IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 17/06/2022

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A Maier-Frawley

CASE NO: 2021/42791

In the matter between:

MARSHALL RESTAURANT (PTY) LTD Plaintiff

and

F C MAPUNGUBWE (PTY) LTD Defendant

J U D G M E N T

MAIER-FRAWLEY J:

1. This is an application for the winding-up of the respondent on the basis that it is unable to pay its debts as envisaged in section 344(f) read with section 345(1)(c), alternatively, section 345(1)(a) of the Companies Act 61 of 1973 ('the Act'), further alternatively, on the basis that it is just and equitable for the respondent to be wound up as envisaged in section 344(h) of the Act. The applicant seeks a final order in this regard.

2. The respondent broadly opposes the application on the basis that the applicant is abusing the winding-up proceedings in order to enforce a disputed debt. It disputes that the amount claimed is the amount which is owing to the applicant or that any amount that may be found to be owed is yet due for payment.

3. The deponent to the answering affidavit is the managing director of Premier Hotels and Resorts (Pty) Ltd ('the Premier Hotel Group') and a director of the respondent, FC Mapungubwe (Pty) Ltd, the latter being a subsidiary of the Premier Group. He is also the sole director of a company known as Faircity Hotels (Pty) Ltd, the sole shareholder of the respondent.

Background Factual Matrix

4. The following facts are either common cause or undisputed or unrefuted on the papers.

5. The applicant conducts the business of a restaurant under the name and style of 'The Marshall Restaurant' at premises forming part of the Mapungubwe sectional title scheme 124/2007, situated at the corner of Ferreira and Marshall Streets, Marshalltown, Johannesburg, Gauteng.

6. Until end June 2021, the Respondent conducted the business of a hotel under name and style of 'The Premier Hotel Mapungubwe' ('the hotel') from premises forming part of the aforementioned sectional title scheme.

7. The hotel was established a number of years ago by a company known as Faircity Mapungubwe (Pty) Ltd ('Faircity') which was part of the Faircity Hotels Group. At that stage, the hotel was known as 'Faircity Mpungubwe'.

8. The Applicant, who owns the restaurant in the same building as the hotel, had an agreement with Faircity in terms of which guests of the hotel could

dine at the restaurant and book their restaurant bills to their rooms in the hotel, in other words, guests' restaurant bills would be added to their final hotel bills.

9. In respect of bookings made a "bed & breakfast" or "dinner, bed & breakfast" basis, guests enjoyed their breakfasts and/or dinners at the restaurant, with a fixed amount being charged to Faircity for the said breakfasts and dinners.

10. The Applicant invoiced Faircity at the end of each month for food and beverages consumed by hotel guests in the aforesaid manner. There was no contractual nexus between the applicant and guests of the hotel. The said food and beverages were sold and invoiced to Faircity, who in turn invoiced the hotel guests.

11. During July 2018, the business of the hotel was transferred as a going concern from Faircity to the Respondent, which is part of the Premier Hotels Group. Faircity was deregistered following thereupon. From that time onwards, the Respondent operated the hotel under the name and style of 'The Premier Hotel Mapungubwe'.

12. When the business of the hotel was transferred, the agreement that was in place between the applicant and Faircity was on the applicant's version tacitly relocated to the respondent and continued to be implemented and given effect to by the respondent in the same manner as had previously been the case.[1] Guests of the hotel continued to dine at the restaurant and to book their restaurant bills to their rooms in the hotel, which were added to their final hotel bills issued by the respondent to such guests. The Applicant's invoices were forwarded to the Respondent, who received same,

[1] Although the respondent denies that a tacit relocation occurred, it does not dispute that it became bound to implement the self-same agreement on the same basis as had previously been in place and implemented between the applicant and Faircity.

acknowledged same, and made payment in respect of same on a monthly basis, albeit that the Respondent accrued an outstanding balance on its account with the applicant from time to time.

13. The agreement with the Respondent also provided for vouchers or meals that were provided to members of tour groups and for the provision of catering services for conferences that were hosted at the hotel. The agreement with the Respondent in respect thereof was as follows. Visits to the hotel by tour groups were usually arranged by travel agents, who earned commission of up to 15% for the total spend of each guest. In respect of such tour group guests, the applicant invoiced the respondent for the full amount due to it for the food and beverages consumed by such guests, and the respondent, in turn, invoiced the applicant for the relevant percentage commission due by it to the travel agent or booking site. The Respondent's commission invoices were then, in the ordinary course of business, set-off against the applicant's invoices on a monthly basis.

14. Conferences that were hosted at the hotel on a regular basis were usually organised by professional congress organisers (PCO's), who were billed at fixed fees by the Respondent for each conference. These fees included a fee 'per head' for food and beverages consumed by each attendee. The Respondent sub-contracted this to the Applicant, and billed the relevant PCO, who became entitled to commission, which was deducted from the final payment for the specific conference. These commissions were then clawed back from the Applicant, also by way of commission invoices, which were also, in the ordinary course of business, set against the Applicant's invoices on a monthly basis.

15. The applicant avers that as at 30 June 2021, an amount of R1,510 762.27 was due, owing and payable by the respondent to it in respect of the provision of

food and beverages consumed by guests dining at the hotel. The said amount is supported by entries appearing in the respondent's own supplier detailed ledger,[2] for the period 1 January 2021 to 30 June 2021. Commissions that fell to be deducted from that amount totalled R360,372.12, leaving an outstanding balance of R1,149 918,03 due on the respondent's account. The amount of deductible commissions is supported by entries appearing in the respondent's own customer detailed ledger.[3] The ledgers were furnished to the applicant by the respondent.[4]

16. At the end of June 2021, the hotel closed its doors and the business of the respondent ceased to exist. The cessation of the respondent's business was preceded by a letter dated 23 June 2021, headed 'creditor notification' which was sent to the creditors of the respondent, including the applicant, in which creditors were notified that the Premier Hotel Group would, effective midnight 30 June 2021, 'no longer be associated with the day-to-day operations of managing and marketing' the hotel.[5] The notification made no mention of how and when creditors of the respondent would be paid.

17. On 20 July 2021, an email[6] was sent to the applicant by Mr Werner Van Deventer ('Van Deventer') who referred to himself therein as the General Manager of 'Premier Hotels & Resorts', advising, *inter alia*, as follows: "*See attached breakdown[7] of <u>what we owe Marshall</u> and what you owe us, based on <u>our</u> suppliers and customer age… Mr Nassimov has requested a list of things including this breakdown before they* (sic) *will start making payment to creditors…*" (emphasis added). The breakdown reflects an amount of R639,338.15 as the

[2] Annexure 'WB5' to the founding affidavit.
[3] Annexure 'WB 6' to the founding affidavit.
[4] Although the ledgers refer to Faircity, it is not disputed that they reflect the respondent's indebtedness and emanated from the respondent's own bookkeeping system, reflecting the amount of the respondent's indebtedness as opposed to that of Faircity, which entity had been deregistered a few years prior.
[5] a copy of the relevant creditor notification is contained in Annexure 'WB9' to the founding affidavit.
[6] Annexure 'WB7' to the founding affidavit.
[7] A copy of the relevant breakdown is contained in Annexure 'WB8" to the founding affidavit.

total amount owed to the applicant after deducting from the applicant's claim of R1,150 762.27, per 'Marshall Customer Age', the following: (i) an amount of R360,672.12 being in respect of commissions per 'Marshall Supplier Age' that fell to be set-off against the applicant's claim; (ii) an amount of R175,627.00 in respect of 'F & B Bad Debt'; and (ii) an amount of R335,125.00 in respect of 'Marshall debtors'.

18. As no payment in any amount was received from the respondent, the applicant caused a statutory demand[8] to be served on the respondent on 16 August 2921 in terms of s 345 of the Companies Act, in which it called on the respondent to pay its indebtedness to the applicant within 21 days of receipt of the demand. Despite the lapse of 21 days, no payment was forthcoming or secured to the reasonable satisfaction of the applicant.

Applicable legal Position

19. Section 344 of the Companies Act provides for instances in which a company can be wound up. Section 344 is the source of authority that vests a court with the power to liquidate a company.[9] Subsection 344(f) provides that a company may be wound up by the Court if it is unable to pay its debts as described in Section 345, which in turn provides, in relevant part, that:

> "345. **When company deemed unable to pay its debts**.–(1) A company or body corporate shall be deemed to be unable to pay its debts if–
>
> (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due–
>
> (i) has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or

[8] See Notice in terms of s 345(a) of the Companies Act, annexure "WB10" to the founding affidavit.
[9] See *Ex Parte Muller NO: In Re P L Myburgh (EDMS) Bpk* 1979 (2) SA 339 (N) at 340. The relevant part of s 344 provides as follows: 'The court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just . . .'

(b) It is proved to the satisfaction of the Court that the company is unable to pay its debts."…

20. In *Imobrite*,[10] the Supreme Court of Appeal summarised the principles to be applied in cases where a debt is disputed, as follows:

"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debts. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.

A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation.[11] It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights[12]. " (footnotes included)

21. In considering the court's discretionary power in the context of winding-up applications, the court in *Imobrite* referred to established case law, summarising the legal position thus:[13]

"In Afgri Operations Limited v Hamba Fleet (Pty) Ltd, this Court reaffirmed that an unpaid creditor has a right, ex debito justitiae, to a winding-up order against a company that has not discharged its debt. Notably, it also reaffirmed the trite principle that the refusal of a winding-up order under such circumstances entails the exercise of a narrow discretion. The following observations in Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited appositely illustrate that the mere fact that there may be more value than the claim is not, without more, sufficient to sway a court towards exercising the discretion in favour of a debtor:

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[10] *Imobrite (Pty) Ltd v DTL Boerdery CC* (1007/20) [2022] ZASCA 67 (May 2022), paras 14 & 15.
[11] *See Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)*. That principle has *been so entrenched in our law that it has* become known as 'the Badenhorst rule'.
[12] Henochsberg on the Companies Act Issue 23 at 694.
[13] Id *Imbobrite*, paras 20 & 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 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.'
>
> In summing up, it bears emphasising that the exercise of discretion in favour of not granting a liquidation order must be based on a solid factual foundation…" (Footnotes omitted).

22. In *Standard Bank of South Africa Ltd v R-Bay Logistics CC*,[14] the following was said:

> "There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, <u>if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved</u>. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f)." (emphasis added)

23. In *Lampbrecht*,[15] the Supreme Court of Appeal held:

> "I have already found that the agreement [that] was made an order of court by Kruger AJ was valid. This leads me to find that the respondent conceded that the appellant had locus

[14] *Standard Bank of South Africa Ltd v R-Bay Logistics CC* (2013 (2) SA 295 (KZD), para 27.
[15] *Lamprecht v Klipeiland (Pty) Ltd* [2014] 4 All SA 279 (SCA), para 16.

standi, that he was a creditor for a sum no less than R100 and further that it was due and payable. There is no dispute that although the section 345(1)(a) demand was served on the respondent, it has not paid any amount nor secured or compounded any amount to the reasonable satisfaction of the appellant. To my mind, the jurisdictional requirements set out in section 345(1)(a) have been met. As stated by Malan J (as he then was) in Body Corporate of Fish Eagle v Group Twelve Investments 2003 (5) SA 414 (W) at 428B-C:

> 'The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beek's case supra at 331F). If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.' "

24. Section 346(1)(b) of the Companies Act confers *locus standi* on all creditors of a company. A debt of R100 is sufficient. If a creditor establishes a case for liquidation, where a portion of the amount of the debt is disputed by the debtor or that the precise amount of the debt is uncertain, such a dispute will not constitute a defence.[16] *Locus Standi* will only be deemed to be absent where the existence of the whole of the debt is *bona fide* disputed on reasonable grounds.[17] Where *prima facie* the indebtedness exists, the onus is on the respondent to show that it is *bona fide* disputed on reasonable grounds.[18]

Discussion

25. The respondent does not dispute the manner in which the alleged debt claimed by the applicant arose, nor does it dispute being in default of payment of the amount claimed from it by the applicant pursuant to service of the statutory demand. Stated differently, it is not the existence of the

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[16] See: *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 (2) SA 856 (W) at 861.
[17] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1952 (2) SA 346 (T) at 347-348.
[18] See: *Meyer NO v Bree Holdings (Pty) Ltd* 1972 (3) SA 353 (T) at 354D-355B; *Hulse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C); *Porterstraat 69 Eindomme (Pty) ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C)

debt, or the liability, that is disputed, rather it is whether the debt is due or payable, and the amount thereof, which is in dispute.[19]

26. The application is resisted on the basis that (i) there is still a further accounting to be done for purpose of reconciling the final amount owing to the applicant; and (ii) even if an amount is found to be owing by it to the applicant, no amount is yet due or payable, having regard to the terms of a written management agreement which the respondent 'inherited' from its predecessor and further having regard to an oral agreement concluded between the deponent to the answering affidavit and two directors of the applicant within a month or two of the respondent taking over management of the hotel.

27. As regards the first defence (relating to the amount that is due and owing to the applicant) the respondent relies on the email from Van Deventer referred to earlier in the judgment.[20] In this email, he refers to the amount the respondent contends is owed to the applicant (R639,338.15) based on a reconciliation performed (by using the respondent's own accounting records) of what was owing by the respondent to the applicant after deductions (including an amount for 'bad debts') were made from the applicant's claim and which was reflected in the breakdown[21] attached to that email. The email reads:

"See attached breakdown of what we owe Marshall and what you owe us based on our suppliers and customer age. With regards to our meeting yesterday Mr Nassimov has requested a list of things including this breakdown before they will start melting any payments to creditors, I was also looking at May conference charges and something Isn't adding up if you look at the amounts that were closed off to debtors for conferencing May and what your statement is showing. I know the breakdown from Lulama is tied back to our PMS system but there was also a payment made directly to Marshall's bank account

[19] See para 26 of the answering affidavit at 004-11 read with para 3.1 of the supplementary answering affidavit at 017.10.
[20] See para 17 above.
[21] The breakdown appears at 001-43 of the papers.

and I'm not sure if It is reflected in the statement. I only got access to our PMS system again this afternoon and will give feedback on this ASAP..” (emphasis added)

28. Given Van Deventer’s remarks about ‘something not adding up’ vis-a vis May conference charges and a payment by the respondent that appeared not to be reflected in the applicant’s statement, the respondent avers that ‘These issues between the parties, and others relating to bad debt allocations, have yet to be resolved and it is only once they have been resolved that it can finally be determined whether or not any amount is owed to the Applicant.’[22]

29. Despite delivery of the answering affidavit in September 2021 - some two months after the email was sent in July 2021 - the respondent has put up no facts to contradict its own records or breakdown. No affidavit from Van Deventer was provided to shed light on the contents of his email – after all, he should have known what amounts pertaining to May conference charges were not ‘adding up’ or were disputed and which specific payment from the respondent was not reflected in the applicant’s statement. Information relating to payments made by the respondent to the applicant would have been easily ascertainable from its own bank records. Provision was already made in the breakdown for bad debts allocations, in respect of which an amount of RR175,627.00 was deducted from the applicant’s claim, yet the respondent seeks to rely on *‘issues’* relating to bad debt allocations without explaining what such issues are. No factual basis was either laid in the answering affidavit for an argument that any issues that still had to be resolved would probably result in nothing being owed to the applicant or that further specific deductions to be made would result in the extinguishing of the debt. I am therefore inclined to agree with counsel for the applicant that the mere allegation that there were still certain ‘issues’ to be resolved, is vague and unsubstantiated to the extent that it is meaningless. In my view, the respondent has failed to discharge the onus that the debt claimed to be

[22] See paras 49-50 of the answering affidavit.

due, owing and payable to the applicant *bona fide* disputed, on reasonable grounds. On the totality of the evidence, including that which is reflected in the respondent's own accounting records, it is irrefutable that the applicant is indeed a creditor of respondent in respect of a debt of more than R100.00.[23] As the authorities above indicate, the precise amount owing is not relevant in the context of a liquidation application.

30. As regards the second defence (relating to whether or not payment is due to the applicant) the respondent alleges that payment to the applicant was wholly dependent on the unit owners making the necessary funds available to the respondent. In this regard, the respondent relies on the terms of a management agreement pursuant to its taking over the management of the hotel. The said management agreement was concluded between the Steering Committee of Mapungube Luxury Apartments (representing the owners of the hotel apartments) and a company by the name of 'Faircity Hotels and Apartments (Pty) Ltd'. The respondent was not a party to this agreement.[24] The answering affidavit does not set out any factual or legal basis upon which the respondent can be said to have obtained any rights flowing from such agreement.[25] Absent from the answering affidavit is any allegation to the effect that that there was a cession of rights from Faircity Hotels and Apartments (Pty) Ltd to the respondent, coupled with a delegation of the obligations of the former to the latter. Aside from a vague allegation that the agreement was 'inherited' by it pursuant to the sale of the business from Faircity to the Premier Hotel Group (assuming the correctness of such allegation for purposes of argument) no primary facts were disclosed

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[23] See, for example, the respondent's own Supplier Age analysis at 001-100 where an amount of R1,182 063.30 is reflected as owing to the applicant; Respondent's breakdown reflects that "***Total owed to Marshall including conference debtors'*** is an amount of R639,338.15.

[24] The applicant was also not a party to the management agreement.

[25] Reliance was placed by the respondent on rights provided for in the agreement in clauses 4.7, 4.8, 4.22, 5.2, 5.5 and 6.1. Specifically, it relied on the terms of the management agreement for its contention that the owners of the hotel apartments remained responsible for the payment of all debts of the hotel, including any historical debt.

by the respondent as to what the alleged 'inheritance' entailed, how it occurred - whether in writing or orally, or the basis on which it holds legal value. No substantiating evidence whatsoever was provided in support of the allegation. No confirmatory affidavits were either provided by the parties to the management agreement or the owners of the hotel apartments. But perhaps most significantly, even if I were to accept that the respondent considered itself bound to the management agreement, it failed to point out any clause in the said agreement that made payment of liabilities incurred by the respondent in its own name contingent upon its receipt of funds from the owners. In the circumstances, the respondent's reliance on the management agreement is misplaced and does not support its alleged defence that payment of its debt to the applicant is not due for payment.

31. But even if reliance could be placed on the terms of the management agreement, which is doubtful, its provisions still do not assist the respondent. It was conceded by counsel for the respondent during oral argument presented at the hearing of the matter that the management agreement did *not* make payment to the applicant of its restaurant charges contingent on the owners (represented by a steering committee) making payment to the respondent of any indebtedness incurred by it to the applicant in respect of restaurant charges billed to hotel guests. The concession was correctly made, in my view. The undisputed facts illustrate that guests were charged by the respondent for meals and beverages provided by the applicant, which charges were added to the guests' hotel bills (invoiced by the respondent) with payment thereof recovered by the respondent from the guests. Amounts comprising restaurant charges would then be payable to the applicant (subject to deduction of commissions due, which were to be set - off against the applicant's bill). This begs the question: why would the indebtedness so incurred, which was owing and became payable to the applicant under the parties' aforesaid agreement, then need to be recovered

from the owners of the premises? I cannot therefore conclude that such dispute was *bona fide* raised in the papers on reasonable grounds.

32. The respondent also relies on an oral agreement concluded between the applicant, represented by two of its directors and the respondent, represented by the deponent to the answering affidavit, Mr Nassimov. The respondent's version in this regard, is as follows:

> "…issues discussed at the meeting included …a substantial amount owed to Marshall Restaurant (Pty) Ltd in respect of past debts that had arisen whilst the Mapungubwe Hotel was being managed by the Faircity Group.
> At the meeting, I explained to Basson, amongst other things and his fellow director that:
> Currently, however, Premier Hotel Group had, through its acquisition of the shareholding in Faircity Hotels, "inherited" a contractual arrangement that was in place between the Respondent and the owners of the units, in terms of which the Respondent was simply paid a management fee and the owners remained responsible for the payment of all debts of the hotel, including the historical debt…; and
> Any amounts due by F C Mapungubwe (Pty) Ltd to the Applicant, whether presently owed or future debts, could only be paid should the owners of the hotel premises make the necessary funds available to F C Mapungubwe (Pty) Ltd in order for it to pay the Applicant. Payment to the Applicant was dependent on the owners of the Units making the necessary funds available.
> Basson and his co-director accepted the above arrangement…"[26] (emphasis added)

33. The applicant disputes that it agreed to any such 'arrangement' whereby payment of the respondent's debt would be postponed indefinitely or that payment thereof would be subject to the whims of third parties (unit owners) with whom the applicant enjoyed no contractual relationship, and avers that any agreement to such effect would have amounted to

[26] Paras 23 to 25 of the answering affidavit at 004-10 to 004-11. In so far as counsel for the respondent sought to argue at the hearing of the matter that the alleged agreement related only to the historic debt inherited from Faircity by the respondent, such argument is in stark contradistinction to the respondent's own evidence and is thus unsustainable. Had the agreement related to only the historic debt, the amount thereof would likely have been ring-fenced for resolution, which did not occur.

commercial suicide. Indeed, the deponent to the founding and replying affidavits states that the applicant always held the view that the management agreement did not make payment to creditors such as the applicant contingent to owners of hotel apartments making funds available to the respondent. The respondent's debts became due, owing and payable in the normal course of business. The Respondent rendered invoices, in its own name, and appropriated the income of the hotel, in its own name (albeit on the understanding that it would eventually have to account for the nett profits of the hotel business to the unit owners). Thus, even if the respondent deems itself bound to the management agreement concluded between unit owners and another entity, the payment of profits or funding of shortfalls was a matter that would only have arisen between the said owners and the respondent, and could not have affected the respondent's liability to make payment of debts incurred by it towards the applicant in the normal course of its business.

34. The unrefuted evidence put up in reply regarding the ongoing manner in which the respondent conducted business with the applicant, is the following: the respondent already had an open credit account with the applicant. Such account had a running balance prior to Mr Nassimov being appointed as a director of the respondent. After his appointment as director, the respondent's credit account remained open. The respondent continued to incur debts on a monthly basis, in the same manner that it did before Mr Nassimov's involvement. The respondent made payment of debts owed by it to the applicant, on a monthly basis, in the same manner that it did before, with the "running balance" fluctuating from month to month. The respondent's own accounting records[27] appear to support these averments. In short, the Applicant continued to invoice the Respondent on a monthly basis, and the Respondent continued to pay the Applicant on a monthly

[27] Annexure's 'WB5', 'WB6' and 'WB7' to the founding affidavit.

basis, in circumstances where the running balance of the credit account fluctuated from month to month and ended up with an outstanding balance in excess of R1.1 million.

35. Aside from the fact that the version, namely, that payment would only be made to the Applicant 'when the owners of the Mapungubwe hotel premises made funds available' to the respondent is, from a commercial perspective, both far-fetched and untenable,[28] such that it is incapable of engendering a genuine dispute, and, given the conclusion to which I have arrived in paragraph 31 above, such dispute cannot be said to have been raised (or pursued) on reasonable grounds.

36. Insofar as the respondent suggests that the debt was incorrectly calculated because a further accounting needs to be done to take account of further deductions that may have to be made in respect of either May conference charges, or (unexplained) 'bad debts' or some or other payment by the respondent, the point is this: Despite remaining in default beyond the 21-day period stipulated in the statutory demand, the respondent failed to tender to pay what is considered to be the correct amount, nor did it make any suggestions regarding how to discharge its indebtedness, despite Van Deventer's undertaking to revert 'asap'. Under these circumstances, there can be no merit in the suggestion that the appellant is attempting to enforce payment of a debt which is bona fide disputed. That being the case, it cannot be accepted that the appellant's application is predicated on any reason

[28] The version suggests that any businessperson would accept an arrangement whereby presently owed or future debts do not have to be paid until the happening of an event which lies outside the control of the creditor or which may never eventuate, with payment possibly delayed indefinitely or resulting in a situation where payment would not have to be made at all - in the sense that payment of the debt became dependent on a condition which reserved an unlimited option to the respondent (and unit owners) not to make payment at all. The version is in any event contradicted by Van Deventer's email (at 001-42) discussed above. Van Deventer did not disavow liability for payment of the debt. His email suggests rather that the parties resolve the amount that is payable before Mr Nassimov would consider making payment to the applicant. He did *not* say that the respondent does not have to pay anything because the owners of the premises have not placed the respondent in funds. The existence of the respondent's obligation to make payment of the debt is irrefutable on the papers.

other than the bona fide bringing of winding-up proceedings. Thus, the respondent has not shown that the winding-up proceedings constitute an abuse of the court's process.

Respondent's inability to pay its debts in the normal course of business

37. By the time the application was launched, the hotel had closed its doors and had ceased to conduct business. Its object was to operate and manage the hotel. The closure of the hotel resulted in the demise of its only business. The respondent appears to have several creditors, including the applicant,[29] and in terms of its own records, its liabilities in aggregate total millions of Rands. There is no indication in the papers that the respondent has any assets or source of income. No financial records have been disclosed by the respondent to show that it is able to pay its debts as and when they fall due from income or readily available resources and no facts have been presented in its answering affidavit to support an allegation that it is able to pay the debt owing to the applicant.

38. Be that as it may, the applicant also relies on deemed inability on the part of the respondent to pay its debts timeously.[30] Courts have held that a respondent's failure to effect payment of a debt is presumptive of its insolvency,[31] for if it is established that the company is unable to pay its

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[29] See list of creditors at 001-100 to 001-101; respondent's own breakdown at 001-43; and para 77 of the answering affidavit at 004-20, where the respondent seeks to side-step the issue as to how it intends to pay its creditors.

[30] In terms of s 345(1)(a) of the Companies Act, a company shall be deemed to be unable to pay its debts if it has for three weeks subsequent to a demand having been served on it neglected to pay the sum of its indebtedness.

[31] See *De Waard v Andrew and Thienhaus Ltd* 1907 TS 727 at 733, where Innes CJ said the following: "…*I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says: 'I am sorry that I cannot pay my creditor but my assets far exceed my liabilities.' In my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes."*

See too: *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597 C-H where the court confirmed that if a company has failed on demand to pay a debt, payment of which is due, this is cogent *prima facie* proof of the company's inability to pay its debts *'for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources."*

debts in the sense that it is unable to meet current demands upon it or its day-to-day liabilities in the ordinary course of its business, it is in a state of commercial insolvency.[32]

39. Faced with this indubitable state of affairs on the papers, the respondent then sought leave to file a supplementary affidavit in which it indicated that a shareholder of the respondent (Faircity hotels (Pty) Ltd)[33] had elected to make sufficient funds available to secure the 'alleged indebtedness' for the benefit of the applicant in terms of an annexed resolution of the board of directors of Faircity Hotel.[34] The respondent attached proof of payment of an amount of R1,148 418.03 by Faircity Hotels into the trust account of Van Der Merwe & Sorour Attorneys in its application. Respondent alleged that 'Sorour has been authorised and instructed to invest the funds in a separate interest-bearing trust account held at Standard Bank in terms of Section 88(4) of the Legal Practice Act, with such interest to be retained pending final determination of the contemplated action**....** In ... the circumstances, the ability of the respondent to pay the applicant's disputed debt, if proven, is no longer in issue and neither is the ability of the Respondent to pay its debts in the ordinary course of business...'

40. The resolution of the 'board of directors' of Faircity Hotel on 25 February 2022, which was in effect a decision of Mr Nassimov in his capacity as sole director of Faircity Hotel, records that Faircity Hotel shall loan the respondent an amount equal to the disputed claim and that payment of the amount of R1,148 418.03 shall be effected directly into the trust account of

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[32] Id *Rosenbach*.

[33] Acording to the deponent to the answering affidavit, who also deposed to the supplementary affidavit, Faircity Hotels (Pty) Ltd (*Faircity Hotels),* is the sole shareholder of the respondent, holding 100% of its issued shares. As indicated earlier in the judgment, Mr Nassimov is the sole director of Faircity Hotels.

[34] Mr Nassimov states that '*Recently, the Board of Directors of Faircity Hotels decided that Faircity Hotels will pay an amount equal to the disputed claim of the applicant (R1 148418.03) into the Trust account of an independent firm of attomeys, to be retained as security for,payment of the applicant's claim should the applicant prove its claim in action proceedings to be instituted against the respondent***."**

an independent firm of attorneys which shall be retained as security for payment of the disputed claim.

41. Although the applicant resisted the interlocutory application, *inter alia*, on grounds that the founding affidavit did not comply with the regulations promulgated in terms of the Justices of the Peace and Commissioner of Oaths Act, 16 of 1963, the position was regularised in the replying affidavit. Higher courts have consistently held that regulations made pursuant to the Act are directory only,[35] and it is well established by now that a court has a discretion as to how it deals with the matter.[36]

42. I do not intend to deal with the application for leave to file a supplementary affidavit in detail, save to state that it is trite that the Court has a discretion to permit the filing of further affidavits, not least of all in circumstances where the respondent seeks to address new allegations made in the replying affidavit, which call for a response, as was the case in *casu*. I have decided to exercise my discretion in favour of allowing the supplementary answering affidavit, including further affidavits filed by both parties in response thereto, in the interests of justice. Both parties were given an opportunity to argue their respective cases based on the totality of the papers filed of record and the issue of costs aside, no prejudice was occasioned to any party as a result of the supplementation of the papers. I deal with the issue of costs later in the judgment.

43. The applicant raised various objections to the nature or form and basis for the security tendered by the respondent, which it argued was neither

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[35] See: *S v Munn* 1973 (3) 734 (NC), a full bench decision of the Northern Cape division of the High Court; *S v Msibi* 1974 (4) 821 (T), a full bench decision of the Transvaal Provincial Division (as it then was known); *Lohrman v Vaal Ontwikkelingsmaatskappy* 1979 ALL SA 416 (T);1979(3) SA 391 (T) *Armstrong v S* 2019 (1) SACR 61 (WCC) a full bench decision of the Western Cape High Court.

[36] See: Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme court of Appeal of South Africa,* 5th ed, at p 451.

reasonable nor satisfactory to it in the circumstances. Its objections, *inter alia*, included that:

(i) No proof was furnished of any funds having been made available by Faircity Hotels (Pty) Ltd to the Respondent by way of a loan, as envisaged in the resolution dated 25 February 2022;

(ii) The relevant attorneys have not confirmed that they are holding any amount whatsoever in their trust account for and on behalf of the Respondent;

(iii) The payment confirmations of Standard Bank are totally meaningless without an affidavit by a duly authorised director or partner of the relevant firm of attorneys, confirming, under oath, that the funds were received into the attorneys trust account, and held for a specific purpose, not on behalf of Faircity Hotels (Pty) Ltd, but on behalf of the Respondent, in compliance with FICA;

(iv) The payments are furthermore completely meaningless without an irrevocable guarantee, on the part of the firm of attorneys, in terms of which they bind themselves to pay the full amount of the Applicant's claim to the Applicant, upon demand.

44. Despite these objections, the respondent did not provide proof of any loan of funds from Faircity Hotel to the respondent, evidenced by a loan agreement or the advance of funds to the respondent or by the relevant attorneys holding the funds deposited into his trust account for and on behalf of the respondent (as opposed to Faircity Hotel). Significantly, the funds were invested for Faircity Hotel and not the respondent and were being held for Faircity Hotel. In a confirmatory affidavit deposed to by the relevant attorney, he did not state that his firm holds the funds on behalf of the respondent based on a loan made by Faircity Hotel to the respondent. Nor does he say that his firm will pay the amount to the applicant. He merely undertakes to retain the amount paid into the trust account '*pending the*

outcome of an action to be instituted by the applicant against the respondent claiming payment of the disputed debt.' No irrevocable guarantee in the terms required by the applicant was either provided.[37] Moreover, there is no confirmation by the relevant attorney that he or his firm have not had prior dealings with either Mr Nassimov or any of the entities controlled by him in support of the respondent's averment that such firm is indeed independent.

45. The applicant alleges that the *'alleged loan by Faircity Hotels (Pty) Ltd to the Respondent, is not a bona fide loan, by a third party, which the Respondent is able to repay. The alleged "loan" is between two companies of which Mr Nassimov is the director and controlling mind. In these circumstances, the alleged "security", which is in any event non-existent, does not assist the Respondent, as it does not show that the Respondent is in any way able to pay its debts itself, from its own resources or revenue. Mr Nassimov is shifting money around, in an attempt to prop up the Respondent, and to avoid the inevitable collapse of his empire... It is furthermore misleading for Mr Nassimov to refer to 'the board of directors of Faircity Hotel' in an attempt to prop up one of his entities, namely the Respondent, Mr Nassimov merely took off one proverbial hat, and put on another. There is no 'board of directors', and Mr Nassimov himself is merely shifting money around from one entity to another*.' These allegations remain unrefuted in the papers.

46. To meet the threshold laid down in s 345(1)(*a*) of the Companies, the applicant was required to prove three essential requirements:[38] first, that it is

[37] The relevant attorney filed an affidavit in which he confirmed only that *'In the event that the Court is inclined to grant, in the liquidation proceedings, an order in the terms proposed by the respondent in the supplementary answering affidavit, I confirm that neither I nor Van der Merwe & Sorour Attorneys have any objection to the Court including in such order relief that requires the funds held by us in the aforementioned Trust Account to remain in Trust pending the outcome of an action to be instituted by the applicant against the respondent claiming payment of the disputed debt…I hereby confirm and furnish the Court and the Applicant with an irrevocable undertaking that should the Court refuse to grant a winding up order… and instead direct that the applicant, within 45 days of the grant of the order, institute action against the respondent to claim payment of the disputed debt, I shall ensure that the aforementioned funds are retained in the aforesaid Trust account pending the final determination of that action, so as to ensure that the applicant has security for the disputed debt.'*

[38] See: *Lamprecht v Klipeiland (Pty) Ltd* (753/2013) [2014] ZASCA 125 (19 September 2014), para 15.

a creditor of the respondent for an amount not less than R100, second, that the debt is due and payable. In other words, the debt must be liquid. Third, there must be proof that, notwithstanding service of the s 345(1)(*a*) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor. In my view, the applicant has done so. It is quite clear, when regard is had to the resolution itself, that the Respondent is unable to pay its debts as and when they become due in the normal course of business. The Respondent had to rely on an alleged 'loan' from its sole shareholder, which, even assuming the correctness of such allegation, it failed to demonstrate that it was able to repay in the ordinary course of business. This it could not and did not do. The fact of the matter is that the Respondent no longer trades. It appears to be nothing other than an empty shell, which is unable to pay its debts. The applicant has established that the respondent is commercially insolvent. It has also established its *locus standi* as a creditor with a liquid claim of not less than R100.00, which is due and payable. Likewise, it has established that the respondent has failed to provide security or additional security which is to the creditor's satisfaction within 21 days after the statutory demand. In the circumstances of this matter, the Applicant was therefore well within its rights to seek the liquidation of the Respondent, for its own sake. All of the requirements for a liquidation order have been met, including the formalities prescribed by s 346 of the Companies Act, and the time has come for the respondent to be liquidated.[39] In the light of these conclusions, it is not necessary for me to consider the alternative ground on which the applicant relies, namely, that it is just and equitable for the respondent to be finally wound up.

Costs

[39] A liquidator will be empowered to investigate the affairs and trade dealings of the Respondent, including the veracity of the Applicant's claim, and will be able to conduct the necessary enquiries, which includes the issuing of a subpoena for Mr Nassimov himself to testify, in order to establish whether any voidable dispositions are required to be set aside, and the proceeds to be distributed amongst the Respondent's creditors in their order of preference.

47. The applicant seeks costs incurred by it in opposing the interlocutory application and which ultimately necessitated the filing of additional affidavits at a time when heads of argument in the main application had already been filed of record. Whilst it cannot be said that its opposition was unreasonable, I am not persuaded that an order other than that the costs of the main application including the interlocutory application should be costs in the liquidation.

48. Accordingly, the following order is granted:

ORDER:

1. The respondent is placed under final winding-up in the hands of the Master.
2. The Applicant's costs are to be costs in the liquidation of the respondent.

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AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	17 March 2022
Date of Judgment:	17 June 2022
Judgment delivered	20 June 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 20 June 2022.

APPEARANCES:

Counsel for Plaintiff:	Adv RB Engela
Attorneys for Plaintiff:	Van Der Merwe & Robertson Inc Attorneys

Counsel for Defendant:	Adv S Hoar
Attorneys for Defendant:	V Chetty Inc Attorneys