Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: M261/2021

In the matter between:

NOBILATUS PROJECTS 23 (PTY) LIMITED **Applicant**

and

K2015351259 (SOUTH AFRICA) (PTY) LIMITED **Respondent**

(Registration Number: 2015/351259/07)

JUDGMENT

GURA J

Introduction

[1] The applicant ("Nobilatus") seeks an order in the following terms:

[1.1] That the respondent ("K2015") be placed under final winding up in the hands of the Master of the High Court.

[1.2] That the costs of this application be costs in the winding – up.

The applicant's case.

[2] The deponent to the founding affidavit, Kamal Dinnath Bhimma (Bhimma) Dhinnath is a businessman and a business associate of applicant and he is a director of a number of companies. Bhimma ceded and assigned his right, title and interest in, and to the first and second loans to the applicant (Nobilatus). The respondent (K 2015) is a company duly registered in terms of the company laws of the Republic of South Africa with its registered office at 9B Dina Close, Safari Gardens X8, Rustenburg Northwest. The sole director of K2015 is Willem Andries Badenhorst. However a certain Chris Nortje (Nortje) at all material times hereto represented K2015 in business dealings with Bhimma and K2015 and was its controlling mind and/or authorised representative.

[3] The basis for the application is that K2015 is unable to pay its debts in accordance with the provisions of section 344 (f) read with section 345 of the Companies Act 1973 (the 1973 Companies Act). The provisions of section 344 and 345 of the 1973 Companies Act are made applicable by virtue of item 9 of Schedule 5 of the Companies Act, 2008

[4] Nobilatus will also make application on the same factual matrix for the winding-up of an entity known as Improfin (Pty) Ltd registration number 2015/249113/07 (Improfin) a company duly registered in terms of the company laws of the Republic of South Africa with its registered office at 162A Frederick Drive, Northcliff, Gauteng. K2015's indebtedness to Nobilatus is in its capacity as surety for the repayment of the indebtedness of Improfin as surety towards Nobilatus. The applicant and Bhimma also instituted action against the respondent *ex abudante cautela* in the Pretoria High Court and under case number 8503/2021, the institution of which does not influence this application.

[5] Nobilatus is a creditor of K2015 in the latter's capacity as a surety for the indebtedness of Improfin as envisaged in section 345 of the 1973 Companies Act in the liquidated capital sums (excluding interest) of:

[5.1] R8,862,018.09 in terms of the first loan discussed below the (first claim) and

[5.2] R9,240,00.00 in terms of the second loan discussed below (the second claim.)

[6] Notwithstanding the respondent entering an appearance to defend in the action, the liability in respect of the first and second claims remain undisputed as at date of the signing of the founding affidavit. Nobilatus accordingly has the requisite locus standi to apply for the winding up of the respondent. K2015 (and Improfin for that matter) is commercially insolvent in the sense that it cannot pay its debts as and when they fall

due. Despite demand it has not and cannot settle the claims of the applicant.

[7] Bhimma met Nortje towards the end of April 2014. He was introduced to him by Bhimma's partner, George Hamilton. Nortje represented to Bhimma to be a global investment broker that traded successfully in inter alia financial instruments and currency on various banking platforms on behalf of the business investors with favorable monthly and or annual returns. On the 10 of December 2015 and at Rivonia, Improfin duly represented by Nortje and Bhimma concluded a written loan agreement (the first loan). The first loan contains inter alia the following material, express, alternatively tacit further alternatively implied terms:

7.1 The parties recorded that Bhimma lent and advanced the capital sum of R17 million to Improfin;

7.2 Within seven days from date of signature, Improfin undertook to pay the sum of R6,160,000.00 into the nominated trust account;

7.3 Improfin authorized Berndt and La Vita Incorporated (BLV) to issue a guarantee in the amount of R5 750 000.00 in favour of Botha Coetzee Attorneys (BC) for monies lent and advanced with the balance amount in the sum of R490,000 -00 to be paid at expiry of the loan term;

7.4 Improfin shall pay Bhimma the amount of R3 080 000-00 payable in monthly installments as follows:

7.4.1 R770, 000.00 on or before 1 December 2015;

7.4.2 R770, 000.00 on or before 1 January 2016;

7.4.3 R770, 000.00 on or before 1 February 2016;

7.4.4 R770, 000.00 on or before 1 March 2016;

7.5 Should Improfin fail to make payment of any instalment on due date, Bhimma shall be entitled, but not obliged, to claim payment of the full balance of the capital together with interest then outstanding;

7.6 The loan amount shall be repaid in full on or before 31 August 2016;

7.7 A certificate by Bhimma's attorney or an affidavit deposed to by Bhimma shall be sufficient proof of the amount owing in terms of the first loan or any other fact relating to the first loan for purposes of judgment;

7.8 If Improfin fails to make payment of any instalment on due date and Bhimma decides to enforce the acceleration clause, he shall give written notice calling upon Improfin to make payment within two weeks, failing which he shall be entitled to claim payment of whatever is due in terms of the agreement including interest at the rate of prime plus 3%; and

7.9 Any legal costs awarded against Improfin will be recoverable on an attorney and own client scale.

[8] All conditions precedent of the first loan were fulfilled, alternatively waived by Bhimma. The latter advanced the sum of R 10,092,018.09 to Improfin and complied with all his obligations in terms of the first loan. Improfin breached the first loan by failing to repay the loan in full by 31 August 2016. It only made one capital payment in the sum of RI ,230,000.00 on 8 June 2016. Despite written demands for repayment of the first loan dated 11 March 2019, 4 March 2020 and 14 December 2020 respectively,

copies of which are attached hereto marked annexure "DI" to "D3", Improfin and K2015 as surety, failed and/or refused to make payment of the full balance of the capital together with interest outstanding. The full balance of the capital in the sum of R8,862,018.09, together with interest at a rate of prime plus 3% per annum is due owing and payable in terms of the first loan.

[9] On 28 January 2021 and at Rivonia, Nobilatus [duly represented by Aadil Essop ("Essop")] and Bhimma, concluded a written Deed of Cession ("the cession"). In terms of the cession, Bhimma ceded, transferred and made over to Nobilatus his right, title and interest in and to any amount due and owing by Improfin in terms of the first loan. By the operation of law, Improfin is indebted to Nobilatus in terms of the first loan. Improfin is currently indebted to Nobilatus in a total sum in excess of R 17,724,036.18, which includes interest calculated at the aforesaid rate. According to advice received, it cannot exceed this sum by operation of the *in duplum* rule. As proof Improfin's total indebtedness to Nobilatus, an affidavit deposed to jointly by Bhimma and Essop (the Chief Financial Officer of Nobilatus) is attached hereto marked annexure "D5" confirming the outstanding amount owing on the first loan as at 31 January 2020.

[10] On 17 March 2016 and at Johannesburg, Improfin [represented by Helena Vossina Cronje ("Helena Cronje")], K2015 represented by Badenhorst and Bhimma, concluded a further loan agreement (which included a deed of suretyship executed by K2015) (the second loan

agreement.) The second loan contains the following material, express alternatively implied terms:

10.1 Bhimma would lend and advance the capital amount of R9.24 million to Improfin;

10.2 Improfin shall use the capital amount for its business only;

10.3 The capital amount and interest calculated at a rate of 5,12 ^{0}/0 per month compounded annually thereon shall be repaid in full by 30 November 2016 as set out in annexure "A" to the second loan; and

10.4 As security for the due, proper and timeous payment and performance in full of all Improfin's obligations in terms of the second loan, K2015 will register a surety bond in favour of the Applicant.

[11] The bond contains, inter alia, the following material express terms:

11.1 K2015 bound itself as surety and co-principal debtor *in solidum* for compliance with all the terms and conditions of any loan agreement, mortgaging as security for the fulfilment of the said obligations the properties mentioned below;

11.2 K2015 declared itself to be truly and lawfully indebted to Bhimma in the sum of RI 7 million and the additional sum of R3.4 million arising from any cause, including but not restricted to existing, future and contingent indebtedness to Bhimma;

11.3. Agreed, as continuing covering security for the maximum sum in respect of existing future and contingent indebtedness of K2015 to Bhimma arising from any cause described in clause 1 thereof or

otherwise, even though the amount of such indebtedness may fluctuate or be temporarily extinguished;

11.4 Bhimma was entitled at any time, without the consent of Improfin to cede, make over or transfer or sell or delegate any or all rights in and to the obligations in terms of the bond to any other person; and

11.5 In the event that the mortgager breaches any of the provisions of the bond the amount secured by the bond, at Bhimma's option, would become immediately due and payable on demand and may institute proceedings for the recovery thereof and for an order declaring the properties to be executable.

[12] The bond was registered over the following immovable properties:

12.1 Section number 1, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.2 Section number 2, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.3 Section number 3, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in

respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.4 Section number 4, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.5 Section number 5, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8. Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.6 Section number 6, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77square meters in extent;

12.7 Section number 7, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.8 Section number 8, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.9 Section number 9, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.10 Section number 10, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.11 Section number 11, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.12 Section number 12, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini

Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.13 Section number 13, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent;

12.14 Section number 16, as shown and more fully described on Sectional Plan No. SS208/2010 in the scheme known as Emile's Place in respect of the land and building or buildings situate at Erasmus Extension 8 Township in the area of Kungwini Municipality of which section the floor area, according to the said sectional plan, is 77 square meters in extent; and

12.15 An undivided share in the common properties in the scheme apportioned to the said sections in accordance with the participation quota as endorsed on the said sectional plan.

[13] The bond constitutes a suretyship and a surety mortgage bond which covers both the indebtedness of the first and second loans. A copy of the surety mortgage bond caused to be registered by K2015 on 31 October 2016 under bond number B57327/2016 is attached to the founding affidavit marked annexure "E2" should Nobilatus and/or Bhimma elect to apply the suretyship (as Nobilatus and/or Bhimma are entitled to do) to the oldest debt first, i.e. that constituted by the first loan. A certificate signed by any director or manager of Bhimma, whose appointment need not be proven, as to the existence of and the amount

of indebtedness by Improfin and K2015 to Bhimma, would constitute prima facie proof that such amount is due and payable including interest accrued thereon.

[14] On 25 August 2016 and at Johannesburg,_Nobilatus, Improfin, K2015 [as represented when concluding the second loan] and Bhimma, concluded a written addendum to the second loan in terms of the addendum, clause 4.1 of the second loan was amended by:

14.1 Deleting the date of "30 November 2016";

14.2 Replacing it with "the end of February 2018"; and

14.3 Deleting the content of annexure "A" thereto and replacing it with annexure "A" attached to the addendum. In all other respects, the terms of the second loan remained unchanged.

[15] In compliance with the second loan [read together with the addendum], Bhimma advanced the sum of R9,24 million to Improfin. In terms of annexure "A" to the second loan (as amended) the capital amount due in terms of the second loan (together with interest) exceeds R18,480,000.00 but, according to advice received cannot exceed this sum by operation of the *in duplum* rule.

[16] On or about 17 March 2016 and at Johannesburg, Improfin, K2015 [as represented when concluding the second loan and the addendum] and Bhimma, concluded a written assignment agreement (the assignment agreement) In terms of the assignment:

16.1 Bhimma agreed to cede and assign all his rights, title and interest under the second loan and suretyship to Nobilatus, including his right, title and interest against K2015 arising from the bond with effect from the signature date being 17 March 2016; and

16.2 Improfin and K2015 consented to the assignment and Nobilatus accepted the assignment.

[17] Improfin breached its payment obligations under the second loan and failed to repay the full outstanding capital amount and interest on the second loan to Nobilatus before end of February 2018. Improfin is currently indebted to Nobilatus in the total sum of R 18,480,000.00, which includes interest and other finance charges as provided for in the second loan, read together with the addendum. Bhimma attached to the founding affidavit annexure "E5" a certificate of balance signed jointly by himself and Essop in accordance with clause 8 of the second loan agreement and/or the assignment agreement confirming the full balance due, owing and payable. Notwithstanding the demands as contained in annexures "DI" to "D3" hereto, K2015 as surety and Improfin has failed to make payment to Nobilatus in respect of the second claim. Annexures "DI " and "D2" constitute notices in terms of Section 345 of the 1973 Companies Act. Despite the lapse of 3 weeks after such demands, the Respondent has failed to make payment and also failed to raise any dispute as to its indebtedness.

[18] It is common cause that Improfin failed to settle the full indebtedness due owing and payable in terms of both the first and second loans and

that K2015, liable as surety to the Applicant, failed to make payment of any portion thereof. Bhimma has engaged with Nortje, in demanding repayment of both the First and Second Loans. No dispute has ever been raised in respect of repayment of either of these two loans. On the contrary, Improfin and the Respondent have throughout our dealings admitted the amount owing under claims one and two and has consistently made attempts to settle the claims. As far back as 02 September 2017, Cronje stated in an email of such date.

> *"....1 understand that your companies are under serious pressure because of the delayed payments. The payment is my responsibility and the issues with the banks etc is not your problem and any delays because of this should not be made your problem..."*

[19] After some negotiations, it became apparent to Bhimma that both Nobilatus and Bhimma have been victims of a fraud and that the Respondent and/or Improfin had no intention of repaying its debt. Bhimma has filed criminal charges against Nortje, Improfin and other related entities. His statement in those criminal proceedings is annexed hereto marked "F1" ("the Charge Statement") to the founding affidavit.The charge Statement sets out the history of the matter and highlights a number of suspicious and fraudulent behaviors of Nortje including, but not limited to, providing fake "proof of payments". These "proofs of payments" were received over the course of 2017 to 2019 and purported to establish that payments were made into nominated accounts at certain dates, when in fact no payment was made. Bhimma is not aware of any exculpatory version given by Nortje for the charges filed.

[20] The notice and letter of demand dated 4 March 2020 (attached hereto marked annexure "D2") was sent to both Improfin and K2015 on 1 1 March 2020 demanding repayment of the First Loan. Nortje responded to the aforesaid letter by email dated 18 March 2020 stating that:

> *"writer is of the opinion that this matter can be settled amicably and will endeavour to do so. Kindly advise what is the amount claimed in full and final settlement by your client in order to cancel the relevant surety bond, and in order for a guarantee to be issued to your client payable upon cancellation and registration of the bond cancellation in the relevant deeds office.* In correspondence with the Respondent, Nortje — on behalf of Improfin - consistently admitted that the First and Second Loans are due and payable. He however offered numerous excuses as to why payment could not be made. The most prominent excuse was that: *"funds are held up at the bank and are not being released."*

[21] As such, Nortje advised that payment could not be made. An email from Nortje dated 18 May 2020 (annexed hereto marked annexure "HI") states inter alia that:

> *"Mr. George Hamilton (Director of DEC) was appointed as the investigator in this matter and he had numerous meetings with various people involved (and not involved) in this matter and he has obtained all the relevant information pertaining to source of funds and how the various issues arose that prevented me from settling the indebtedness in accordance with the agreements concluded".*

"From my (Nortje's) perspective the matter that has to be dealt with is settlement of the outstanding liability and how this can be arranged"
"...we have been in constant communication with the bank and the relevant people involved to bring this matter to a close and release payments due to the beneficiaries (myself included)";
"I have indicated to your clients previously that I am desirous of concluding the payments as expeditiously as possible and I hope to have some idea of timeline for payment in lieu of this during the course of the week"; and
"it would be of great assistance if your clients (myself and Nobilatus) could confirm an amount acceptable to them in full and final settlement of the indebtedness to them.. I cannot confirm the payment timelines and conclude the agreement before I have confirmed payments from the bank in order to do this. "

[22] On 26 May 2020 Nortje sent a further email. He stated that he "is desirous of concluding the current issue". He agrees that Nobilatus and Bhimma have been patient in waiting for payment and that he has "undertaken to resolve the matter and make payment due" and further contends that the "resolution to the matter pertains to quantum for payment acceptable to your clients (myself and Nobilatus)". More particularly, he stated the following:

"Quantum: I can confirm that during previous discussions held with your clients (Bhimma and Second Applicant) a payment in full and final settlement in the amount of R62 000 000.00 (Sixty Two Million Rand) was discussed. This payment is a substantial amount if you take into consideration that the settlement amount is calculated at an increase of approximately 670% compared to the initial capital payment in the amount of R9 240 000.00 (Nine Million Two Hundred and Fourty (sic) Thousand Rand). Is this settlement acceptable to your clients, and if not what would accordingly be an acceptable settlement?"

He confirms in paragraph 6.2 thereof that:

> *"Timeline: I do not have a confirmed timeline for payment at present. I will advise as soon as possible, but I can confirm that everyone in this matter is desperate to have the matter resolved. ....„*

[23] The last statement can only be interpreted to be confirmation that Improfin is hopelessly insolvent, both commercially and factually. Since date of this email and up to date hereof, no payment has been received and no timeline has been provided for repayment.

[24] A director of Nobilatus, Fred Pietersen ("Pietersen"), has also been communicating with Nortje for repayment of the First and Second Loan in a string of WhatsApp communications ranging from March 2019 to date, annexed hereto as "J". Bhimma highlights the following messages which confirm the fact that the indebtedness to Nobilatus has never been disputed:

> *"06/03/2019, 12:45 - Chris Norjke (sic): I really am making every effort to resolve the*
> *R61m payment asap .. we will have to discuss additional interest cannot afford to pay more than that amount due";*
> *"06/03/2019, 13:16 — FHP (Pietersen): Hi Chris (Nortje), the R61m is fine as the settlement. Please provide me with a timeline - when you are in a position to do so";*
> *"11/03/2019, 10:39 - Chris Norjke (sic): Thank you I will endeavour to get your payment done asap .. this week still if possible but please let me confirm first";*

"23/07/2019, 14:43 - Chris Norjke (sic): Hi fred (Pietersen) ..online confirmed funds cleared and will be available in 48hours.. ".

"27/07/2019, 10:22 - Chris Norjke (sic): Please ask FP (Pietersen) to be patient we are waiting for the POP .. authorisation was put through on our enterprise system";

"29/07/2019, 13:03 - Chris Norjke (sic): Will confirm .. i will appoi t (sic) a lawyer to draw up a full and final settlement agreement hetween (sic) me you (Pietersen) and kamal (myself) in the interim once the payme t (sic) is done all funds to be paid to the lawyer and he will settle all your outstanding liabilities";

"29/07/2019, 13:32 - Chris Norjke (sic): Collen will pay the lawyer .. laywer (sic) pays kamal (myself) kamal pay you (Nobilatus).. you can nominate an account .. dont care where that goes as long as i have an agreement for the settlement and we conclude business";

"29/07/2019, 13:41 — FHP (Pietersen): Ok, I get you. A settlement agreement does make sense for al/ parties concerned. When do you contemplate that the actual payment will be made?";

"29/07/2019, 13:42 - Chris Norjke (sic): We will make first payment tomorrow if all goes to plan";

"30/07/2019, 11:31 - Chris Norjke (sic): We met the lawyer this morning all instructions have been issued. I will confirm later if the first funds have been transferred as i confirmed to kamal (myself)";

29.11. "31/07/2019, 07:24 - Chris Norjke (sic): Hi Fred (Pietersen) payments have been processed as confirmed by online yesterday but not reflecting (sic) in the beneficiary accounts yet. We will only be able to get info on posting when the bank opens. Agreements wont (sic) be ready today I am still busy with drafts and the lawyer. Cc. Kamal Collen";

"31/07/2019, 07:44 - FHP: Hi Chris, surely I should have sight of a draft agreement for my edification as well. Please forward me a copy for my and Kamal's perusal when available. I would have thought that a one page settlement agreement would suffice, for each party concerned. Cc Kam,. CG

06/08/2019, 11:27 - Chris Norjke (sic): Hi Fred (Pietersen) .. agreements have been drafted busy with annexures etx (sic).. will send asap";
"07/08/2019, 10:42 - Chris Norjke (sic): Hi Fred (Pietersen) .. i will.send that agreement asap .. but as you know a piece of paper means nothing if you cant perform .. who gave the undertaking for the drop today lemme call them and
find out if it is 100%.. ? ";
"13/08/2019, 18:00 Chris Norjke (sic): Forgot to mention .. I read every single message you send .. I am resolved to get your payment done as priority"; and
"28/08/2019, 17:39 – Chris Norjke (sic): Fred ……you will be paid and that's (sic) a fact".

[25] The amount of R62 million and R61 million referred to earlier was calculated by including interest on the first and second loans. Nortje confirmed the amount owing in a draft settlement agreement compiled by the attorneys of record of Improfin (settlement agreement). The settlement agreement which was drafted on behalf of Improfin but which was never signed confirms that:

25.1 Improfin borrowed funds from Bhimma and the applicant;

25.2 As security for the repayment of the said funds K2015 consented to the registration of a surety bond over certain property owned by it and;

25.3 Improfin is now willing and able to settle the outstanding liability in order to proceed with the cancellation of the surety bond passed in Bhimma's favour by making payment of R61 421 280.70 on or before 30 August 2019.

[26] The settlement agreement turned out to be another delaying tactic as despite having same prepared, the agreement was not signed and there was no intention of making payment. It however expressly admitted the indebtedness arising from the first and second loans to the applicant. The respondent has, despite demand, failed to make payment to the first and second claims or any part thereof.

[27] Although the Respondent owns the properties bonded in terms of the Surety Bond, it does not appear to trade or conduct any other business. Its failure to make payment to the Respondent of the undisputed debt can only justify an inference that K2015 cannot make payment to the Applicant and that it is commercially insolvent. Bhimma is not aware of the value of these properties, but in view of the failure to make payment, the justifiable inference extends to a conclusion of factual insolvency.

The respondent's (K2015's) defence

[28] The opposing affidavit was deposed to by Chris Nortje a businessman and representative of the respondent. He raised two points in *limine*: (a) Prescription and (b) No cause of action. The respondent elaborated the points in *limine* along the following lines:

Prescription

[29] The Applicant's basis for the application for liquidation, and in effect its claim is failure by the respondent to pay monies lent and advanced in terms of two written loan agreements entered into between the applicant alternatively Mr. Kamal Bhimma in his personal capacity and the entity known as Improfin (pty) Ltd. Accordingly the applicant's claim is based on the debt as envisaged in the prescription Act 68 of 1969 (as amended) in respect of which a three-year prescription, finds application. The first written loan agreement provided that the loan amount should be repaid in full on or before 31 August 2016. In the premises, the aforementioned 3 year prescription period, commenced to run on 31 August 2016 and was completed on 30 August 2019. The second written loan agreement provided that the loan be repaid in full on or before 30 November 2016. In the premises, the three-year prescription, commenced to run on the 13 November 2016 and was completed on 29 November 2019.

[30] The applicant issued and served a combined summons on the respondent in another action brought in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 8503/2021 in, what I can only submit to be an attempt to interrupt prescription pertaining to both the first and second written loan agreements. However, the combined summons was only served on 25 February 2021. This is after both the first and second claims of the Applicant became prescribed, as envisaged in the Prescription Act 68 of 1969 (as amended). In the premises, the applicant's claims became prescribed and as such the applicant has no basis to bring this current application for the winding up of the respondent.

No cause of action.

[31] The applicant is seeking the winding-up of the Respondent through the current application before court. In order to be successful in obtaining the relevant relief, the Applicant needs to prove to the Honourable Court that the Respondent is commercially insolvent as well as that it is just and equitable that the Respondent be wound up and control of its assets be given to a liquidator in order to act in the best interests of the Respondent's creditors.

[32] The Respondent owns various immovable properties. As a matter of fact, several of the immovable properties act as security in respect of the surety bond on which the Applicant's cause of action is based, being Section 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 16 as more fully described on Sectional Plan No SS208/2010 in the scheme known as Emile's Place in respect of the land and buildings situate at Erasmus Extension 8 Township in the Kungwini Municipality. These properties are located in prime location in the town of Brokhorstspruit and are in high demand as rental properties. The properties are as such of good commercial value.

[33] As such, the Applicant could have easily foreclosed on the immovable properties, called up its security and sold same on public auction in order to extinguish and/or at least partially extinguish, the outstanding

debt. This substantiates the fact that the Respondent is not commercially insolvent as it owns assets of enough value to cover its liabilities. Furthermore, the Applicant is the only creditor of the Respondent. The question begs why this application was thus launched by the Applicant, knowing very well that there is no cause of action and it is premature. Furthermore, the Applicant also holds various forms of security from the Respondent which could have been utilized to obtain payment of the outstanding debt, however chooses to proceed with the current application. The only inference that can be drawn from this is the Applicant is being vexatious and the merits non-existing with respect. The relief claimed and the prosecution of this application is therefore premature and defective, the entire application is vexatious and must be dismissed with cost.

[34] On the merits of the application the respondent states that any claim that applicant may have had in terms of the first loan agreement became prescribed before the alleged deed of cession was purportedly entered into on 28 January 2021, and consequently Bhimma had no rights in fact or in law to cede to the applicant. The respondent was not a party to the first loan agreement and is not mentioned in the deed of cession. The surety mortgage bond relied upon does not in fact or in law cover any indebtedness in terms of the first loan agreement. In the premises neither the applicant nor Bhimma has any claim against the respondent in terms of the first loan agreement and/or deed of cession. Any claim that applicant may have had in terms of the second loan agreement became prescribed for reasons stated supra.

[35] In the civil case which the applicant has launched in the Johannesburg but not Pretoria High Court, the current respondent has filed its plea, containing a special plea of prescription as well as a counterclaim in the main action.

[36] The respondent admits that an amount of R10 092 018.09 was advanced to Improfin. It is denied that the conditions precedent to the first loan agreement were fulfilled, alternatively waived (to the extent to which it was susceptible for waiver) timeously or at all. The respondent further denies that it received the written demands as so alleged by the Applicant, specifically taken into account that the address for the Respondent referred on annexure **"D2"** is not the registered address of the Respondent. The Applicant also does not provide any proof that the letters of demand were indeed sent by registered post and even the email address on **annexure "D1"** does not correspond with the email addresses reflected on **annexure "D2".** In respect of annexure "D3", again the Applicant provides no proof of delivery of said letter of demand.

[37] The Respondent denies that:

37.1 Any valid underlying causa existed for registration of the security mortgage bond in favour of applicant on 31 October 2016;

37.2 There is/was any nexus between the surety mortgage bond concerned and the first loan agreement;

37.3 The surety mortgage bond concerned in fact or in law provides any security for any indebtedness in terms of the first loan agreement;

37.4 The surety mortgage bond is a bond in respect of or in confirmation of either the first and/or further loan agreements pleaded and relied upon by applicant.

[38] In amplification of the aforesaid denials the respondent stated that:

38.1 On date of registration the surety mortgage bond ie 31 October 2016 there was no valid underlying causa for the registration of the mentioned bond;

38.2 In the absence of the valid underlying causa the surety mortgage bond could not and should not have been registered in favour of applicant on 31 October 2016

38.3 In the premises, the surety mortgage bond is *void ab initio* and stands to be cancelled and deregistered.

[39] The respondent avers that from the contents of the e-mail correspondence, it is clear that Nortje never purported to act on behalf of the respondent or accepted liability in respect of the outstanding monies on its behalf. In fact Nortje refers to himself in his personal capacity, by stating: 'the payment is my responsibility' or by stating 'writer is of the opinion that this matter can be settled…" Here is yet another example:" prevent it me from settling the indebtedness… I have indicated to your clients that I am desirous of concluding the payments… "I cannot confirm the payment timelines… I am desirous of concluding the

payments… I cannot confirm the payment timelines…" I am desirous of concluding the current issue… as I indicated to you telephonically I am of the opinion… I have undertaken to resolve the matter and make payment due". "I really am making every effort to resolve the R61M payment … I will endeavor to get your payment done asap… I am resolved to get your payment done as priority…"

[40] The relief claimed and the prosecution of this application is premature and defective. The entire application is vexatious and must be dismissed with costs. No proper application has been made out for the winding up of the respondent.

The interlocutory application

[41] The respondent's answering affidavit was filed with the Registrar of this Court on 29 July 2021 and on 20 September 2021 the applicant filed its replying affidavit. On 19 August 2022 the main application served before court Just before argument, counsel for the respondent handed over to the court a bundle of documents of the pleadings of the parties in a civil case at Gauteng High Court. Counsel for the applicant objected against the handing in of such documents on the ground that they were not properly introduced into the main application. The court rejected respondents application on the ground that they had not been properly introduced in the main application. The main application was then argued. Before Mr South for the applicant could finish his address, the matter was postponed for some reasons beyond the Court's control.

[42] The matter served before court again on 26 September 2022. Between 19 August and 26 September 2022 however, the respondent launched a formal written interlocutory application. To be exact, this application was filed with the Registrar on 09 September 2022. The interlocutory application was set down for hearing at the commencement of the hearing of the main application. Therein, the respondent prayed for an order in the following terms.

42.1 That the supplementary opposing affidavit, which is also filed in support of this application, be allowed and that it be ordered to form part of the body of evidence, to be considered for purposes of opposition to the relief sought by Applicant in the main application.

42.2 That respondent be ordered to pay the costs of this interlocutory application, save in the event of any opposition thereto, in which event the opposing party be ordered to pay costs of this interlocutory application.

42.3 _____ ____ _____"

[43] The primary purpose and aim of the affidavit is set out by the respondent as follows:

> *"2.1 the primary aim and purpose of this affidavit is to seek leave to file a further supplementary opposing affidavit;*
>
> *2.2 The further, purpose and aim of this affidavit is to supplement respondents opposing affidavit previously deposed to;*
>
> *2.3 This supplementary affidavit constitutes a further affidavit as envisaged in Rule 6 (5)(e) of the uniform rules of court.*

2.4 Respondent is advised that the honourable court may in its discretion permit the filing of this further and supplementary opposing affidavit"

[44] The respondent then set out in detail why this supplementary opposing affidavit should be allowed. At the time when the opposing affidavit in the main application was prepared, respondent did not have the benefit of counsel's advice and was only assisted by its attorneys. Counsel was for the first time involved when respondents heads of arguments were prepared. At this stage counsel advised that all relevant facts should be brought to the attention of the honourable court. Counsel specifically advised that the interest of justice would be defeated if the honourable court was not informed of all facts that influence the relief sought by applicant, and that in fact and in law are relevant for purposes of proper adjudication of the application under the above mentioned case number. Respondent in particular was advised that the action instituted and pending before the High Court of South Africa Gauteng Local Division, Johannesburg case number 8503/2021, and the content of the pleadings exchanged in that action, are pertinently relevant in fact and in law to the adjudication of the application under the above mentioned case number.

[45] Counsel advised that because the content of the pleadings exchanged in the aforementioned action are relevant and because the mentioned pleadings are public documents reference thereto should be permitted, and the honorable court would be requested to take judicial cognizance of not only the existence of the action but also the content of the pleadings exchanged between the parties. Respondent's heads of

argument were prepared on the basis that a bundle consisting of the pleadings in the aforementioned action would be made available to the honourable court at the hearing of the application under the above mentioned case number. Applicant however recently voiced an objection to the bundle of documents consisting of the pleadings exchanged in the aforementioned action. The basis of the objection is that the mentioned pleadings were not incorporated into any of the afidavits under the above mentioned case number in the circumstances the purpose of this supplementary opposing affidavit is to incorporate the pleadings exchanged between the parties in the action under the above mentioned case number into the record of evidence relevant to this application.

[46] It is in the interest of justice that the honourable court note and take cognisance of the contents of the pleadings as same have a direct impact and influence on the relief sought by the applicant and respondents opposition thereof. To adjudicate applicant's application in isolation and as if the action under the above case number does not exist and further as if it is not still pending will result in a travesty of justice.

[47] In the civil action between the parties which is pending in Gauteng High Court the respondents also successfully made application for the joinder of the registrar of deeds and filed a counter application by means of which it claimed the cancellation of the surety mortgage bond, on the basis that it never should have been registered, as it lacked a valid underlying causa at date of registration thereof. The afore-mentioned

application for joinder of the registrar of deeds and the counteraction, are also incorporated into this affidavit and the contents thereof should be read herewith as if specifically repeated. Applicant filed a replication in the Gauteng civil action in which it specifically placed reliance on Section 14 of the Prescription Act 68 of 1969 (as amended) in terms of which it bears the onus. The contents of the replication should be read herewith as if specifically repeated.

The opposition to the interlocutory application.

[48] In this interlocutory application which is opposed by the applicant the parties will continue to be referred to as in the main application. The applicant has opposed the current application to file a further opposing affidavit. The first aspect which the applicant raised is a point *in limine* in the form of *res judicata.* The basis of this defense is set out by the applicant as follows in its opposing affidavit. This matter is part-heard before the Honourable Justice Gura. The hearing commenced on 19 August 2022 on Microsoft Teams and could unfortunately not run to its conclusion as a result of congested court roll on that day. By agreement between the parties the matter was adjourned to recommence the hearing on a date to be confirmed with the Registrar of the Honorable Justice Gura. The application has now been re-enrolled to finalise the hearing on 26 September 2022. On approximately 12 August 2022 the respondent served a bundle of the pleadings under case number 8503/2021 issued in the High Court of South Africa, Gauteng Local Division, Johannesburg and sought to introduce same as part of the record of proceedings including submissions contained in the heads of

argument delivered on behalf of the respondent. The applicant objected to the bundle of pleadings to form part of the record of proceedings before the Honourable Court.

[49] At the commencement of the hearing on 19 August 2022 counsel for the respondent applied for leave to introduce the bundle of pleadings as part of the record. His Lordship Justice Gura ruled against the bundle of pleadings forming part of the record which ruling is final in effect in the part-heard proceedings. The purpose of the respondent's interlocutory application is to revisit the ruling already made by the honourable court on this issue. The issue is accordingly res judicata and the respondent's interlocutory application's stands to be dismissed with costs on this basis alone.

[50] The second point which the applicant raised is that the application by the respondent fails to meet the jurisdictional requirements. The applicant developed this defence as follows in its answering affidavit: The respondent has failed to make out a case to deliver a supplementary opposing affidavit and to introduce new evidence into the record by way of supplementary answering affidavit. The plea under case number 8503/2021 in the Johannesburg High Court was signed and dated on 5 May 2021 by senior counsel representing both K2015 and Improfin. The answering affidavit of the respondent in this matter was signed and dated on 27 July 2021. Accordingly the allegation contained in paragraph 3.1 of this interlocutory application is correct. In preparing its plea in the action under case number 8503/2021 the respondent

undoubtedly had to consult senior counsel before 5 May 2021 being on the date on which the plea in those proceedings were signed.

[51] The ineluctable conclusion is that the respondent had the benefit of senior counsel advice before the answering affidavit in these proceedings was signed and more importantly that the respondent's pleadings were already drafted before the answering affidavit was deposed to. The interlocutory application lacks any explanation as to why the content of the respondent's plea was not incorporated in its answering affidavit. Equally, the interlocutory application lacks any cogent explanation as to why their pleadings were not introduced as part of the record at any stage prior to the hearing which had already commenced on 19 August 2022. Absent such an explanation the respondent has failed to meet one of the pre jurisdictional factors in order to succeed in this interlocutory application. Allegations contained in pleadings do not constitute evidence. The status of such allegations are not elevated to evidence by a mere incorporation thereof in an affidavit sought to be introduced out of time and out of sequence. The content of the allegations contained in the respondent's plea is not expressly confirmed under oath.

Analysis

[52] The applicant raised a point in limine to the effect that the matter of the handing in the Gauteng bundle of pleadings to this court is re judicata on the ground that on 19 August 2022 this court rejected the respondents

application to hand in the same bundle of documents. We should bear in mind that on 19 August 2022 there was no formal application for the introduction of this bundle of documents. All what counsel for the respondent did was to apply orally from the bar to hand in the documents. Counsel for the applicant, correctly in my view, objected to this step. The court refused the application at that stage (on 19 August 2022) not because there was no substance in the respondent's application but due to the wrong procedure which the respondent adopted to introduce the documents to court. In the current interlocutory application, the respondent was actually addressing applicant's counsel and this court's concern of 19 August 2022 that this was not the way to introduce the Gauteng pleadings. Therefore, I do not consider the ruling against the respondent by the court on 19 August 2022 to be a bar against the current application. The defence of *res judicata* cannot succeed therefore because the respondent has now (26 September 2022) brought a formal application.

[53] It is common cause between the parties before me that in the civil action in Gauteng they have already exchanged pleadings which form part of the bundle of papers which respondent seeks to make part of its answering affidavit. The respondent has given a valid reason in support of its application. The answering affidavit in the main application was prepared by an attorney but the heads of argument were compiled by an advocate. The applicant, in all fairness, is unble to dispute these allegations. The court therefore accepts the version of the respondent that it is the attorney who attended to the answering affidavit in the main application. It is respondent's case that it is in the interest of justice that

the bundle of pleadings be received, a fact which the applicant is unable to deny. It is my considered view that the reception of the bundle of pleadings by this court will not lead to any prejudice on the part of the applicant. At best this bundle of documents has a potential to illuminate the various issues between the same parties in the civil action. Despite the applicant's opposition to the interlocutory application, I am of the view that the bundle of papers be allowed in the interest of justice.

Costs in the interlocutory application

[54] The pleadings in the Gauteng civil case were prepared by the respondent's advocate but a few months later the respondent decided not to use an advocate to file an answering affidavit in this application. Why the respondent decided at that stage not to engage an advocate in this application has not been explained. It is respondent's own folly which ultimately led to the decision not to engage the advocate earlier in the current application. I do not think it would be fair under the circumstances that the losing party (applicant) should pay the costs. The respondent should be deprived of the order of costs due to its own misjudgment. Consequently it is ordered that each party should carry its own costs.

Main application: Civil action in the High Court of SA, Johannesburg, case No. 8503/2021

[55] In his written heads of argument, counsel for the respondent in this court provided the following background: on 25 February 2021, the applicant as first plaintiff and Bhimma as second plaintiff issued summons out of the aforementioned court under the aforementioned case number against the principal debtor (Improfin) as the first defendant and against the respondent as the second defendant. In its particilars of claim (authored by the same counsel who authored the heads of argument on behalf of the applicant) the applicant on the basis of the very same session on which it relies for the winding up application, claims repayment of the first loan agreement. In the alternative thereto it claims from the principal debtor on the basis of enrichment. In addition, and as second claim, it claims payment on the basis of the second loan agreement against the principal debtor, and against the Respondent on the basis of the suretyship agreement, and a surety mortgage bond.

[56] The particulars of claim are dated 24 February 2021, and accordingly preceded the issuing of the winding up application *incasu*. The action is concerned with exactly the same alleged debt that is relied upon, in the winding up application *in casu*. The mere fact that the Applicant instructed its legal team and/or was advised to proceed by means of action procedure in respect of the alleged debt, is indicative thereof that factual disputes were, at all relevant times (correctly), foreseen. The principal debtor and the Respondent entered an appearance to defend on 10 March 2021, and accordingly, prior to the present winding up application being made *in casu*. In the circumstances, the Applicant knew that the claims instituted by means of action procedure, were defended prior to the issuing of the winding up application *in casu*.

[57] On 12 May 2021, and thus nine calendar days after the winding application *in casu* was issued, the principal debtor and the Respondent served and filed a plea, by means of which their defences were raised and pleaded. In addition, the Respondent made application for the joinder of the Registrar of Deeds, Pretoria to the action, in order to facilitate its counterclaim by means of which it sought the following relief:

57.1 A declaratory order that the surety mortgage bond is void ab initio;

57.2 An order directing and authorising the Registrar of Deeds, Pretoria, to cancel the surety mortgage bond.

[58] *Ex facie* the counter-claim, the aforementioned relief is claimed on the basis that the surety mortgage bond lacked a valid underlying causa, at date of registration thereof i.e. 31 October 2016. The lack of an underlying causa is brought about by the fact that Bhimma on 17 March 2016 already, ceded his rights, title and interest in respect of the second loan to the Applicant, and as such, had no right, title and interest in respect of which a surety mortgage bond could be registered in his favour, on 31 October 2016. The joinder application was granted by the High Court Johannesburg on 3 August 2021. Accordingly, the Registrar of Deeds, Pretoria, has now also been joined to the litigation in the action which is pending before the High Court in Johannesburg.

[59] In addition to the relief sought by means of the counter claim in respect of the surety mortgage bond, the principal debtor and the Respondent have also raised the undermentioned defences:

59.1 It was pleaded that the alleged debt that originated from the first loan agreement, became prescribed on 30 August 2019, and before summons was served on 25 February 2021. If this prescription plea succeeds, then there was no debt in existence to be ceded to the Applicant on 28 January 2021, and then the Applicant is not a creditor of the principal debtor, and consequently the Respondent. In this regard, the Honourable Court will note that the third party's alleged right, title and interest in the first loan agreement, was only ceded to the Applicant on 28 January 2021;

59.2 In terms of the alternative claim of enrichment. prescription was also raised. It was pleaded that the enrichment claim, which is relied upon as an alternative to the first loan agreement, also became prescribed on 7 June 2019, and before the issuing of summons;

59.3 Also, in respect of the claim based upon the second loan agreement, it was pleaded that that claim prescribed on 29 November 2019, and before the issuing of summons, In this regard, it was pertinently pleaded that the addendum relied upon, which provided for the payment date to be extended to 28 February 2018, does not assist the Applicant, because the addendum was not timeously signed. The Honourable Court will note that Clause 3.1 of the addendum reads as follows:

"with effect from date of signature of the party last signing this agreement, the agreement is amended by:

(1) deleting the date 30 November 2016 in Clause 4.1 of the agreement and replacing it with the end of February 2018".

[60] *Ex facie* the addendum, there is no indication of the date on which the Applicant signed the addendum, nor of the date on which it was signed by Bhimma. There is accordingly a dispute of fact on whether the addendum was timeously signed, in order to bring about an extension of the payment date. This factual dispute can only be resolved by means of viva voce evidence. If the prescription defence in respect of the second loan agreement succeeds, it will also mean that the Applicant is not a creditor of the principal debtor, and consequently the Respondent.

[61] In addition to the prescription defences raised, the principal debtor and Respondent also raised the following defences in their plea, and in respect of their alleged indebtedness:

61.1 The Applicant did not acquire any rights in terms of the first loan agreement, because the underlying debt was extinguished by means of prescription, prior to the alleged cession that only took place on 28 January 2021;

61.2 The Respondent was not a party to the first loan agreement, and not mentioned in the deed of cession;

61.3 The disputed surety mortgage bond does not in fact, or in law, cover any indebtedness in terms of the first loan agreement.

61.4 The suretyship and the alleged surety mortgage Bond, are accordingly not applicable in fact and/or in law, to the first loan agreement;

61.5 The addendum was not timeously entered into, as a result of which, the extension of the payment date under the second loan agreement, did not occur in fact and/or in law;

61.6 No valid underlying causa existed for the registration of the surety mortgage bond, registered in favour of Bhimma.

61.7 There was no factual and/or legal nexus between the surety bond, and the first loan agreement.

61.8 The first mortgage bond did not provide any security for any alleged indebtedness in terms of the first loan agreement.

61.9 The surety mortgage bond is void *ab initio.*

[62] The Applicant and Bhimma restricted their response to the defence raised. By means of a replication, they responded to the special defences of prescription only. The replication is dated 1 June 2021. Ex facie the replication, it is alleged that the prescription period applicable to the first loan agreement was thirty years. There is a fundarnental dispute of fact and of law, in respect of this issue. In this regard, it is emphasised that the principal debtor and Respondent pleaded that the surety bond did not apply to the first loan agreement, There is accordingly a fundamental dispute of fact in this regard.

[63] It is significant to point out tho (the Applicant did not make this dispute of fact known to the Honourable Court by means of its replying affidavit, which was commissioned on 17 September 2021. Instead of doing so, it testifies that it is common cause that the surety mortgage bond was valid and finds application to both loans, whereas the true position is that it was to the knowledge of the Applicant, expressly pleaded that the surety mortgage bond was void ab initio, because it lacked a valid underlying causa, at the time of its registration, and further that it and

the suretyship agreement in any event, never applied to the first loan agreement.

[64] In addition, the Applicant in its replication filed in the aforementioned action, and dated 1 June 2021, raised the interruption of prescription, as envisaged in Section 14 of the Prescription Act 68 of 1969 (as amended). It is trite, that the Applicant bears the onus in respect of its reliance on Section 14 of the Prescription Act 68 of 1969 (as amended). The papers filed in the winding up application, provide a good example of the factual disputes underlying the Applicant's reliance on Section 14 of the Prescription Act 68 of 1969 (as amended), in respect of which the Applicant bears the onus.

[65] In this regard, the Honourable Court will note that the Applicant relies upon WhatsApp and other communication, the high water mark of which, on a proper interpretation thereof, is that the representative on behalf of the principal debtor in his personal capacity, as opposed to the principal debtor, made certain acknowledgements and/or undertakings towards the Applicant.

Submissions

[66] Before this court the oral submission and written heads of argument of counsel of the applicant were mainly based on the following issues and little was done to address the crucial dispute raised in the pleadings of

the Gauteng court. Applicant's counsel directed his arsenal at the various defences as raised by the respondent in the answering affidavit. These are the following:

66.1 A point in limine that the applicant's claim has become prescribed;

66.2 A point in limine that no cause of action is disclosed in the founding papers mainly with the reference to their properties which the respondent owns;

66.3 An allegation that based on the prescription defence that Bhimma had no right in fact or in law to cede to the applicant;

66.4 That the surety mortgage bond does not cover the indebtedness in terms of the first loan;

66.5 That the surety mortgage bond is void ab initio as there was no valid underlying causa;

66.6 That the respondent did not receive the written demands on the basis that:

66.6.1 The e-mail address on annexure D2 does not correspond with the e-mail address on an annexure D1;

66.6.2 That annexure D2 was not sent to the respondent's registered address;

66.6.2 that the applicant failed to provide proof that an annexure D2 and D3 being the demands, including notices in terms of section 345(1) of the old Companies Act were sent by registered post and;

66.6.4 That the applicant did not provide proof of delivery of annexure D3.

66.7 That Nortje the deponent to the respondent's answering affidavit, never acted, or purported to act on behalf of the respondent and

never accepted liability in respect of the outstanding monies due to the applicant, other than in his own personal capacity.

Legal principles

[67] It is trite law that insolvency procedure should not be used as a method of enforcement of disputed debts. In **Pilot Freight v Von Landsberg Trading**[1], the court expressed the legal position as follows:

> *"55 The law relating to the test in liquidation applications is clear. Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds, since the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.*
>
> *56 The aforesaid is known as the 'Badenhorst rule' after Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H-348C where it was held as follows in this regard:*
>
> *'Die maatskappy betwis die geldigheid van die vordering van £l20, en wanneer 'n skuld te goeder trou betwis word, moet 'n likwidasie aansoek geweier word. Hierdie proses is nie bedoel vir die beslissing van twyfelagtige skuld'e nie. (In re Gold Hill Mines (1883) 23 Ch 210 (CA) en Re Welsh Brick Industries Ltd, 1946 (2) AER 196 (CA).'*
> *'n Gerieflike opsomming is die volgende, uit Buckley on Companies, 11de ed, bl 357:*
> *"A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to*

[1] 2015 (2) SA 550 (GJ)

exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous_abuse of the process of the court. Some years ago petitions founded on disputed debts were directed to stand over till debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern prtactice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order, "

Die respondent betwis die geldigheid van die beweerde skuld, en ek is van oordeel dat die juiste benadering is om te oorweeg of respondent die Hof op 'n balans van waarskynlikheid ooduig het, nie dat die beweerde skuld nie opeisbaar is nie, maar dat dit, bona fide en op redelike gronde betwis word. As hy dit doen ten opsigte van so 'n gedeelte van die beweerde skuld dat die onbetwiste gedeelte daarvan (as daar is) minder as £50 word, dan moet die aansoek afgewys word.'

57 *In Wackrill v Sandton International Removals (Pty) Ltd and others 1984 (1) SA 282 (W) at 293C – E it was held as follows:*

'In the case of sequestration proceedings the principle is clearly established that the court has a discretion to refuse a sequestration order if the application is not made for the bona fide purpose of bringing about a concursus creditorum and a distribution of the respondent's assets by a trustee in insolvency, but is made mala fide and with an ulterior and improper motive. Such a mala fide application is an abuse of the process of the court. See Berman v Brimacombe 1925 TPD 548; Amod v Khan 1947 (1) SA 150 (N) at 152 and on appeal in 1947 (2) SA 432 (N) at 439; and Millward v Glaser 1950 (3) SA 547 (W) at 551. In my view, there is no reason for not adopting the same rule in the case of proceedings for a winding-up order, if only for the reason that a mala fide application made with an ulterior and improper motive is an abuse of the process

of the court. See Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd 1980 (3) SA 253 (W) at 257H.'

58 *In Hulse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey Intervening) 1998 (2) SA 208 (C) at 219F- 220A it was held as follows:*

'Apart from the fact that they dispute the applicant's claims, and do so bona fide… what they must establish is no more and no less than that the grounds which they do so are reasonable. They do not have to establish even on the probabilities that the company under their direction will, as a matter of fact succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their claims and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit or otherwise, the actual evidence on which they would rely at such trial. This is not an application for summary judgment in which a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefor", It seems to me to be sufficient for the [respondents] in the present application, as long as they do so bona fide, to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company. '

[59] *In Robson v Wax Works (Pty) Ltd supra at 1122B-H it was held as follows:*

'The applicant was aware prior to the institution of the application that his money claims against the first respondent were disputed. It is trite

that winding-up proceedings are inappropriate when brought by a creditor whose claims are reasonably and bona fide disputed. See Badenhorst v Northem Construction Enterprises (Pty) Ltd 1956_(2) SA 346 (T) and the many subsequent cases in which the so-called Badenthorst rule has been applied (some of which are collected in Kalil v Decotex (Ply) Ltd and Another 1988 (1) SA 943 at 980D-F). The institution by a creditor of winding-up proceedings in such circumstances has on occasion been stigmatised as an abuse of process. A lack of bona fides is not readily inferred. There is nothing in the papers which leads me to conclude that the second and third respondents, as directors of the first respondent, do not genuinely dispute the claims of the applicant. In the circumstances it is not necessary for me to analyse and decide the question of whether the first respondent is liable to pay its debts.

60 *Where prima facie the indebtedness exists the onus is on the company to show that it is bona fide disputed on reasonable grounds.*

61 *Where this onus is discharged, the application should fail, even if it appears that the company is nevertheless unable to pay its debts.*

62 *Where the debt is disputed, and hence the applicant's locus standi as a creditor, the application will be dismissed (if the dispute is bona fide and on reasonable grounds), not because the applicant lacks locus standi, but because winding-up proceedings are inappropriate for the purpose of determining whether or not he does.*

63 *That is precisely the situation in the present matter in regard to the aforesaid defences."*

Analysis

[68] Earlier in this judgement it is stated that there is a civil action pending in the High Court in Johannesburg where the applicant before me is the first plaintiff and Bhimma (the deponent to the founding affidavit before me) are suing the principal debtor (Improfin) as first defendant and the current respondent as second defendant. The particulars of claim in the civil action are almost the same as the averments in the founding affidavit. The alleged cause of action is the same. That action was instituted before this application was lodged with the Registrar of this court. When the applicant bought the application for liquidation before this court it was fully aware that the Civil case in Johannesburg was opposed. The various defences which the respondent raised in its answering affidavit have been referred to earlier in this judgment. But over and above those defences there is one aspect in this application which sticks out like a sore thumb: This court is being requested to liquidate a respondent who is not only opposing the applicant's or plaintiff's claim but is doing so on a number of crucial points.

[69] In my view this court need not at this stage consider whether the applicant has discharged its onus on a balance of probabilities. The crucial question is whether the applicant's claim both in this court, and in Gauteng Court is disputed by the respondent (defendant) on bona fide and reasonable grounds. In answering that question, this court need not inquire or consider whether the defendant in the Gauteng case will be successful or not. It is sufficient if this court finds that the opposition of the respondent / defendant is bona fide and attended by reasonable grounds. I have seriously considered the respondent's opposition and I am of the view that the respondent / defendant is

disputing the claims bona fide and on reasonable grounds. Such grounds include, but are not limited to:

69.1 Prescription;

69.2 Whether Nortje, when he made promises to pay (he did so in writing) he was acting as an agent/representative of the respondent;

69.3 Whether or not the registration of the surety mortgage bond lacked a valid underlying causa when it was registered on 31 October 2016;

69.4 Whether or not the respondent was a party to the first loan agreement.

[70] It is my view that the sole purpose of bringing this application to this Court was an attempt, on the part of the applicant, to have respondent forced to pay a debt which is disputed. Incidentally, in the founding affidavit, the applicant withheld material information from this court. All it stated was that the civil action in Johannesburg was opposed. It did not mention, albeit in a summary form, the various defences raised in Gauteng. It did not even disclose that a counterclaim for the cancellation of the mortgage bond is before the Johannesburg court. The disclosure by the respondent, threw a totally different colour on the applicant's bona fides. It is my view that the applicant must fail in its bid to force payment of a debt which is disputed bona fide and on reasonable grounds.

Costs

[71] On 19 August 2022 the matter was postponed due to the heavy roll and costs were reserved. It is only in the interest of Justice that each party should bear its costs for that day.

Order

[72] Consequently, the application for the winding-up is dismissed with costs.

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SAMKELO GURA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	:	02 AUGUST 2022
DATE OF JUDGMENT HANDED DOWN	:	30 NOVEMBER 2023
COUNSEL FOR THE APPLICANT	:	ADV. A.G SOUTH SC
	:	ADV L.W DE BEER
COUNSEL FOR THE RESPONDENT	:	ADV M LOUW