REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

Date: 26/2/18 **WHG VAN DER LINDE**

26/2/18

Case no. 16411/2017

In the matter between

RH Plant Hire CC **Applicant**

and

Toncon 3 Construction (Pty) Ltd **Respondent**

AND

Case no. 16410/2017

In the matter between

RH Plant Hire CC **Applicant**

and

Arminda Cabral Neves De Carvalho **Respondent**

Judgment

Van der Linde, J:

Introduction

[1] In two matters argued together the applicant, a plant hire business, asks for the liquidation of its debtor, a construction company to which it had rented heavy plant and machinery, and for a money judgment against a surety for the debt owed by the principal debtor. I will refer to the construction company as the principal debtor and to the surety by that nomenclature.

[2] Counsel both referred indiscriminately to evidence in the one application as evidence in the other. There was no application for consolidation under rule 11, but since there was no objection to counsel's approach, I will adopt it here.

[3] There was really only one central issue in the two applications, being whether the principal debtor's disputing of its debt to the applicant had been shown by the debtor on a balance of probabilities to be reasonable and bona fide. Initially there were other issues too, such as whether the applicant had complied with s.346(3) of the Companies Act 61 of 1973[1] by furnishing to the Master of the High Court sufficient security, but this point was not persisted in after the certificate of 22 September 2017 was produced.[2]

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[1] The provisions of chapter 14 of the Companies Act 61 of 1973 continue to apply to applications for the winding up of companies by virtue of item 9(1) of schedule 5 to the Companies Act 71 of 2008.

[2] Court v Standard Bank of South Africa Ltd., Court v Bester NO (133/93, 638/93) [1995] ZASCA 39; 1995 (3) SA 123 (AD); [1995] 2 All SA 440 (A) (30 March 1995).

[4] There was also the issue as to whether the mere fact that the debtor was not paying its debt meant that the applicant has shown that it is unable to pay its debt,[3] and although the point did not appear to be pressed, I will revisit it below.

[5] As to the debtor's indebtedness, the applicant founded its case on two separate contracts of letting and hiring, referred to respectively as the Matla and Bandini contracts/projects, but in the course of argument the applicant abandoned reliance on the former and persisted only in the latter. I proceed to deal with the two issues to which I have referred.

The Bandini indebtedness

[6] The applicant's claim is for R165 014.35. The aggregate of the invoices is R168 218.35, but the applicant allowed for a disputed amount of R3204 in respect of diesel. The seven invoices on which it relies are dated from 31 October 2016 to 3 November 2016. The applicant's case is that the Bandini indebtedness is back-dropped by a 22 May 2015 credit application by the debtor, approved by the applicant, which is a generic that would regulate the hiring of plant. The application, which is signed by the surety on behalf of the debtor, also constitutes the suretyship on which the applicant relies.

[7] The debtor's answering affidavit disputes the indebtedness. But it does not dispute that the surety signed the particular credit application form. It submits that the name of the debtor was changed to coincide with the name of the debtor as reflected on the applicant's invoices. The name on the credit application and on the invoices is "Toncon Projects Construction", whereas the debtor's full name is "Toncon 3 Construction (Pty) Ltd". But it makes no further point about this.

[8] It does not suggest, in particular, that the originally reflected creditor was someone other than the applicant. Indeed, it annexes an earlier credit application form dated 19 January

[3] S.345(1)(c) of the Companies Act 1973 states superfluously that a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts. See Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd, 1978 (1) SA 70 at 71.

2012 addressed to and accepted by the applicant, in which the debtor had spelled out its full name. But the terms of that instrument and the later one are for relevant purposes the same; and in particular, the earlier instrument also incorporates a suretyship by the same surety in the same general terms as the later one.

[9] The debtor also says that the credit application form on which the applicant relies here was in fact intended for a different contract. The credit application form does not say so; but more importantly, however, the suretyships signed by the surety are in similar terms, and those terms are of sufficiently wide import to embrace any subsequent indebtedness howsoever arising. For present purposes, since the applicant must make out its case in its founding papers, it is sufficient to point to the 2015 suretyship and its terms. Accordingly this issue may be put aside, and one may move on to consider the defence put up to the Bandini claim.

[10] Here the defence is said to be based *"on a failure to sign off various time sheets and fuel"*.[4] It is also said that the Bandini project was to take 1.5 weeks but because the applicant's operators *"were derelict in their duties and in their performance"* the project took 2.5 weeks. But it makes no claim arising from this assertion. Finally, although not raised in the Bandini context, the debtors says that arising from the Matla project, it has a claim for damages against the applicant for R3 849 604.99.[5]

[11] The relevance of the time sheet assertion is that the debtor says that the parties' contract required that the hours worked daily by the applicant's plant had to be signed off daily by the debtor's foreman, and by the applicant's operator. And in the application against the surety the case is that it is the applicant's representatives that did not sign off the time sheets.[6] There is no assertion of how many hours, on the debtor's version, the plant had

[4] Answering affidavit p88 para 15.42; p98 para 15.70.
[5] Answering affidavit p97.
[6] Answering affidavit p 77 para 23.34.

operated; and so there is no assertion by the debtor of what amount it admits it owes to the applicant.

[12]Do these assertions establish on a balance of probabilities that the debtor disputes the Bandini indebtedness on reasonable and bona fide grounds?[7] The debtor relied on Badenhorst v Northern Construction Enterprises (Pty) Ltd[8] for the proposition that the application for liquidation should be dismissed because it has shown reasonable and bona fide grounds for disputing the claims for payment. The debtor relied, amongst others, also on Maharaj v Barclays National Bank Ltd.[9]

[13]Two issues arise in the light of these submissions. The first is the obvious one: has the debtor on these affidavits shown such a defence to the Bandini claim? And the second one is this: if no defence meeting this threshold is shown on the Bandini project, does the debtor's assertion of a damages counterclaim of some R3,8m on the Matla project serve potentially to extinguish the Bandini claim?

[14]In my view the debtor has not met the threshold in respect of the Bandini project, for these reasons. The time sheets term on which it relies, even if it was a term of their contract, cannot serve to disentitle the applicant to claim what it contends is owed. The term would merely serve evidentiary value. After all, the debtor says it is the applicant who has not signed off – but does not say that the amounts claimed in the invoices are more than would be justified on the debtor's version of the hours actually spent by the plant on site. As already pointed out, the debtor does not take the court into its confidence by saying what it accepts is owed by it to the applicant in this regard.

[15]I return below to the issue of the counterclaim. The reliance by the debtor and surety on Maharaj does not, in my view, avail. That case concerned the threshold for an affidavit

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[7] Kalil v Decotex (Pty) Ltd and Another, 1988 (1) SA 943 (A) at 980 B – H.
[8] 1956 (2) SA 346 (T) at 347 – 348.
[9] 1976 (1) SA 418 (A) at 426.

resisting summary judgment, a standard that is very different from that which applies to the present context. The relevant sub-rule of rule 32 provides:

"(3) Upon the hearing of an application for summary judgment the defendant may-
(a) ...
(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[16]All a defendant need do is set out averments which if proved at trial would constitute a defence; and the averments must not be too vague and sketchy, because the court needs to be persuaded of the bona fides of the defence. Here, as laid down in Kalil, the averments must go twofold further: it must additionally disclose that the respondent's disputing of the applicant's claim is reasonable; and further, the respondent must do so on a balance of probability.

[17]The debtor and surety also submitted that the liquidation application cannot succeed for the presence of irresoluble factual disputes on affidavit. But the mere presence of factual disputes is not good enough. Courts must scrutinise these to establish whether one is dealing with unmeritorious defences that seek refuge in the stratagem of disingenuous factual disputes. Heher JA said in Wightman Wightman t/a J W Construction v Headfour (Pty) Ltd and Another:[10]

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to

[10] (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008) at [13]. See also PMG Motors Kyalami (Pty) Ltd and Another v FirstRand Bank Ltd, Wesbank Division 2015 (2) SA 634 (SCA); [2015] 1 All SA 437 (SCA); [2014] ZASCA 228 at [23]; Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) ([1984] ZASCA 51) at 634 in fin; Fakie NO V CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at [55]-[56].

provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[18]The fuel aspect of the dispute has been removed from contention by the applicant's abandonment of reliance on that part of the claim for present purposes. And the fact that the project took longer to complete did not result, on the debtor's case, in any legally relevant consequence.

[19]That leaves the question concerning the counterclaim. Here the applicant submitted that the alleged counterclaim is one for damages and thus unliquidated; there is accordingly no automatic operation of payment by set-off. All that there is, is the question of whether a court would exercise its common law discretion by permitting a stay of the claim in convention, pending the determination of the counterclaim for damages, which if successful would liquidate the counterclaim and so allow the claim in convention to be extinguished by set-off.[11]

[20]There are substantive reasons why a court would not, on these facts, exercise its discretion in favour of the debtor. First, no specific reasons were put up as to why a court should do so here. Second, the alleged claim arises from a different contract; it allegedly arises from the Matla contract, whereas the indebtedness held to exist arises from the Bandini contract. The evidence on the claims in convention and reconvention will thus not overlap or converge. Third, the damages counterclaim on the Matla project is disputed whereas the Bandini claim

[11] Compare rule 22(4).

is not bona fide disputed. And finally, there is no suggestion that, if the damages counterclaim is good, the applicant will not be able to pay that indebtedness.

Has it been shown that the debtor is unable to pay its debts?

[21]Caney, J famously said: *"A concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources... . The proper approach in deciding the question whether a company should be wound up on this ground appears to me ... to be that, if it is established that a company is unable to pay its debts, in the sense of being unable to meet current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency."*[12]

[22]In this case I have found that there is a debt that is due, and it is common cause that the debtor is not paying it. This debt is not an extraordinary item on the debtor's income statement; it is the very type of current liability that the debtor, given its business, is expected and likely to incur. But what adds to the concern of inability to meet current demands, is the vague, unsubstantiated and unparticularised excuse put up for not paying the debt, as I have pointed out above.

[23]It is true that, as has been said, commercial insolvency, another way of saying that a debtor cannot pay his debts as and when they fall due for payment, is no more than an onus-shifting device, which then burdens the debtor to show that his assets exceed his liabilities.[13] But in this case the debtor has not shown that its assets exceed its liabilities. The one line certificate from its accountant takes the matter nowhere.[14]

[24]In these circumstances it has been established, I believe, that the debtor is unable to pay its debts for the purposes of s.345(1)(c) of the Companies Act, 1973.

Conclusion

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[12] Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd, 1962 (4) SA 593 (D) at 597. These passages are quoted in Henochsberg on the Companies Act, Meskin, Vol 1, at p 709, 710.
[13] Mars, The Law of Insolvency in South Africa, 9th Ed, p2, para 1.1.
[14] Annexure JA 2, *"This letter serves to confirm that the above is a trading and solvent entity."*

[25]It follows that in my view the money claim should be granted and a provisional liquidation order should issue. In consequence I make the orders set out below.

[26]In the matter of RH Plant Hire CC v Arminda Cabral Neves De Carvalho, case number 16410/2017, I make an order in the terms set out in the draft order which I have initialled, dated, and marked "X".

[27]In the matter of RH Plant Hire CC v Toncon 3 Construction (Pty) Ltd, case number 164/2017, I issue a provisional liquidation order returnable on 28 May 2018 in the terms set out in the draft order which I have initialled, dated, and marked "X".

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: Friday, 23 February 2018
Date judgment: Monday, 26 February 2018

Appearances

For the Applicant:	**Adv. J. Van Rooyen**
Instructed by:	**Donn E Bruwer Attorney** c/o 454 Queen`s Crescent Lynwood, Pretoria Tel: (083) 458 1212 Fax: 0866 710 527
For the Respondent:	**Adv. R Blumenthal**
Instructed by:	**Spencer Tarr Malan Geyer inc** C/O Friedland Hart Solomon Nicolson Monument Office Park 79 Steenbok Avenue Monument Park, Pretoria Tel: 012 424 0200 Fax: 012 424 0207

W 05/03/18

WHG "X"
26/2/18

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:- **16411/2017**

On this the 23rd day of FEBRUARY 2018 at PRETORIA
Before the Honourable Justice Van der Linde

In the matter between:-

RH PLANT HIRE CC Applicant

-and-

TONCON 3 CONSTRUCTION (PROPRIETARY) LIMITED Respondent
(Registration Number:- 2007/009862/07)
Registered Adress:- ***98 Ronald Road, Linbro Park, Sandton, Gauteng***

DRAFT ORDER

Having read the papers filed of record and having heard counsel for the parties, it is Ordered that:-

1. The respondent is placed under a provisional winding-up order in the hands of the Master of the High Court.

2. A *rule nisi* do issue calling upon all persons concerned to appear and show cause, if any, on 28 MAY 2018 at 10h00 as to why a final winding-up should not be granted and why the costs of this application should not be costs of the winding-up.

3. Service of this Order shall be affected:-

3.1 at the registered address of the respondent;

3.2 by publication in a newspaper circulating in Gauteng;

3.3 by publication in the Government Gazette;

3.4 on the Master of this Court;

3.5 on the South African Revenue Service; and

3.6 by registered mail on all known creditors of the respondent with claims in excess of R20,000.00.

4. Costs of this Order be costs in the winding-up of the Respondent.

BY ORDER

REGISTRAR

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 16411/2017

PRETORIA 26 FEBRUARY 2018

BEFORE THE HONOURABLE MR JUSTICE VAN DER LINDE

In the matter of:

RH PLANT HIRE CC — Applicant

And

TONCON 3 CONSTRUCTION (PTY) LTD — Respondent
Reg No: 2007/009862/07

Address: 98 RONALD ROAD, LINBRO PARK, SANDTON, GAUTENG.

HAVING HEARD counsel for the applicant and having read the notice of motion and other documents filed of record

IT IS ORDERED THAT

JUDGMENT:

1. The abovementioned respondent company be and is hereby placed under provisional winding-up order.

2. A rule *nisi* be and is hereby issued calling upon all persons concerned to appear and show cause, if any, to this court at 10:00 on 28 May 2018 why the respondent company should not be placed under final winding-up order and why the costs of this application should not be costs of the winding-up.

3. Service of this order shall be affected:

3.1 at the registered address of the respondent;

3.2 by publication in a newspaper circulating in Gauteng;

3.3 by publication in the Government Gazette;

3.4 on the Master of this Court;

3.5 on the South African Revenue Service; and

3.6 by registered mail on all known creditors of the respondent with claims in excess of R20 000.00.

4. Costs of this order be costs in the winding-up of the respondent.

BY THE COURT

REGISTRAR
EM

Attorney: DONN E BRUWER ATT.
Address: 454 QUEEN'S CRESCENT LYNNWOOD, PRETORIA.

441