REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A191/2023

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

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Date Signature

In the matter between:

**TAU ROLLER MEULE (PTY) LTD** **APPELLANT**

And

**MARCUS M FARMING CC** **RESPONDENT**

**Summary: Appeal against a dismissal of a final liquidation order. Respondent was placed under provisional liquidation. On the return day the Court a *quo* refused to grant a final liquidation order. Application seeking leave to lead further evidence –**

**to**

**prove that the rescission application was dismissed by a Court and all appeal attempts were foiled as well as raising a defence of *lis pendens*. Regard being had to the requirements of a section 344 (f) of the Companies Act 61 of 1973 application there is no need to lead such further evidence. Raising of a new defence of *lis pendens* is not permissible. Nevertheless, a Court judgment is a public document, its existence does not require proof by way of evidence. Section 19 (b) of the Superior Courts Act 10 of 2013 (the Act) applies only to evidence necessary to resolve a factual dispute arising from the merits of the appeal - (*Prince v President, Cape Law Society and Others* 2001 (2) BCLR 133 (CC)). The evidence contemplated in section 19(b) is one that is weighty, material, practically conclusive and final in effect on the issue it is directed to. Generally, evidence is required in order to prove or disprove facts in a case. In *casu*, it is not necessary or required to prove an existence of a public document. Section 2 of the Civil Proceedings Evidence Act 25 of 1965 provides that no evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact shall be admissible. Section 5 (1) provides that judicial notice shall be taken of any law. Also, in terms of section 15 it is unnecessary to prove or disprove an admitted fact. With regard to the respondent's leave to introduce a *lis pendens* defence, no legal basis for the granting of such an application has been demonstrated.**

**In terms of section 16 (1) of the Act, an appeal against any decision lies upon leave been granted. In granting leave to appeal a judge or judges form an opinion. Once the opinion is formed the Court of appeal has jurisdiction only to hear and determine the appeal (section 19 (d) of the Act). The appellate Court has no jurisdiction to reconsider and or correct the opinion to grant leave to appeal. A party who did not successfully oppose the granting of leave to appeal remains with the option to only oppose the appeal on its merits.**

**Where a party exercises a right of appeal, such party is not re-applying and the principle of *res judicata* finds no application. In terms of section 18 (1) of the Act, the operation of the judgment refusing to make the provisional winding up order final is suspended pending the decision of the appeal Court. There is no basis in law to set aside the notice of appeal. If the appellant successfully impugns the**

**order of the**

**Court *a quo*, by virtue of the powers bestowed in section 19 (d) of the Act, this Court may render any decision which the circumstances require. Thus this Court is empowered to make a provisional winding up order final, it being the order sought and refused at the Court below. With regards to the merits the solitary question to be addressed is whether there is proof that respondent is unable to pay its debts and whether it is apparent that it is just and equitable for the company to be wound-up. On the available evidence, there is cogent proof that the company was unable to pay its debts when they fell due and payable. The respondent failed to discharge its onus to dispute its indebtedness on *bona fide* and reasonable grounds. Thus it is apparent to this Court that it is just and equitable for the company to be wound-up. Held: (1) Interlocutory applications dismissed. Held: (2) The appeal is upheld. Held: (2) The order of Maumela J is set aside and is replaced with an order proposed in this judgment.**

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**JUDGMENT**

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**CORAM: MOSHOANA, J (BAQWA J AND MAZIBUKO AJ CONCURRING)**

Introduction

[1] This is an appeal against the judgment of the Court below per Maumela J. The appeal is with the leave of the Court below. In the impugned order, the Court below discharged the provisional order made by Klein AJ and dismissed an application to finally wind-up the respondent with costs. The impugned order was made on 29 July 2020. Leave to appeal was granted by Maumela J on 23 May 2023. The present appeal is duly opposed by the respondent, Murcus M Farming CC (Murcus). As an opening gambit, it bears mentioning that admittedly, this matter, despite the fact that in its nature, it requires pressing attention, has been loitering within the precincts of justice for the longest of time. Perhaps the interests of justice would have been better served if it did

not take this long for this matter to be finalised.

Background facts and evidence

[2] Briefly, the pertinent facts of this appeal are that Murcus was placed under provisional liquidation by an order of this Court on 12 September 2019. On 25 October 2019, Murcus filed an affidavit opposing the making of the provisional order final. The provisional order was made returnable on the 28 October 2019. The appellant, Tau Rollermeule (Pty) Ltd (Tau) and Murcus argued the merits of the application before Maumela J on the return day. On 29 July 2020, the impugned order was issued.

[3] The onset of the present dispute in the corridors of justice was when an action was instituted by Tau against Murcus for money owed in respect of chicken feed sold and delivered. The amount owed was in the tune of R5 395 962.30. On 29 September 2016, Tau and Marcus reached a compromise and that compromise was, as agreed between the parties, made an order of Court as per the order of Molefe J on 15 November 2016. Other than disputing the institution of the action by way of summons, Murcus does not dispute that the money is owing and the conclusion of the compromise. It only alleges that the compromise was concluded under duress in avoidance of a threatened court action. I interpose to remark that for about two months before the compromise was made an order of Court there was no attempt made by Murcus to seek an order setting aside the agreement allegedly concluded under palpable duress. To the contrary, after two months of its conclusion the compromise was made an order of Court.

[4] Additionally, Murcus does not dispute that the said settlement was made an order of Court. Murcus suggested in its opposing papers that it has a *bona fide* defence against the action which ironically it had testified that it

was not aware of. It complained about the quality of the goods delivered. The chicken feed was according to it infected with mycotoxin. Despite admitting the indebtedness, Murcus failed to make good the admitted indebtedness. Such a failure compelled Tau to

cause a warrant of execution to be issued on 17 February 2017. Following the issuing of the writ, a further arrangement was made by Murcus to pay the admitted debt. An indication was given to Tau that Murcus is in the process of disposing a portion of its business to a third party providing the Land Bank approves. At some point Murcus indicated to Tau that the Land bank had approved. From 11 July 2017 up to 08 March 2018, Murcus made payment of certain varying amounts towards the servicing of the admitted debt. The total amount paid, with no palpable resistance, was R278 908.60. Murcus alleged that the payments were made possible by the payments it received from its lessee, Eagles.

[5] After 8 March 2018, no further payments were made. Upon enquiry as to when the admitted debt is going to be settled, Murcus gave various explanations and made various promises to no avail. Curiously, perspicuously absent from the various explanation is the contention that the compromise had been concluded under coercion. Owing to those empty promises, Tau caused the writ of execution to be re- issued. The sheriff attempted to execute and found that Eagles was in occupation of the place and no assets belonging to Murcus were pointed out. Tau received no further payments after the foiled attempt to attach realisable assets in satisfaction of the admitted debt. Upon investigation by Tau, it was discovered that the Land Bank had also instituted action against Murcus for a debt in the tune of R7 435 584.04. Land Bank also sought an order declaring the business premises of Murcus, to wit Portion 1 of the Farm Modderfontein 188 Registration Division, IP, Northwest Province (the immovable property) to be especially executable. Ultimately, Land Bank obtained a summary judgment against Murcus. The operation of that judgment is currently suspended owing to the Supreme Court of Appeal granting Murcus leave to appeal to the Full Court of this division.

[6] In the meanwhile, Tau launched the present motion and obtained, as indicated earlier, a provisional order. Around the same time, Murcus launched a rescission application seeking to rescind the order of Molefe J, which order as pointed out, simply made the compromise reached an order of Court. On 10 March 2021, my sister Neukircher J dismissed the rescission application. All attempts to appeal

against the dismissal order failed. Before us, Tau launched an application, seeking leave to lead evidence in relation to the developments relating to the rescission application, in terms of section 19 (b) of the Act[1]. In due course, this Court shall, in this judgment, specifically deal with such an application.

[7] Additionally, Murcus launched its own section 19 (b) of the Act application and other interlocutory applications seeking a reconsideration and or correction of the order of Maumela J when granting leave to appeal his order; seeking an order for the appeal not to be heard on allegations of *lis pendens*; seeking to set aside the notice of appeal on allegations of it being an irregular step; and seeking an imposition of restrictions on Tau on allegations of it approaching the Court with unclean hands and abusing Court process. Other than these innumerable interlocutory applications, Murcus contends that it has a *bona fide* defence against the claim giving rise to the indebtedness; that it is commercially solvent and that no updated facts had been placed before this Court to enable it to determine whether it is unable to pay its debts.

Basis of the appeal

[8] Effectively there is only one basis pursued by Tau in this appeal. The basis is that the Court below ought to have found that Murcus is unable to pay its debts and ought to have been finally liquidated regard been had to just and equitable circumstances. To my mind, the fact that Murcus allegedly has a *bona fide* defence against the claim that gave rise to the indebtedness recedes to the back-end and is actually irrelevant. In due course, this Court shall demonstrate why that is the case.

Analysis

[1] Act 10 of 2013 as amended.

[9] Before this Court delves into the merits of this appeal, it is apposite to dispose of the interlocutory applications hanging in the balance. Although some key concessions fatal to the interlocutory applications were made by both counsel during argument of this appeal none of them formally withdrew any of the interlocutory applications. For all intents and purposes, a decision upon them is still required as they were argued before us. Here below, in turn, each of the interlocutory applications or preliminary objections shall be discussed and decided.

*Application to reconsider and correct the order granting leave to appeal.*

[10] This Court must remark; this is a strange application. Mr Ndobe, counsel for Murcus, himself dubbed it an *unusual application*. He conceded that such an application is not contemplated in the Act nor the Uniform Rules of this Court. He, however, obliquely and ambivalently referred us to section 173 of the *Constitution of the Republic of South Africa*, 1996 (*Constitution*) and sought to submit that this Court has inherent jurisdiction to deal with this unusual application. Although, he did not press on with this argument, I categorically reject the argument as being meritless. Equally, Ndobe was unable to provide this Court with any legal basis for such an application. Nevertheless, Ndobe somewhat persisted with the application despite the misgivings from the bench.

[11] For the sake of posterity, since the legal point was poorly argued before us, as a departure point, the judgment of Maumela J dismissing the liquidation application is appealable since it is one that is final in nature (See *Zweni v Minister of Law and Order*[2]). Section 150 (1) of the *Insolvency Act* 24 of 1936 makes provision for an appeal against the refusal to make a provisional order final. In terms of section 16
(1) (a) of the Act an appeal against any decision of a Division of a Court

[2] [1993] 1 All SA 365

of first instance lies upon leave having been granted. Therefore, what authorises an appeal of any decision to lie is the granting of the leave to appeal. Section 17 (1) of the Act

[2] [1993] 1 All SA 365

regulates how a judge or judges may give leave for an appeal to lie. What the section requires is for a judge or judges to form an opinion on three legislated issues (those are spelled out in subsections (1) (a) (i), (ii); (b); (c); and (d) of section 17 of the Act). Once an opinion is formed predicated on any of the legislated basis, an appeal lies.

[12] The powers of this Court in exercising appeal jurisdiction are also legislated. Section 19 of the Act spells out the powers of the appellate Court. In addition to powers as may specifically be provided for in any other law, this Court may exercise any of the powers outlined in subsection (a) –(d) of section 19. Counsel for the respondent was unable to point this Court to any other law that specifically empowers this Court to reconsider and or correct the order granting leave to appeal. A party aggrieved by the granting of leave to appeal is nevertheless entitled to oppose the appeal on its merits whatever they are. Available to that party is also a right to piggy bag, as it were, on the leave granted and launch a cross-appeal. If the appeal is successfully opposed, the order granting leave to appeal (which only serves as a gate keeper for the appellate Court[3]) becomes moot. Section 19 (d) of the Act specifically empowers this Court to confirm or set aside the impugned decision. The impugned decision in *casu* is one dismissing the final winding-up application and not one granting the leave to appeal. It was suggested to counsel for the respondent that the effect of the request equates an appeal against an application for leave to appeal, an anomalous request indeed. The granting of leave to appeal is simply a gate pass to the appellate Court and it serves no other substantive purpose in relation to the rights of any of the parties to the appeal process. Accordingly, this Court has no jurisdictional powers to entertain the application of the respondent. As such the application falls to be dismissed for want of jurisdictional powers.

*The lis pendens defence*

[3] By separating chaff from the wheat so to speak.

[13] Curiously, this point was raised under the rubric of an application for leave to lead further evidence in this appeal. In due course this Court shall address itself to the principles applicable to a true application contemplated in section 19 (b) of the Act. Murcus alleges that there is a parallel application launched under case number 27060/2021. This appeared to be a competing liquidation application of Marcus launched by Eagles. The sin, which allegedly gave birth to the *lis pendens* defence obliquely raised in the present appeal, was when Tau joined in the application of Eagles. It is unclear to this Court, not that it matters though, as to the grounds pursued in that application. It ought to be remembered that a company may be indebted to a number of creditors and be unable to pay its debts. All or some of the creditors may decide to launch liquidation proceedings against that one company. For an example one creditor may rely on section 344(f) of the CA whilst another may rely on a *nulla bona* return ground. Clearly what arises is not the same cause of action in the sense of *lis pendens* but competing liquidation applications. Such a situation is not unusual in liquidation proceedings[4].

[14] Where there is a number of competing liquidation applications, a Court may engage in a prioritisation exercise. However, once a company is placed under liquidation, the same company may not be placed under liquidation again given the remaining, if any, competing applications. The defence of *lis pendens* like that of *res judicata* commends itself to the requirements of finality and certainty. This being an appeal, the defence of *lis pendens* was never before the Court below. However, the defence of *lis pendens* finds application in instances where the same matter involving the same parties and seeking the same thing pends in another forum. With regard to this matter, the defence may be raised perhaps successfully if there was another appeal which pends in another appeal Court differently panelled. Absent such a situation, the defence of *lis pendens* can nevertheless not be upheld in this Court.

*Irregular step proceedings*

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[4] See *Pat Cornick & Co (Pty) Ltd v Mimosa Meubels (Edms) Bpk* 1961 (4) SA 119 (T).

[15] This application is predicated on the fact that the notice of appeal suffers some alleged defects in that it seeks an incompetent relief[5]. According to Murcus since the provisional order was discharged by the impugned order, Tau is not entitled to seek a final order before us. This argument is oblivious of one cardinal statutory principle. Arising from section 18 (1) of the Act is that, unless exceptional circumstances are demonstrated, the operation and execution of a decision which is the subject of an appeal is suspended pending the decision of the appeal. Such simply means that the order discharging the provisional order of liquidation is not operational until this Court decides the appeal. Thus the position is such that the discharge is treated as if it does not exist during the currency of the appeal.

[16] To the extent that Tau seeks a confirmation of the provisional order and the setting aside of the discharge order, it is competent for this Court to issue such confirmation of the provisional order. Section 19 (d) of the Act empowers this Court in the exercise of its appeal jurisdiction to render any decision which the circumstances may require. In the circumstances where, as in this case, this Court is satisfied that Murcus is unable to pay its debts, this Court is entitled in the exercise of its residual powers to finally place Murcus under liquidation. Accordingly, the irregular step application as punted for by Murcus falls to be dismissed.

*The unclean hands and abuse of process claim.*

[17] This claim is meritless and is predicated on tremulous basis and it is not grounded on any *terra firma*. It is unclear on what proper factual and legal basis is it alleged that the hands of Tau are unclean. The in *pari delictum* rule is premised on an illegality. There is no factual nor legal basis laid for the invocation of the *in pari delictum* rule[6]. Without any hesitation, this Court rejects this claim. As indicated earlier, Tau obtained leave to

appeal and such an appeal lie before us. Section 19

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[5] Prayer 1 of the Notice of Appeal – seeking an order to wind-up the Close Corporation.

[6] With regard to the discussion of the rule see *Jajbhay v Cassim* 1939 AD 537. See also *Afrisure CC and Another v Watson NO and Another* 2009 (2) SA 127 (SCA).

of the Act requires this Court to deal with the appeal on any of the basis legislated therein.

[18] It is again unclear as to how an application to wind-up Murcus constitutes an abuse of process. In the first instance such an application is authorised by section 346 of the Companies Act (CA)[7]. In the second instance section 344 read with section 345 of the CA legislated the circumstances under which a Court may wind-up a company. In this appeal, Tau relies on section 344 (f) and (h) of the CA circumstances. In the third instance, section 34 of the Constitution guarantees everyone the right to have any dispute that can be resolved by application of law decided fairly in a public hearing before a Court. There can be no doubt that Tau has a dispute capable of being resolved by application of the relevant provisions of the CA. Accordingly, the claim of Murcus falls to be rejected.

*The application for leave to receive further evidence from both parties*

[19] Both Tau and Murcus launched discrete applications seeking leave for this Court to receive further evidence. Part of the application of Murcus is predicated on the need to raise a *lis pendens* defence in the present appeal. Contrary to trite authorities[8] this point of *lis pendens* is raised for the first time on appeal and it is not even foreshadowed in the pleadings of the present appeal. Earlier, this Court gave consideration to the *lis pendens* defence. Herein below, this Court shall express itself in greater details to the Tau application. However, the same general principles do find application to the application by Murcus. The general rule is that an appeal ought to be determined on the basis of the evidence and material that served before the Court below. It is only in exceptional circumstances that a Court of appeal may receive new evidence. Section 19 (b) of the Act refers to receiving further evidence. Undoubtedly receive must mean admit such further evidence for one purpose only

[7] Act 61 of 1973 as amended.

[8] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

and that is for the determination of the appeal. It is important to acknowledge that the section is reserved for evidence and nothing else.

[20] Differently put, what the Court must receive is evidence. In law, evidence is defined as any of the material items or assertions of fact that may be submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation. Based on this definition the purpose of evidence must be to ascertain the truth of an alleged fact. Axiomatically, this Court must admit evidence aimed at exposing the truth of a fact raised in this appeal. Regard being had to the application of Tau, what Tau seeks to exhibit before the appeal Court, is the fact that a Court judgment exists. Mr Erasmus SC appearing for Tau graciously conceded to this proposition. This, Tau seeks to exhibit not to prove any of a fact that will sustain its quest for a final liquidation order but to dislodge, as it were, a finding of the Court below, which finding, as it shall be demonstrated later, was an unnecessary one to make in this Court's view. An important legal principle to flag is that an appeal lies against the order and not the reasons of the order[9]. During argument, Mr Erasmus in an attempt to demonstrate the relevance and materiality of the judgment 'evidence', referenced the reasoning of Maumela J. Effervescently, this demonstration equates an appeal against reasons as opposed to an order.

[21] This is a civil appeal thus it constitutes civil proceedings. Undoubtedly, the provisions of the Civil Proceedings Evidence Act (CPEA)[10] finds application. In terms of section 2 of the CPEA, no evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible. The immediate question is, what fact, which is relevant or material to prove or disprove that Murcus is unable to pay its debts or that it is just and equitable that it must be wound-up, will the judgment

of Neukircher J illuminate? To the mind of this Court, the 'evidence' which this Court is implored to receive does not prove or disprove the relevant issue of indebtedness or just and equitability. It must then

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[9] *Neotel (Pty) Ltd v Telkom SOC & others* (605/2016) [2017] ZASCA 47 (31 March 2017).

[10] Act 25 of 1965 as amended.

follow that the evidence is immaterial and or irrelevant, thus inadmissible. Section 5

(1) of the CPEA provides that judicial notice shall be taken of any law. A Court judgment is a public document. All it proves is that a law was decreed by a judge. Case law is usually submitted to a Court to support a particular submission in law. The Constitutional Court in *Prince v President, Cape Law Society and Others* (*Prince*)[11] held that a Court will admit evidence if that evidence is necessary to resolve a factual dispute arising from the merits of the case. Assuming for now that the existence of the judgment of Neukircher J constitutes evidence, it is one that is admitted on record. Section 15 of the CPEA provides that it shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on record of such proceedings.

[22] Therefore, the evidence contemplated in section 19 (b) of the Act is one that is weighty, material, practically conclusive and final in effect on the issue it is directed to. This was confirmed by the Court in *Colman v Dunbar* (*Colman*)[12] where the Court said the relevant criteria is (a) the need for finality; (b) the undesirability of permitting a litigant who has been remiss in bringing forth evidence, to produce it late; and the need to avoid prejudice.[13]A Court judgment's finality depends on the appeal processes it may be subject to. It is so that the Supreme Court of Appeal has refused leave to appeal. Murcus may seek leave from the Constitutional Court. For what it is worth, Neukircher J may have been correct that Murcus is not entitled to a rescission of the order of Molefe J. However, to my mind, the issue whether Murcus had a *bona fide* defence to the claim seeking to recoup the amount owed is an irrelevant matter to the liquidation claim predicated on an inability to pay an admitted debt. There cannot be a defence which is *bona fide* in an instance where the indebtedness has been admitted. The fact that an action is instituted in the first place is ignited by the fact that the debtor is unable to pay the creditor. It is one thing to refuse to pay, it is yet another thing to be unable to pay a debt. A person who believes that he or she

[11] 2001 (2) BCLR 133 (CC)

[12] 1933 AD 141 (A)

[13] See also *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC) and *PAF v SCF* (788/2020) [2022] ZASCA 101 (22 June 2022).

does not owe another may refuse to pay even though that person is able to pay his or her debts. A person possessed of a defence in law is *prima facie* entitled to refuse to pay any debt. However, such a person may be in a position to pay if his defence is lost. It is indeed so that a person who is unable to pay the debt may still refuse to pay the debt on flimsy and unsound basis.

[23] Alive to all of these possibilities, I say, the legislature inserted section 345 of the CA. In terms of this section where a demand has been served requiring the company to pay the sum so due, it can be deemed that the company is unable to pay. The antipodal of an inability to pay is the ability to pay. Having a *bona fide* defence in law does not necessarily equate the ability to pay or even not to pay for that matter. Another premise to generate a presumption of inability to pay is when it is proved to the satisfaction of the Court that the company is unable to pay its debts. On this premise, what requires proves to the satisfaction of the Court is the inability to pay debts and not necessarily the presence or lack of a *bona fide* defence. As an indication that the presence of a *bona fide* defence is not always of a moment, section 345 (2) empowers the Court to also take into account the contingent and prospective liabilities of the company. This Court is yet to come across a properly formulated *bona fide* defence against a prospective and contingent liability. To the extent that the Court below found the alleged presence of a *bona fide* defence in instances where the indebtedness which was unequivocally admitted was relevant, the erudite judge erred in my respectful view. This Court must remark that the judgment of the Court below is, with respect, not a model of clarity itself. Before reaching the impugned order, the primary judge stated the following:

> "67 However, in this case, the facts advanced by the Applicant <u>fall short of</u> <u>proving that the Respondent is unable to pay its debts</u>. The Respondent has demonstrated that it has a *bona fide* defense

against the claim brought by the Applicant against it. Considering that the standard of proof required for purposes of demonstrating *bona fide* defense is lower, the court find that the submissions advances (sic) by the Respondent suffices in constituting a *bona fide* defense on reasonable grounds. The court also takes into consideration

that a possibility obtains that upon application for rescission, the Respondent may succeed.

68 The Respondent avers strongly that it stands to succeed in its application for rescission of the judgment in the top by my sister Molefe J. it is trite that at this stage, the Respondent is not obliged to prove that it will succeed. However, if that were to be the case, (if the Respondent succeed in its application for rescission). Granting this application will have unduly overtaken valuable events. Consequently, the application for final winding up does not stand to be granted…"

[24] It is apparent to me that the above findings constitute the gravamen or the mainstay of the order to refuse the final liquidation order. In my respectful view, the erudite judge below missed the legal basis to consider applications of this nature by a proverbial mile. In my considered view, even before Molefe J exercised her discretion by making the settlement agreement reached by the parties an order of Court, Murcus had demonstrably been unable to pay Tau, hence the settlement agreement which was prompted by an action instituted by Tau for a failure or inability to pay by Murcus. Therefore, at the time when Molefe J was implored to exercise discretion to make the settlement agreement an order of Court[14], Murcus had already admitted an inability to pay. At that time, Murcus had already on various occasions demonstrated the inability to pay an admitted debt which was due and payable. The fact that Murcus made a *volte face* two years later does not in itself remove the manifest inability to pay debts when they fall due. It was held in *Eke* that a settlement agreement extinguishes a dispute. Therefore, differently put, there was no longer a dispute after the conclusion of the settlement agreement that (a) Murcus is indebted to Tau and (b) that due to its inability to pay the debt, payment terms were agreed to.

[14] *Eke v Parsons* 2015 (11) BCLR 1319 (CC) (*Eke*)

[25] More recently, the Supreme Court of Appeal in *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd (Afgri Operations)*[15] provided the following needful guidance:

> "[12] Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court *a quo* did not keep in view the specific principle that generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt[16]... The court *a quo* also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual circumstances only[17].
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> [13] As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects, the court *a quo* applied 'the wrong principle[s]'. There must be no room for any misunderstanding: the onus is not discharged by the respondent merely by claiming the existence of a counterclaim. The principles of which the court *a quo* lost sight are: (a) as set out in *Badenhorst* and *Kalil*, once the respondent's indebtedness has *prima facie* been established, the onus is on it to show that his indebtedness is disputed on *bona fide* and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon application of an unpaid creditor is narrow and not wide,
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> [17] ... If one accepts the test set in the English cases upon which the respondent has relied, the respondent would have to show that its counterclaim was 'genuine'. "

[15] 2022 (1) SA 91 (SCA)

[16] See *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733.

[17] *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428B.

[26] Of importance, the SCA rejected the reasoning in *Ter Breek v United Resources CC and another (Ter Breek)*[18] which correctly suggested that an applicant bore the *onus* of showing that the respondent was indebted to it and that the respondent bears the onus of demonstrating that the indebtedness was disputed on *bona fide* and reasonable grounds. However, the Court in *Ter Breek* concluded that the applicant did not discharge its onus on the basis that it was not just and equitable but still granted final order of liquidation. The SCA concluded that to the extent that *Ter Breek* was at odds with its reasoning exposed above, it should not be followed. In light of all the above, this Court takes a view that at best it can take judicial notice of the judgment by Neukircher J but refuses to exercise its powers in terms of section 19

(b) of the Act. Accordingly, both applications for leave to adduce further evidence fall to be dismissed. As an additional factor, in respect of the application by Murcus, it was common cause that the Court *a quo* did not express itself on the *lis pendens* defence for reasons that it was never raised before it. A Court of appeal should normally decide whether the judgment appealed from is wrong or right according to the facts in existence at the time it was given and not according to new circumstances which have subsequently come into existence. In principle, therefore, evidence of events subsequent to the judgment under appeal should not be admitted to decide the appeal.[19] Having disposed of all the preliminary issues, this Court now turn to the merits of the appeal.

*The Merits of the appeal*.

*[27]* It bears mentioning at this point that some of the applicable legal principles to the merits of this appeal have been discussed above. As indicated earlier, Tau had grounded its application for liquidation on the inability to pay debts. It is unnecessary for the purposes of this part of the judgment to recite, as it were, the provisions of section 345 (f) of the CA.

The law is such that where there is an inability to pay debts, the creditor acquires a right to seek winding-up of a company - *Afgri operations*. *Ex*

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[18] 1997 (3) SA 315 (C)

[19] See Erasmus Commentary Superior Court Practice/Volume 1 chapter 5, *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A) at 507D and *R v Verster* 1952 (2) SA 231 (A).

*debito justitiae*, Tau was entitled to apply for the winding-up of Murcus. It is common cause in this appeal and it was common cause before the judge below that Murcus was indebted to Tau in the tune of R5 395 962.30. It also is common cause that Murcus admitted the indebtedness and in consonant with such an admission, it paid a sum of R278 908.60 towards extinguishing the admitted debt. A point to be made is that acquiescence is very much part of our law. By paying part of the debt, Murcus acquiesced and cannot approbate and reprobate at the same time or blow hot and cold at the same time[20]. Not only did Murcus admit indebtedness, there was overwhelming evidence that upon being asked to make good of the debt, Murcus demonstrated its inability to pay by disclosing in writing[21] to Tau that Eagles had not paid it in order for it discharge its obligations towards the debt.

*[28]* The judge below gave consideration to an insubstantial and not so well articulated allegation of Tau colluding, as it were, with Eagles to ensure that it must not pay Murcus so that it must fail to pay its debt. The flipside of this not so well articulated allegation actually makes it even more perspicuous that Murcus was and is still unable to pay its debts[22]. On proper interpretation of section 344 (f) read with section 345 (1) (c) of the CA what requires demonstration or prove is the inability to pay debts and not the reason for the inability to pay the debts. Hence, it has been authoritatively held that a solvent company may be liable to a wind-up if it is unable to pay its debts when they fall due and payable[23]. Accordingly, in giving consideration to the not so well articulated and supported allegation of collusion, the learned judge below erred. This allegation of collusion – which goes only to the reason of the inability - is not one of the necessary allegations to dislodge a *prima facie* case of inability to pay debts. Differently put, it does not discharge the onus of disputing the indebtedness on *bona fide* and reasonable grounds. As confirmed in *Afgri*

[20] See *Policansky Bros v Herman and Canard* 1910 TPD 1265 at 1278-9; *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) Pty Ltd* 1974 (2) SA 125 (C); *Hlatshwayo v Mare and Deas* 1912 AD at 259 and *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A).

[21] The *WhatsApp* communication between Masenya and Tau representative.

[22] At paragraph 33 of the answering affidavit it was testified that *Eagles' refusal to continue paying the rental has led to the Respondent's inability to continue making payments to the Applicant*. Volume 1, p.001-80.

[23] *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) 436 (C) (*Absa Bank*)

*Operations* once the indebtedness of Murcus has *prima facie* been established, the onus lies on Murcus to dispute the indebtedness on *bona fide* and reasonable grounds. Additionally, the room for a Court faced with an application by an unpaid creditor to wiggle, as it were, is narrow. *Bona fide* and reasonable grounds become the little space left for the Court to wiggle. Mere allegation that a party has launched a rescission application, which, to borrow from the words of the judge below, is a *valuable event which may overtake the granting of the application for final winding-up*, does not, like a counterclaim did not, in *Afgri Operations*, give room for a Court to refuse a final winding-up order.

[29] Regard being had to the mainstay of the judgment of the Court below as quoted above, it is clear that the judge below was less concerned with whether the rescission application was genuine and is possessed of merits. The judge below particularly held *that it is trite that the respondent is not obliged to prove that it will indeed succeed*. The suggestion by the judge below is that a meritless rescission application is enough to allow a Court space to wiggle in a situation where the law provides a limited room to wiggle. This suggestion is inconsistent with the principle established in *Afgri Operations*. Just to add, an application for rescission is an application aimed at setting aside an order of Court and ordinarily allows a party to dispute a claim that gave rise to the order. Assuming for now that Murcus would have succeeded to set aside the order of Molefe J, what will remain, as a stubborn fact, this Court must remark, would have been the settlement agreement reached by the parties with regard to the indebtedness.

[30] As pointed out in *Eke* a settlement agreement extinguishes the dispute between the parties. Even if a Court for good or bad reasons refuses to make a settlement agreement its order, on application of the *pacta sunt servanda* principle the settlement agreement remain binding on the parties[24]. It is trite law that a rescission

[24] See *Gbenga Oluwatoye v Reckitt Bencksiter South Africa* 2016 (12) BCLR 1515 (CC) at para 24 where the Court said: "*The public, and indeed our courts have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none*

order is incompetent in instances where the order was simply to record the terms of the settlement agreement.[25] The order of Molefe J simply recorded the terms of the settlement agreement reached by the parties. Such an order is incapable of being made in error. It is therefore not surprising that Neukircher J ultimately dismissed the rescission application. Howbeit, in the view of this Court, that mere application for rescission did not allow the judge below room to discretionarily refuse the final liquidation application. In the answering papers a veiled attempt was made to suggest that the compromise was concluded under duress. During argument, Ndobe wisely did not press on with this attempt.

[31] Before this Court concludes its analysis on the merits appertaining this appeal, it behoves it to comment on the issue of whether Murcus has realisable assets which will enable it to pay its debts. Before the judge below, Tau was seeking to make a provisional order final. Having been refused that order Tau appealed. Therefore, this Court is in the same position the judge below was. In terms of section 345 (2) of the CA, a Court must also take into account the contingent and prospective liabilities of the company. In *casu*, Tau was required to prove to the satisfaction of the Court, this Court included at this stage of the appeal, that Murcus is unable to pay its debts. As indicated above, the overwhelming evidence is that Murcus is indeed unable to pay its debts. In 2018 already, it failed to pay a debt which was due and payable when it ceased paying the agreed to instalments. The issue of available realisable assets seeks to demonstrate to the Court that Murcus is solvent. Such is only relevant to the exercise of a Court's residual powers, namely whether to grant or refuse a winding-up order even in instances where a company is unable to pay its debts within the contemplation of section 344 (f) of the CA[26]. Once a Court finds, as this

*should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is so because he concluded an enforceable agreement that finally settled his dispute with his employer."*

[25] See in this regard *Theodosiou and Others v Schindlers Attorneys and Others* [2022] 2 All SA 256 (GJ)

[26] See *Standard Bank of South Africa v R-Bay Logistics* 2013 (2) SA 295 at 300-301 para 27

Court does, that Murcus is unable to pay its debts, it matters not that the company assets, fairly valued, far exceeds its liabilities, Murcus is liable to be wound-up[27].

[32] Other than nude allegations that Murcus has sufficient assets and liquidity, none of such allegations were supported by empirical evidence. It was alleged that the land is valued at R12 000 000.00 without any valuation report to adorn such an already denuded allegation. In its opposing papers Murcus referred to a valuation report. Such was not a valuation report but some report to support an offer to sell or purchase. Howbeit, there is incontestable evidence that Land Bank as a secured creditor has obtained a judgment that renders the said land executable. Accordingly, this Court is satisfied that Murcus is unable to pay its debts. During argument, counsel for Murcus submitted that after the discharge of the provisional order, Murcus continued to trade. This submission was made in order to demonstrate the liquidity of Murcus. Nevertheless, as indicated earlier, the correct legal position is that the order of Maumela J ceased to operate from the day an application for leave to appeal was made. There was no indication that a section 18 (3) of the Act application was ever launched and granted. A suspension of the operation of Maumela J's order simply means that the provisional order continued until the outcome of the present appeal.

[33] Nevertheless, despite having returned to business despite being provisionally placed under liquidation, there is dearth of evidence that Murcus was able to pay its debts in the interim. This, in my view is a further proof that Murcus is unable to pay its debts and thus liable to be wound-up. Perhaps, if there was further evidence that emerged after the discharge of the provisional order to show *bona fides* and reasonableness, it might have been opportune for Murcus to apply under section 19 (b) of the Superior Act to lead such evidence, if to do so would have promoted the interests of justice.[28]

[27] See *Absa Bank Ltd v Rheboskloof (Pty) Ltd* 1993 (4) SA 436 (C).

[28] *Nova Property Group Holdings Ltd v Cobbett* 2016 (4) 317 (SCA).

[34] Murcus seem to pin its hopes on the possible sale of the immovable property. There is an allegation that the farm is already sold to Eagles for R9 million rands. In argument, Ndobe submitted that that sale was cancelled since it was not approved by the Land Bank. However, nowhere in the papers is that fact testified to. These are motion proceedings and a party stands and fall by allegations made in its papers. The deponent of Murcus simply testifies that he believes that the farm will fetch a higher price and the proceeds of the sale would be used to pay its debts thus removing its inability to pay its debts. The difficulty with this evidence is that no indication is given as what that higher price is. This is a fatal omission, particularly where the onus to show *bona fides* and reasonableness lies on a party that is indisputably unable to pay its debts when they fall due. Factually it is common cause before us that in respect of Tau and the Land Bank, Murcus is indebted to them in the tune of over R13 million rands. Elsewhere Marcus's witnesses testified that the immovable property is valuated at around R12 million rands. On its own version the proceeds of the sale would not cover all its debts. It remains the onus of Murcus to demonstrate that it is able to dispute the indebtedness on *bona fide* and reasonable grounds.

[35] The debt of over R13 million rands is incapable of being disputed on any *bona fide* nor reasonable grounds. During argument Ndobe harped on the issue of the power of attorney given to an agent to market the immovable property. However, the said power of attorney empowers the agent to market the immovable property not below R12 million rands. Thus on the basis of that power of attorney the possible proceeds of the sale may be nothing more than R12 million rands. The argument about the non-compliance with the National Credit Act (NCA), although given undue attention by the Court below will not receive a similar attention in this Court given its irrelevance. Having failed to discharge the onus to dispute the indebtedness on any *bona fide* or reasonable grounds, in the

face of undisputed inability to pay that debt, it must be just and equitable to place Murcus under final liquidation.

Conclusions

[36] In summary, no basis has been laid out in this appeal that this Court must allow further evidence to be received from both parties. All the preliminary objections of Murcus are without substance and are not upheld. There was overwhelming evidence that Murcus is unable to pay its debts. As such, the Court below had little room to wiggle out of an order to finally winding-up Murcus. Although, there is paltry evidence that Murcus is solvent[29], this Court is nevertheless unable to conclude that a final liquidation order is not to be directed[30]. The Court below ought to have made the order final. Having failed to do so the Court below erred and its order is liable to be set aside on appeal. Empowered by section 19 (d) of the Act, this Court after having set aside the order of the Court below, may render any judgment which the circumstances require. The circumstances in this case require that the provisional order be made final.

[37] For all the above reasons, the following order is

proposed: Order

1. Both applications in terms of Rule 6(11) and section 19 (b) of Act 10 of 2013 are dismissed.
2. The Rule 30 application by Murcus is dismissed with costs.
3. The Appeal is upheld with costs.
4. The order of the Court a *quo* is set aside and is replaced with the following orders:

    3.1 The respondent, Murcus M Farming CC with registration number 2008/091707/23; is placed under final liquidation.

[29] On the available evidence, it is apparent to us that the ship restfully languished at the rock bottom of the sea.

[30] See *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) and *Afgri Operations* para 19.

3.2 The costs of the liquidation application under case number 63226/2018, as well as the costs of this appeal shall be paid from the estate of the respondent;

3.3 Each party shall pay its own costs in respect of the applications brought in terms of Rule 6(11) and section 19(b) of Act 10 of 2013.

**GN MOSHOANA**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

**S MAZIBUKO**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**
(I Agree and it is so ordered)

**SELBY BAQWA**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**
(I Agree and it is so ordered)

APPEARANCES:

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| Counsel for the Appellant: | Mr F J Erasmus SC |
| Instructed by: | VDT Attorneys, Pretoria |
| | |
| Attorney for the Respondent: | Mr S M Ndobe Attorneys, Pretoria |

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| Date of the hearing: | 24 January 2024 |
| Date of judgment: | 21 February 2024 |