Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no.: 10971/23P

In the matter between:

SOUTHERN SPIRIT PROPERTIES **APPLICANT**

227 (PTY) LTD

(Registration Number:[…])

and

AFRO JOINERY (PTY) LTD **FIRST RESPONDENT**

(Registration Number: […])

THE MASTER OF THE HIGH COURT,

PIETERMARITZBURG **SECOND RESPONDENT**

ORDER

The following order shall issue:

1 The first respondent is hereby placed in provisional liquidation in the hands of the second respondent, the Master of the High Court, Pietermaritzburg.

2 The second respondent is directed to forthwith appoint a provisional liquidator to immediately take charge of the first respondent, its business, immovable property, movable property and assets whether corporeal or incorporeal, and to preserve and administer the first respondent and such business, immovable property, movable property and assets for the benefit of the general body of creditors.

3 A rule *nisi* is hereby issued, calling on the first respondent and all other interested parties to show cause on 4 March 2024 why the first respondent should not be finally liquidated.

4 This order and rule *nisi* are published, once in Daily Mercury Newspaper circulating in KwaZulu-Natal and in the Government Gazette.

5 The costs of the urgent application; return dates and this application are costs in the winding-up.

6 The applicant shall be entitled to claim its costs on the attorney and client scale.

7 This order shall be served on the employees of the first respondent and the trade union, if any.

JUDGMENT

SIPUNZI AJ

Introduction

[1] This is an urgent application for the compulsory provisional liquidation of the first respondent. The applicant seeks an order in the following terms:

‘1. Dispensing with the requirements of form and service provided for in the uniform rules of court and permitting this application to be heard as one of urgency in terms of rule (6)(12)(b) of the rules.

2. Placing the first respondent in provisional liquidation in the hands of the second respondent, the Master of the High Court, Pietermaritzburg.

3. Directing the second respondent to forthwith appoint a provisional liquidator to immediately take charge of the first respondent, its business, immovable property, movable property and assets whether corporeal or incorporeal, and to preserve and administer the first respondent and such business, immovable property and assets for the benefit of the general body of creditors.

4. Interdicting and restraining the first respondent from:

   4.1. removing any property and assets for their current location at Ares Road, Oribi Village, Pietermaritzburg, KwaZulu-Natal.

   4.2. concealing, disposing or misappropriating any of its property assets.

5. Ordering that the interdict set out in paragraph 4 above shall operate as an interim interdict with immediate effect, pending the outcome of the return day set forth hereunder, or any further proceedings flowing therefrom.

6. Directing that the rule *nisi* is issued, calling on the first respondent and all other interested parties to show cause on a date to be determined by the court hearing the urgent application, why the first respondent should not be placed into final liquidation.

7. Directing that the provisional order and rule *nisi* are published, once in a newspaper circulating in KwaZulu-Natal and in the Government Gazette.

8. Ordering that the costs of the urgent application and return day are costs in the liquidation and that the applicant will be entitled to claim its costs on the attorney and client scale.

9. Ordering that any party who opposes this application pays the costs occasioned by such opposition.

10. Granting the applicant further and/alternative relief.'

[2] The matter served before this court on 28 July 2023; an order by consent was obtained. The order disposed of the prayers in paragraphs 1;4 and 5 in the notice of motion and gave further directives on the conduct of the first respondent, pending the determination of the provisional liquidation application. The application pertaining to the provisional liquidation was adjourned. The focus of this judgment will therefore be on the remainder of the relief sought as outlined in paragraphs 2; 3; 6; 7; 8 and 9 of the notice of motion.

[3] The first respondent opposed the application on the basis that the parties were still engaged in a pending litigation on the subject matter, as shall be dealt with in detail below. The first respondent also denied that the applicant was its creditor as contemplated in s 346(1)(*b*) of the Companies Act 61 of 1973 ("the Act").

The parties

[4] The applicant, Southern Spirit Properties 227 (Pty) Ltd, with registration number[…], is a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa, which has its registered address and principal place of business situated at 24 Pentrich Road, Masons Mill, Pietermaritzburg, KwaZulu-Natal.

[5] The first respondent is Afro Joinery (Pty) Ltd, a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa with registration number […], which has its registered address situated at 24 Pentrich, Masons Mill, Pietermaritzburg, KwaZulu-Natal.

[6] The second respondent is the Master of the High Court, Pietermaritzburg. It filed the report confirming that sufficient security had been lodged with it and filed a notice to abide.

Facts

[7] The applicant leased business premises at 24 Pentrich Road, Masons Mill, Pietermaritzburg, KwaZulu-Natal to the first respondent. The lease operated for a period of 24 months, with an option for renewal and purchase on terms set out in the

lease agreement. The lease commenced on 1 September 2019 and expired on 31 August 2021. Monthly rental amount for period starting from 1 September 2019 to 31 August 2020 was R48 000 and R51 840 for the period from 1 September 2020 to 31 August 2021.Thereafter the lease agreement was on a month-to-month basis and on the terms outlined in the lease agreement.

[8] From February 2022 to May 2023, the first respondent made irregular rent payments with varying amounts under a month-to-month lease agreement.

[9] The first respondent fell into arears. Pursuant to that, there was an exchange of correspondence between its representatives and those of the applicant. During the said exchange, the applicant claimed that the arrears amounted to R1 234 902.42. On 27 October 2022, the applicant issued summons against the first respondent for the payment of the arrears in rental. The first respondent, who was the defendant in the action, also filed a counterclaim for R118 199.43 which it alleged would amount to undue enrichment of the applicant.

[10] In the trail of emails exchanged between the representatives of the respective parties on 25 January 2023, there was a suggestion that the first respondent's indebtedness to the applicant could be an amount of R771 919.70. This was illustrated in the schedule that was attached to the email, drawn on behalf of the first respondent.

[11] On 03 July 2023, the applicant instituted an application for the eviction of the first respondent from the leased premises. The applicant became aware that the first respondent had vacated the premises on 18 July 2023, contrary to the first respondent's earlier undertaking that it would do so on 31 July 2023. These developments were addressed by the subsequent interim interdict that was taken by consent of the parties on 28 July 2023.

Issues

[12] The central question for determination is whether the applicant made out a case for the granting of the order of provisional liquidation of the first respondent.

This includes whether the applicant established that it has the locus standi as contemplated in the Act.

[13] Further to that, it became necessary for the court to also consider whether the communication marked “without prejudice” in the email dated 25 January 2023 is admissible in these proceedings and whether it amounted to an acknowledgement of debt by the first respondent.

Submissions

[14] According to the applicant, the first respondent had acknowledged its indebtedness of the rental arrears that were due as a result of their lease agreement. They based their contention on the email correspondence exchanged on 25 January 2023. On the other hand, the first respondent denied that the content of the communication amounted to an acknowledgement of their debt to the applicant. According to the first respondent, the said correspondence is not admissible in these proceedings. The basis of their contention being that the correspondence in question was marked ‘without prejudice’.[1]

[15] According to the first respondent, its indebtedness to the applicant was still a subject of dispute, a matter that was still *sub judice,* to which the first respondent had a counterclaim. Among others, the first respondent contended that the disputed amount was occasioned by ‘whether the lease agreement was renewed or not, which affects the calculation of the arrear rental, as evident from the contradictory allegations between the applicant’s founding affidavit and its particulars of claim which has led to a dispute about how much [was] in fact owed.’[2]

Relevant legal discussion

[16] The applicants sought to have the first respondent liquidated in terms of the provisions of s 345 of the Act. Section 345 provides that:

‘**When company deemed unable to pay its debts—** (1) A company or body corporate shall be unable to pay its debt if—

[1] Preliminary answering affidavit, para 44.
[2] Respondent’s heads of argument, para 12(iii).

(a) A creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand due—

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

(ii) …

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to be the reasonable satisfaction of the creditor; or

(b) …

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

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.'

Locus Standi

[17] Among others, the applicant alleged that it had locus standi as the creditor of the first respondent in the application for its provisional liquidation. According to the applicant, when the first respondent fell into arears from 17 to 30 November 2021, there were discussions between their legal representatives. The subject of these discussions included means to be explored by the first respondents on how the applicant would be paid arear rental that was owed to it. Furthermore, on 5 October 2022 a demand for the payment of the arear rental and service charged in the sum of R1 234 902.42 was addressed to the first respondent. When there was no payment made, summons was issued for the payment of arrear rental and service charges on 27 October 2022.[3]

[18] The applicant further stated that its claim that it is the creditor has not been disputed, save for the contention that the first respondent denied the amount of the alleged debt or its basis. The first respondent also contended that there was a

[3] Founding affidavit, paras 29 and 30 and as substantially admitted at paras 42 and 43 of the first respondent's preliminary answering affidavit.

dispute being determined in action proceedings before this honourable court as to the amount owed to the applicant and that the amount was certainly not liquidated.[4]

[19] The first respondent further admitted in the answering affidavit that from 16 February 2022 until 5 May 2023, it made irregular payments of varying amounts to the applicant.[5] The first respondent however denied that its alleged failure to pay the applicant was without good and sufficient reason.

[20] From the above, it can be safely gathered that the first respondent did not *per se* take an issue with the claim that the applicant was its creditor, save to contend that the amount involved was not liquidated and a subject of court proceedings.

[21] For the purposes of establishing *locus standi,* for which the applicant bears the burden of proof, it sufficiently established that it was the creditor to the first respondent, as contemplated in the Act.[6] Therefore I am satisfied that the applicant has locus standi to institute these proceedings.

Admissibility of the alleged acknowledgement of debt

[22] Notably, the applicant alleged that the first respondent unequivocally acknowledged that it owed a debt to the applicant. The applicant based its allegations on the communication dated 25 January 2023, which was part of the exchange between their representatives. According to the applicant, the reading of the communication in the context of the discussion should not be viewed as a settlement proposal but a mere admission that the first respondent owed some arrear rental to the applicant. They differed on the calculation of the amount. It further argued that therefore the disclosure of that communication was not privileged. It was also submitted that all that the applicant was required to establish was that there was money owed to it by the first respondent and that, that communication alone met that requirement.

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[4] Preliminary answering affidavit, para 22.
[5] Preliminary answering affidavit, para 51.
[6] Section 346(1)(*b*) of the Companies Act.

[23] On behalf of the first respondent, it was submitted that the email was part of negotiations and an invitation to the applicant to engage in a discussion. It denied that it amounted to an unequivocal acknowledgement of the first respondent's indebtedness to the applicant. It was further argued that it should not be admissible, for reason that it was also marked, "Without Prejudice". The respondent's argument to this was that the letter was in the spirit of negotiation of the action proceedings that were unfolding. It emphasised that the wording of the text, namely 'might owe some arear rental' amount of approximately R770 000; and 'round table meeting to discuss the discrepancies and agree on a way forward' was no unequivocal acknowledgement of debt. According to it, so the argument went, the dispute was about the manner of calculation of the arear rental.

[24] The contentious part of the email is illustrated in the extract below:

'From: Jeremy Capon – [...]
Sent: 25 January 2023 08:16
To: Anthony Grant- [...]
Subject: Southern Spirit Properties 227 (Pty) Ltd//Afro Joinery and D Steiner
Dear Ant
"WITHOUT PREJUDICE"
Further to the above matter, wherein we act on behalf of D Steiner and Afrojoinery (Pty) Ltd I have been given a copy of a (sic) dated…January 2023.
This letter is somewhat confusing due to the fact that your client has previously issued summons and has now sent a further letter which appears to some extent to contradict what was previously been stated.
Whilst Ikhlaas doesn't deny that Afrojoinery might owe some arrear rental he has calculated that the amount that he owes your client is significantly less than the amount claimed.
Based on the attached calculation there is an amount of approximately R770 000.00 outstanding which is a far cry from the amount claimed in the letter and summons.
In order to resolve the matter without resorting to costly litigation please can you confirm whether you and your client would be amenable to having a round table meeting to discuss the discrepancies and agree on a way forward.
We look forward to hearing from you.
In the interim all of our client's rights remain reserved.
Yours sincerely
Jeremy Frank Capon…'

[25] The preferred approach on the question of admissibility of the communication would be to examine the nature of the email dated 25 January 2023; its content; the context and its purpose against the applicable legal principles. I am also mindful of the guidance the Supreme Court of Appeal gave in *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[7] where it recognised that the circumstances in which a document came into being, is one of the factors to be considered when interpreting a document. Wallis JA stated:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used…'

[26] For this reason, it would be apposite to apply the principle in *Jili v South African Eagle Insurance Co. Ltd*[8] where it was held that:

'No conclusive legal significance that attaches to the phrase 'without prejudice'. The mere fact that a communication carries that phrase does not *per se* confer upon it the privilege against disclosure, for example where there exists no dispute between the parties or it does not form part of a genuine attempt at settlement… nor is a communication unadorned by that phrase always admissible as evidence, for it will be protected from disclosure if it forms part of settlement negotiations…'

[27] Furthermore, in regard to liquidation proceedings, an exception to the general rule can be found in *ABSA Bank Ltd v Hammerle Group*[9] where it was held that:

'It is true that, as a general rule, negotiations between parties which are undertaken with a view to settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to the rule. One of these exceptions is that an offer made, even on a 'without

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[8] *Jili v South African Eagle Insurance Co Ltd* 1995 (3) SA 269 (N) at 275B.
[9] *ABSA Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA).

prejudice' basis, is admissible in evidence as an act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admission of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings are a matter which by its very nature involves the public interest.'

[28] One has to give regard to the content of the communication; the purpose which it sought to accomplish in the course of the discussions, the dictum in *Absa* and the arguments advanced. If one aligned with *Jili,* to the extent that the phrase 'without prejudice' carried no conclusive legal significance against disclosure*,* considered in context of the discussions between the representatives, the argument against admissibility of the email of 25 January does not find support. In light of the proceedings at hand, I agree that for purposes of establishing that a debt existed, the said communication met the requirements for admissibility. In the context of the matters that were under discussion, it cannot be said that the parties were engaged in genuine settlement negotiations when the correspondence was written. Furthermore, for reasons outlined in *Absa* the communication in issue does not enjoy the non-disclosure rule*.* As correctly argued by the applicant, the letter acknowledged indebtedness but differed with the applicant's calculations on the exact amount claimed.

[29] Therefore, for the purposes of establishing that a debt existed and acknowledged by the first respondent, I am satisfied that the email dated 25 January 2023 met the requirements of admissibility.

Section 345 of the Companies Act

[30] The application for the provisional liquidation of the first respondent is founded in the provisions of s 345(1)(*a*) of Act. The opposition of the liquidation application appears to be based on the contention that the first respondent has a counterclaim to the moneys claimed in the action proceedings. According to the first respondent, the dispute over its alleged indebtedness to the applicant was still a subject of ongoing court proceedings. The first respondent argued that their defence of a counterclaim to the applicant's claim was based on bona fide and reasonable

grounds. The first respondent also argued that no defence was necessary when the applicant had no *locus standi* to bring the application for its liquidation in the first place

[31] In order to consider the implication of the said counterclaim, it will be imperative to reflect on what was said in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd.*[10] In this case, the court of first instance had dismissed the application for winding up of the respondent solely on the basis that it had a counterclaim against the appellant.

[32] The SCA emphasised that, 'mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up'. The counterclaim must also be shown to be genuine. It further stated that:

'The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not.'[11]

[33] It was further critical of the failure by the court of first instance to correctly observe the rule that once the respondent's indebtedness has prima facie been established, the onus is on respondent to show that its indebtedness is disputed on bona fide grounds and that the court had the discretion not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide.[12] The SCA upheld the appeal by the creditor and placed the respondent under final liquidation.

[34] Therefore, it is imperative *in casu* to assess if the merits of the defence raised by the first respondent, namely, a pending dispute and counterclaim of the rental arears allegedly owed to the applicants. This should be viewed against the fact that this application is one that is a debt-driven liquidation. Therefore, the ultimate test would be the 'The *Badenhorst* test',[13] namely, that a liquidation order will not be

[10] *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA).
[11] *Ibid*, para 7.
[12] *Ibid*, para 13.
[13] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

granted where it is sought to enforce a genuinely disputed claim.[14] The essence of the test was that, although it is trite that liquidation proceedings are not to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds, the respondent will not succeed in its defence if it failed to show such grounds.

[35] In order to reach a conclusion, among others, it would be prudent to consider if the first respondent was unable to pay its debt without good and sufficient reason. This consideration must, *inter alia*, be informed by the attempts, if any, made to demand or place the first respondent on terms to enforce the debt, and whether the first respondent had made any attempts to satisfy the debt, if it existed. In such determination, the court's reasoning when it dealt with the continued failure to pay the debt in *Express model trading 289 CC v Dolphin Ridge Corporate*[15] finds application, albeit the first respondent, in this instance, argued that the applicant lacked *locus standi* and that there was a counterclaim. Herein, the court held that without an adequate explanation for failure and delay to pay, the appellant, who sought a condonation, could not succeed. Among others, the appellant was arguing that it had assets which it could liquidate in order to cover its liabilities. Subsequently, it transpired that a third party paid the levy arrears on behalf of the debtor, the court found that, the payment of the debt could well be a sign that the respondent was creditworthy, but equally, it could be a demonstration of the opposite, namely that it was unable to pay its debt or that it refused to do so on unreasonable grounds.

[36] A glean at the interaction between the representatives of the parties; the demand for payment of arrear rentals and service charges; the litigation proceedings in an action claim, the eviction proceedings; the interdict and the proceedings at hand, reveal that the applicant had a genuine demand for the payment of the rental and service charges. These materialised when the first respondent began to make irregular rental and service charges payments from February 2022 to May 2023. Despite the demand being made in October 2022, and in a period of 15 months, the first respondent paid varying amounts towards rental and service charges. These

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[14] *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another (Pty) Ltd* 2015 (4) SA 449 (WCC).
[15] *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* 2015 (6) SA 224 (SCA).

payments are also as tabulated in the schedule that was attached to the email dated 25 January 2023 and when it fell into arears.

[37] The chronology of the events that preceded this application include the first respondent falling into arears when it began to make varying amounts of rental during the month to month lease agreement; demand for payment; summons issued in demand of the outstanding arrear rentals; followed by a counterclaim (despite the right of renewal and no set-off clauses of the lease agreement)[16] and email discussions. Even in the face of the eviction proceedings, no payments were made for the continued occupation of the applicant's property. Instead, when the applicant pursued this application, there was a consent order taken, and the first respondent moved to another property adjacent to that of the applicant. A holistic approach and in particular, the application of the '*Badenhorst* test' and *Afgri Operations* to the dispute revealed the first respondent had no reasonable grounds upon which the established debt was not met when due or on demand.

[38] It remained undisputable that although there were monies owed to the applicant, the liquidity of such monies might be a subject for another determination. The cumulative analysis of amounts involved in the application at hand, being the amount of R771 919.70 as suggested on behalf of the first respondent in the email dated 25 January 2023; R1234 902.42 claimed in the summons; and R118 199.43 claimed in the counterclaim, sufficed to establish that the amount involved met the requirements in s 345(1)(*a*)(i) of the Act. The fact that the amount owed to the applicant may not be a liquidated amount should not be a justifiable basis to resist its application based on s 345 of the Act.

[39] As it was emphasized in *Afgri Operations,* the mere fact that the respondents have a counterclaim against the action for arrear rental instituted by the applicant cannot absolve them from the provisional liquidation. The first respondent has not sufficiently shown that its indebtedness to the applicant was disputed on bona fide and reasonable grounds. In this instance, the applicant has met all the requirements in terms of the provisions of the Act upon which it relied, the counterclaim of the first

[16] See Clause 4.1 '…the Lessee shall be entitled to renew the lease…on the terms and conditions applicable to the initial period…' and clause 5 of the lease agreement.

respondent failed to stand in the applicant's application. In my view, the applicant has established a case for the provisional liquidation of the first respondent.

Costs

[40] When the consent order was granted on 28 July 2023, the costs were reserved for hearing when the matter was re-enrolled. During the hearing of the arguments on 24 October 2023, on behalf of the applicant, it was argued that the costs should include the costs of senior counsel. The first respondent was opposed to these submissions and argued that the issues involved were not so complex as to warrant the appointment of a senior counsel, with which I agree. On the overall costs, they agreed that such costs should be costs in the winding-up.

Order

[41] In the result, the following order is therefore made:

1 The first respondent is hereby placed in provisional liquidation in the hands of the second respondent, the Master of the High Court, Pietermaritzburg.

2 The second respondent is directed to forthwith appoint a provisional liquidator to immediately take charge of the first respondent, its business, immovable property, movable property and assets whether corporeal or incorporeal, and to preserve and administer the first respondent and such business, immovable property, movable property and assets for the benefit of the general body of creditors.

3 A rule *nisi* is hereby issued, calling on the first respondent and all other interested parties to show cause on 4 March 2024, why the first respondent should not be placed in final liquidation.

4 This order and rule *nisi* are published, once in Daily Mercury Newspaper circulating in KwaZulu-Natal and in the Government Gazette.

5 The costs of the urgent application; return dates and this application are costs in the winding-up.

6 The applicant shall be entitled to claim its costs on the attorney and client scale.

7 This order shall be served on the employees of the first respondent and the affected trade union, if any.

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SIPUNZI AJ

APPEARANCES

For the Applicant:	Adv P Strathern SC
Instructed by:	Grant and Swanepoel Attorneys
For the First Respondent:	Ms E Van Jaarsveld
Instructed by:	Hay and Scott Attorneys
Date of hearing:	24 October 2023
Date of judgment:	18 January 2024