged non-acceptance by the applicant), the respondent did not dispute that it was the applicant which insisted that a credit application be submitted in order for further supplies to be made. The credit application incorporated a suretyship by Muller. The application form did not specify a form of acceptance by the applicant. There was a box at the end of the document marked 'For office use only', which made provision for details regarding the checking of the customer's references, the approval of the account and so forth. In the copy of the document annexed to the founding affidavit, this box was not completed. However, this was a matter of internal administration. Paterson stated in reply that the applicant had most certainly accepted the credit application and that it was only on that basis that the applicant had continued to supply material to the respondent.

[41] There was no correspondence after 18 April 2013 to suggest that the credit application had been rejected or that the standard terms and conditions incorporated therein were not part of the contract between the parties. Muller's emails of 25 April and 3 July 2013 recognise that the current terms required payment by the end of the month in which the relevant invoice was issued. This was the term of credit contained in clause 34 of the standard terms and conditions.

[42] As to the third point (alleged non-registration as a credit provider), the respondent did not attempt to explain in its answering affidavit why the National Credit Act should be held to apply to the credit agreement between the parties and Mr du Preez made no submissions on the point in his heads of argument. The respondent is a juristic person. Muller did not say that its annual turnover was less than the threshold determined in terms of s 7(1)(a) of the Act, namely R1 million. Since the respondent sought a monthly credit facility of R300 000 from the applicant,

and since over the period March to November 2013 the applicant supplied goods to the respondent with a total price of more than R2 million, it is probable that as at April 2013 the respondent's annual turnover exceeded R1 million. In terms of s 4(1)(a)(i) the Act would thus not apply. In any event, the credit agreement between the parties was a 'large agreement' as described in s 9(4)(b) of the Act, because the credit made available thereunder exceeded the amount of R250 000, being the higher of the thresholds established in terms of s 7(1)(b). For this reason also, and in terms of s 4(1)(b), the Act did not apply. (I mention in passing that it has recently been held by the Supreme Court of Appeal that a credit agreement to which, by virtue of provisions such as the aforesaid, the Act does not apply is not rendered invalid because, in respect of other transactions, the credit provider should be registered – see *Paulsen v Slip Knot Investments* [2014] ZASCA paras 4-13.)

[43] Once it is concluded that there is no reasonable and *bona fide* dispute that the contract between the parties incorporated the standard terms and conditions contained in the credit application form, the respondent's assertion that it is not obliged to pay for certain of the material because it was contaminated or unusable is rendered untenable. The respondent does not allege that it gave timeous notice of any breach or defect in the manner required by clause 29 of the standard terms and conditions. On the face of it, the respondent accepted material supplied to it and only afterwards complained about quality when it was pressed for payment.

[44] The respondent has failed, furthermore, to give particulars of the consignments which were 'contaminated' or 'unusable' and the respects in which they were defective or to spell out the quality terms supposedly forming part of the contract between the parties and how those quality terms came to be incorporated into the contract. As Paterson pointed out in reply, the applicant was supplying the respondent with raw waste material for recycling. Part of the respondent's operation was to separate recyclable plastic from extraneous material. Moreover, the respondent does not say in the answering affidavit what was done with the supposedly contaminated or unusable material. The respondent does not allege that it was rejected upon delivery or returned to the applicant.

[45] Moreover, sporadic complaints by Muller about unusable material date back, according to the email correspondence, to at least 9 October 2012. There was another grumble in the email of 3 July 2013. Muller did not allege in either of these emails that the applicant was in breach of contract and did not say that the respondent was not liable to pay any particular invoices or that it would be bringing a claim for damages against the applicant. The first mention of a claim for damages was in the respondent's attorney's letter of 14 January 2014 in response to the statutory demand for payment. If the respondent *bona fide* believed it had a claim for damages, I would have expected this to have surfaced much earlier. As it is, the assertion of a damages claim appears to have been an afterthought to ward off a liquidation application.

[46] The respondent has thus failed to discharge the onus of showing that its contention, to the effect that the alleged outstanding indebtedness represents the price of material for which it was not contractually obliged to pay, is raised *bona fide* and on reasonable grounds.

[47] Regarding the proposed claim for damages arising from the applicant's alleged failure to deliver 60 tons of usable material per month, clauses 37 and 38 of the standard terms and conditions, which the respondent has unsuccessfully sought to evade, stipulate 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 (*LAWSA* 2nd ed Vol 19 para 244(d); Christie & Bradfield *Christie's The Law of Contract in South Africa* 6th ed at 495-6). In such a case, a 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.

[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

applicant's claim. I nevertheless observe that at the time of the filing of the answering affidavit Muller said that the counterclaim was still in the process of being quantified. Furthermore, the counterclaim rests on a contention that the applicant was obliged to supply approximately 60 tons of material per month. The existence of such an obligation was denied by the applicant in reply. Paterson pointed out that the applicant was dependent on third party suppliers and could thus not guarantee any particular quantity. Clause 8 of the standard terms and conditions states that all quotations are 'subject to the availability of input goods or services'.

[49] The email of 27 August 2012 on which the respondent relies for the alleged term was not framed as a contractual provision. In that email Muller confirmed, with reference to an earlier discussion with Paterson, that he needed about 60 tons of material per month, which would be 'ongoing monthly at this stage'. This reads as a factual intimation by the respondent to the applicant of the amount of material it could use and would thus like to receive. I doubt, if the boot were on the other foot, that the respondent would have accepted that by virtue of the email it was obliged to buy 60 tons per month, even if it did not need that much material or could not afford to pay for it. What the email contemplated were monthly orders.

[50] Moreover, one must again question why the alleged damages claim, if it is *bona fide*, first finds expression in the respondent's attorney's response to the statutory letter of demand. The applicant supplied material to the respondent for about 15 months after the date of the email of 27 August 2012. There is no correspondence during that period in which Muller claimed that the applicant was in breach of contract by failing to deliver 60 tons per month. There were complaints about insufficient quantities to run the respondent's plant efficiently but those were not framed as allegations of breach of contract; they were offered rather in explanation for why the respondent was battling to make timeous payment. It is also noteworthy that, even in the respondent's attorney's reply to the statutory demand, the claim for damages appears to have been linked to the delivery of contaminated material; there was no allegation at that stage that the applicant had breached a contractual obligation to deliver 60 tons of material per month. As far as I can see, the assertion of such a contractual term and its breach was first made in the answering papers.

[51] Although the respondent has not explained the precise nature of the alleged damages, one can assume that the claim will essentially be for alleged loss of profit. *Prima facie* such a claim is excluded by clause 69 of the standard terms and conditions, which states that the applicant shall not be liable 'for any consequential damages including loss of profit or for any delictual liability of any nature whatsoever'.

[52] For all these reasons, my conclusion is that the respondent has not shown that the applicant's claim is disputed either *bona fide* or on reasonable grounds or that the respondent is *bona fide* asserting on reasonable grounds a counterclaim for damages.

Inability to pay debts

[53] The rejection of the respondent's assertion that the applicant's claim is *bona fide* disputed on reasonable grounds largely disposes of the question whether the applicant has shown that *prima facie* the respondent is unable to pay its debts within the meaning of s 69 of the Close Corporations Act. The respondent does not, as I read the answering papers, allege that it could forthwith pay the amount of R668 553,42 if it is indeed due and payable. The statement in the answering affidavit that the respondent is commercially solvent and that it has a number of contracts in place and is a profitable business is not, without more, sufficient to rebut the *prima facie* inference from the respondent's failure to pay a claim which has not been shown to be *bona fide* disputed on reasonable grounds (see *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597G-598C; cf *De Villiers NO v Maursen Properties Pty Ltd* 1983 (4) SA 670 (T) at 677E-F). Muller has provided no details of the respondent's available liquid resources. He has not annexed the respondent's most recent financial statements. The correspondence to which I have referred indicates that the respondent has often battled to meet its cash flow requirements. *Prima facie*, therefore, the respondent is unable to pay its debts as they fall due, and this is the test for commercial insolvency (see *Absa Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA 436 (C) at 440F-J). The applicant has thus established on a *prima facie* basis the ground of liquidation stated in s 69(1)(c) of the Close Corporations Act.

[54] In addition, the applicant is armed with the presumption of an inability to pay debts which arises by virtue of s 69(1)(a). Although s 69 refers back to s 68(c) of the Act, a provision repealed with effect from 1 May 2011 by Schedule 3 of the Companies Act 71 of 2008, it has been held in this court that the cross-reference in s 69 to s 68(c) should now be read as a reference to the provisions of s 344(f) of the Companies Act 61 of 1973. This is so because s 344(f) is one of the provisions of the old Companies Act which, by virtue of item 9 of Schedule 5 of the new Companies Act, remains applicable to companies and which, by virtue of the amended s 66 of the Close Corporations Act, also applies in the liquidation of close corporations (*Absa Bank Ltd v Samsui Empire Park 1 CC* [2013] ZAWCHC 187 paras 22-29 and authorities there mentioned).

Discretion

[55] I have a residual discretion to refuse a provisional liquidation order but see no grounds for exercising that discretion in favour of the respondent.

Order

[56] Mr Randall submitted that because the respondent received notice of the application and has had sufficient opportunity, in accordance with an agreed timetable, to place its opposition before the court, there is no reason not to grant an immediate order of final liquidation. He referred me to *Ex parte Beach Amanzimtoti Hotel (Pty) Ltd* 1988 (3) SA 435 (W) as authority for the proposition that a provisional winding-up is not indispensable to the granting of a final winding-up order.

[57] It is so that the relevant provisions of the Close Corporations Act as read with the provisions of Chapter XIV of the Companies Act 61 of 1973 do not, as in the case of sequestrations, insist on or even expressly mention the grant of provisional liquidation orders. It has nevertheless been the common practice, at least in this division, for provisional orders to be granted as a precursor to final liquidation, even where applications are opposed at the provisional stage. Although I do not doubt that a court in an appropriate case may dispense with a provisional order, the

circumstances bearing on the court's discretion in that respect have changed since Flemming J gave his judgment in *Beach Hotel supra*. The lawmaker has inserted provisions requiring notice of liquidation applications to, and service of liquidation orders upon, employees, trade unions and the South African Revenue Service (see ss 346(4A) and 346A of the 1973 Companies Act) . Creditors also have an interest in the matter. It is the usual practice to require provisional orders to be published in suitable newspapers so that creditors and other interested parties, who would not have received notice of the application, may be heard on the return day. The remedy of business rescue introduced by the Companies Act 71 of 2008 adds a further dimension. Those provisions recognise that shareholders, creditors, trade unions and employees all have an interest in the fate of a financially distressed company, and the lawmaker has, by way of the new remedy, sought to place a higher premium on attempts to rescue ailing companies (see, further, Meskin *Henochsberg on the Companies Act* at 725-6).

[58] In the present case the applicant's notice of motion sought a provisional order, not a final order. There has not been notice of the application to creditors; instead, the notice of motion provides for such notice by way of publication of a provisional order in the usual newspapers. The application was, as between the applicant and the respondent, conducted on an expedited timetable. As far as I can tell from the affidavits, the respondent is still in operation and probably still has employees. Apart from the fact that other sources of opposition may emerge from the publication of a rule nisi, the respondent itself, given more time, might (by way of further papers) be able to persuade a court, contrary to the view I have reached, that it does *bona fide* dispute the applicant's claim on reasonable grounds. In the circumstances, I am not persuaded that I should depart from the usual practice of granting a provisional order. Indeed that is the basis on which I have, in my earlier reasoning, assessed the merits of the application.

[59] I thus make the following order:

[a] The respondent is placed in provisional liquidation in the hands of the Master of this court.

[b] A rule nisi is issued calling upon the respondent and all persons concerned to appear and show cause, if any, on Monday 19 May 2014, why:

(i) the respondent should not be placed in final liquidation;

(ii) the costs of this application should not be costs in the liquidation.

[c] Service of this order shall be effected as follows:

(i) by the sheriff of this court, or by his lawfully appointed deputy, on the respondent at its registered address;

(ii) by the sheriff of this court, or by his lawfully appointed deputy, on the employees of the respondent;

(iii) by the sheriff of this court, or by his lawfully appointed deputy, on the trade unions of the respondent's employees;

(iv) on the South African Revenue Service; and

(v) by publication in one edition of *The Cape Times* and *Die Burger* newspapers.

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ROGERS J

APPEARANCES

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