



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 6082/2023

In the matter between:

REGAN VAN ROOY (PTY) LTD

Applicant

(Registration number 2006/014022/07)

and

LOUBERRI 14 (PTY) LTD

Respondent

(Registration number 2017/290704/07)

(Registered address: 3 Severn Road, Diep River, Cape Town, Western Cape)

Heard: 23 November 2023

Delivered: 04 December 2023 (Electronically)

JUDGMENT

Pillay AJ

INTRODUCTION

1. This is an application for a provisional order for the winding up of the respondent on the following grounds:

- 1.1. The respondent is unable to pay its debts as and when they fall due for payment; and
 - 1.2. It would be just and equitable for the respondent to be wound up.
2. In what follows, I shall first address the relevant factual background, after which I shall address the law and conclude with my findings.

THE BACKGROUND

3. The factual background in this matter is relatively straightforward.
4. The applicant's case may be summarised as follows:
 - 4.1. The applicant is a creditor of the respondent in the amount of R 467 786.65. The respondent's alleged indebtedness arises from an invoice rendered to it by the applicant on 14 October 2022 for the performance of professional tax and structuring support services ("**the services**").
 - 4.2. On 10 February 2023 the applicant caused a letter of demand in terms of section 345 (1) (a) of the Companies Act No 61 of 1973 to be served on the respondent's sole director at its registered address. It is common cause that notwithstanding this demand, the respondent has failed to make payment to the applicant within three weeks or at all.
 - 4.3. The applicant also relies on correspondence that was exchanged between the parties which, it submits, demonstrates that the respondent is *de facto* commercially insolvent and that the applicant is able to prove,

to the satisfaction of this Court, that the respondent is unable to pay its debts in terms of section 345 (1)(c) of the 1973 Companies Act and ought to be wound up.

5. The respondent alleges that:

5.1. The applicant has not rendered all of the services and that the invoice rendered was therefore rendered prematurely.

5.2. The applicant is not a creditor of the respondent and accordingly lacks the necessary *locus standi* to prosecute this application.

6. In terms of a letter of engagement, the terms and conditions of which were agreed to by both parties on 28 March 2022 (“**the agreement**” or “**the letter of engagement**”):

6.1. The following was stated as regards the flow of funds:

“It is a commercial requirement for funds to flow in late March 2022 in order to facilitate payment of the various service providers. Funds amounting to circa USD 33 million will shortly be paid from Central Bank in Europe to Mark Brummer’s account in Mauritius. Imperial Capital Investment, as financier, will transfer the funds to the Louberrri 14 (Pty) Limited Nedbank account which was opened 3 weeks ago to facilitate this transfer (whilst waiting for the Mauritius entities and bank accounts to be opened). Given the time constraints, it has not been possible to set up the envisaged entities and bank accounts in Mauritius as yet.)”

6.2. The respondent would conduct a review of the current and forecast future structure and identify an optimised fit for purpose structure for the applicant’s global business going forward. Ten specific features of what the services would include were identified.

6.3. Under the heading of "Proposed Fee" the following is stated:

"We have agreed a fee of USD 22,400 (or ZAR equivalent) for this assignment. Invoices are payable upon presentation with a 1% service fee applying for payments later than one month from the invoice date. VAT will apply where appropriate, should any withholding tax apply, our fee should be net of this amount."

7. The following exchanges between the parties are of relevance:

7.1. In an internal email from the respondent's representative dated 2 June 2022 he records that he is upset about a certain email and that the understanding of the undertaking of all their agreements was that the respondent would pay all invoicing from all parties once the funding had been secured. The email proceeds: "Now this?" It goes on to state that it was a concern of the respondent from the initial talks and questions that the applicant had not been conveyed the same message.

7.2. On 14 October 2022 the applicant sent an invoice for settlement to the respondent.

7.3. On 27 October 2022 the applicant sent a follow-up email to the respondent advising that it had not heard from the respondent and requesting when settlement of the invoice could be expected. That email also noted that invoices are issued once the assignment is concluded.

7.4. On 27 October 2022 the applicant sent a further email asking for an indication of when funding will be paid.

7.5. On 27 October 2022 the respondent replied to the above-mentioned email stating *inter alia* as follows:

“This exercise was to set up and guide Louberry Africa Ltd through all the tax challenges that we are going to face when LAL gets the funding from the funding partners. The company has not been set up yet as we are waiting for the funding to be completed soon. The payment will be made as soon as the funding is paid.”

(Own emphasis)

7.6. On 31 October 2022 the respondent indicated that the funding would be completed by the end of November 2022 and that it would be in contact with everyone with the updates.

7.7. On 1 November 2022 the applicant wrote to the respondent advising that its stance was in contradiction with the letter of engagement and initial discussions. The e-mail further advised that the applicant was giving the respondent until the end of the month, failing which it would have no other option but to initiate formal collection.

7.8. On 2 December 2022 the applicant addressed a letter of demand to the respondent, referring to the numerous emails requesting settlement of the debt “as per our services delivered under the engagement letter dated 16 March 2022” in relation to taxation and structuring of support services that the parties had entered into. The letter further noted with concern that as at that date, the debt had not been settled and that settlement was long outstanding. It reiterated the importance of the debt being settled in full and that a failure to provide a timeline for settlement of the debt would leave the applicant with little option but to pass the

account to their attorneys for taking such steps as may be required. The letter asked that the matter be treated with urgency.

7.9. On 9 February 2023 the applicant issued a statutory demand in terms of section 345 (1) (a) of the Companies Act read together with the relevant provisions of Schedule 5 Item 9 of the 2008 Companies Act. That letter indicated that the applicant had provided the services which it had contracted for and that it had complied with its obligations in terms of the engagement letter. It also stated that notwithstanding the invoice having been presented for payment on 14 October 2022 and a subsequent letter of demand dated 2 December 2022, the respondent had failed and/or refused and/or neglected to make payment of the amount due to the applicant. The letter advised that in the event that payment was not made or if the respondent failed to secure or compound the amount due (i.e. to present a repayment proposal to the reasonable satisfaction of the applicant) within three weeks from the date of this letter, it would be deemed, in terms of the provisions of section 345 of the Companies Act read together with Item 9 of Schedule 5 of the 2008 Companies Act, that the respondent is unable to pay its debts and that the applicant would apply for its liquidation.

7.10. On 27 February 2023 the respondent proposed a repayment plan which entailed a monthly payment from 2023 through to 2026, with the first payment being due by the end of March 2023. The email indicated that if the applicant was happy with the proposal, the respondent would sign an acknowledgement of debt stating the terms of the repayment plan.

7.11. On 6 March 2023 the applicant addressed an email (through its attorneys) which stated, *inter alia*, that the repayment proposal is not accepted and that it is evident that the respondent is trading in commercially insolvent circumstances which justifies a liquidation application. That email further indicated that papers would be finalised in the course of that week for service on the respondent.

7.12. On 6 March 2023 the respondent addressed a further email which stated as follows:

“With reference to your email below.

My client has a liquidity problem and not an insolvency problem due to all the debt that he is owed.

I request that you refrain from proceeding with the liquidation process and present a new acceptable proposal.”

7.13. On 6 March 2023 the applicant advised that it was prepared to agree to a repayment plan whereby the outstanding debt was settled in six equal monthly instalments with the first instalment being payable immediately. Various other terms were imposed. That email also stated as follows: “It does indeed appear that your client (sic) unable to pay their debts as and when the debts become due and that our client will be able to prove this requirement should we proceed with the liquidation application.”

7.14. Also on 6 March 2023 the respondent (through its attorneys) sent an email indicating that the respondent would not be able to adhere to the terms as proposed by the applicant.

THE LEGAL FRAMEWORK

8. Before engaging with the relevant provisions of the Companies Act, there was some dispute between the parties as to the applicant's reliance on correspondence that was written as part of *bona fide* settlement negotiations. As a result, the respondent argues that the applicant was not entitled to refer to such correspondence.
9. The applicant however relied on **Absa Bank Ltd v Hammerle Group** 2015 (5) SA 215 (SCA), which, in my view, finds application and is binding on this Court.

The SCA held:

"[12] In my view the contents of this letter again serve, not only as an unequivocal acknowledgement of indebtedness by the respondent, in the amount claimed under the loan agreement, to the appellant. It also shows that the respondent is unable to pay its debts and is, in consequence, commercially insolvent. The respondent contended that the letter was written with a view to settling a dispute and was as such inadmissible. It accordingly applied that the letter be struck out, which application was granted. Although the offending paragraphs which reflected the settlement proposals were blocked out, the respondent's argument that the entire document was rendered inadmissible was upheld.

[13] It is true that, as a general rule, negotiations between parties which are undertaken with a view to a 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 this rule. One of these exceptions is that an offer made, even on a 'without 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 admissions 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. A concursus creditorum is created and the trading public is protected from the risk of further dealing with a person or

company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained in the words of Van Schalkwyk J in *Absa Bank Ltd v Chopdat*, when he said:

'(A)s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations. A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.'

In the final analysis, the learned judge said at 1094F:

'In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.'

(Own emphasis)

10. Based on the aforementioned *dictum*, I am of the view that the correspondence exchanged with a view to settling the matter may be relied on and is admissible.

11. Sections 345(1)(a) and (c) of the Companies Act¹ provides:

"(1) A company or body corporate shall be deemed to be unable to pay its debts if-

¹ In terms of Companies Act 71 of 2008 Schedule 5, paragraph 9, despite "the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3)."

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

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

(ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,

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

....

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

12. The applicable legal principles are well established and were helpfully summarised by the SCA in **Afgri Operations Ltd v Hamba Fleet (Pty) Ltd** 2022

(1) SA 91 (SCA):

12.1. It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds. Where, however, the respondent's indebtedness has, *prima facie*, been established, the onus is on it to show that this indebtedness is indeed disputed on *bona fide* and reasonable grounds.²

² At par 6.

- 12.2. Generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt.³
- 12.3. Once the respondent's indebtedness has *prima facie* been established, the onus is on it to show that this indebtedness is disputed on *bona fide* and reasonable grounds; and the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide.⁴
13. The applicant also relies on sections 344(f) and 344(h) read together with sections 345(1)(a) and 345(1)(c) of the Companies Act, contending that it is just and equitable that the respondent should be wound up.

APPLICATION OF THE LAW

14. Turning then to the evidence and my findings.
15. While I accept that the language used in some of the email exchanges referred to may be described as somewhat loose in that it refers to "he" as opposed to the respondent entity, it is clear to me that the exchange at all material times pertained to the outstanding invoice for services pursuant to the agreement concluded between the parties.
16. It is also clear from the detailed engagements that I have referred to that there was no indication that the services had in fact not been rendered. Against that

³ At par 12.

⁴ At par 13.

factual background and quite remarkably, the answering affidavit identifies all of the services referred to in the agreement as not having been rendered and makes the following averments in that regard:

- “39. In addition to the fact that it was agreed that the applicant’s fees will only be paid after it rendered the services and the respondent has received the funding, it is respectfully submitted that the above service has not yet been rendered by the applicant and therefore the full amount can in any event not to be due and payable.
- 40. The applicant has only provided the respondent with a draft letter setting out tax advice on the optimal tax structure and consequently none of the aforementioned services has therefore been provided in full.
- 41. Following on the above, the invoice rendered and referred to in the applicant’s application as “FA 2” is therefore premature and cannot be due and payable, the reason being twofold:
 - 41.1. The fees as (sic) not yet been received by the respondent from Imperial Investment Mauritius; and
 - 41.2. An all-inclusive fee was agreed upon and therefore the entire amount can only be due once all the agreed-upon services have been rendered.”

17. I have considered each of the arguments proffered on behalf of the respondent as to why the debt is not due. In my view none of them have any merit. This is so for the following reasons:

17.1. First, as to the terms of the agreement as set out in the engagement letter, which I have quoted above, it is clear that invoices are payable upon presentation. That was a term that both parties agreed to and I am not satisfied that the correspondence that was exchanged at that time had any impact on the relevant clause in the agreement. The respondent

directed me to an email dated 16 March 2022 in this regard which stated: “Kindly note that the funds will be transferred once we have the transferred funds available at April 2022”. That statement does not, in my view, alter the agreement that had been reached between the parties in terms of which invoices were payable on presentation.

17.2. Second, as to the contention that not all of the services had been rendered, it is clear from the exchange of correspondence attendant on issuance of the invoice that this issue was not raised as a basis for non-payment. Indeed the exchange of correspondence appears to indicate quite the contrary, in that the only issue that has been raised is receipt of the transfer of funds. It is also telling that the answering affidavit does not identify precisely which services were not rendered. It is clear from an annexure to the replying affidavit titled “Tax Advice on the Optimal Tax Structure” that the services were rendered.

17.3. Third, in light of the language of the agreement and the subsequent exchange of correspondence, I do not accept that there is any room for an implied term or a tacit term as contended for by the respondent. The legal principles pertaining to implied and tacit terms are well-established. An implied term is one implied by law and a tacit term is one flowing from the actual or imputed intention of the parties to the contract.⁵ The SCA

⁵ **Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration** 1974 (3) SA 506 (A) at 531D – 532G; **South African Maritime Safety Authority v McKenzie** 2010 (3) SA 601 (SCA) paras 11 and 12.

has explained each of these terms in **South African Maritime Safety Authority v McKenzie** 2010 (3) SA 601 (SCA) paras 11 and 12 as follows:

“[11] In the alternative it is alleged that the term arises either by way of an implied term or as a tacit term. Corbett AJA explained the difference between the two in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*. An implied term properly so called is a term that is introduced into the contract as a matter of course by operation of law, either the common law, trade usage or custom, or statute, as an invariable feature of such a contract, subject only to the parties’ entitlement in certain, but not all, instances to vary it by agreement. Where reliance is placed on such a term the intention of the parties will not come into the picture and the issue is the purely legal one, of whether in those circumstances in relation to a contract of that particular type the law imposes such a term on the parties as part of their contract. A tacit term is a term that arises from the actual or imputed intention of the parties as representing what they intended should be the contractual position in a particular situation or, where they did not address their minds to that situation, what it is inferred they would have intended had they applied their minds to the question.

[12] In our law as it stands at present the usual test for the existence of a tacit term is that of the interfering bystander who asks what is to happen in the particular situation and receives the answer: ‘Of course X will be the position. It is too obvious for us to say so.’ The application of that test in relation to the term pleaded on behalf of Mr McKenzie is destructive of the contention that his employment contract is subject to that term....”

(Own Emphasis)

17.4. No basis was laid for an implied term (i.e. one that is introduced into the contract as a matter of course by operation of law, either the common law, trade usage or custom, or statute, as an invariable feature of such

a contract, subject only to the parties' entitlement in certain, but not all, instances to vary it by agreement). As to a tacit term, it does not pass muster on the interfering bystander test. It is also manifestly inconsistent with the express wording of the agreement.

18. On having considered the evidence, I am satisfied that on the evidence, there is a *prima facie* case in favour of the applicant. I am not satisfied that the respondent has succeeded in showing that the debt is disputed on *bona fide* and reasonable grounds or by showing that it is able to meet its obligations. I am also satisfied that the threshold of justice and equity as contemplated by section 344(h) of the Companies Act has been met on the evidence.

THE FORMALITIES HAVE BEEN COMPLIED WITH

19. This application has been served on the respondent, on the South African Revenue Service, and on the Master of the High Court. The respondent has no employees and thus there are no trade unions with any interest in the application.
20. The applicant has lodged a bond of security with the Master. According to the Master's Report, he knows of no facts which would justify the Court postponing the hearing or dismissing the application. The last two orders made hereunder have been provided for at the request of the Master.

ORDER

21. In the circumstances, I make the following order:

21.1. The respondent is placed under provisional winding up in the hands of the Master of the High Court.

21.2. A *rule nisi* is issued calling upon the respondent and all interested parties to appear on the return date on 14 February 2024 to provide reasons, if any, as to why:

21.2.1. a final order of liquidation should not be granted; and

21.2.2. the applicant's costs of the application, including reserved costs, should not be costs in the winding up.

21.3. Service of this order shall be effected as follows:

21.3.1. By the Sheriff on the respondent;

21.3.2. On the South African Revenue Service;

21.3.3. By publication on one edition of respectively the *Cape Times* and *Die Burger* newspapers.

21.4. The registrar is directed to transmit a copy of this Order to the Sheriff of the province in which the registered office of the respondent is situated

and to the Sheriff of every province in which it appears that the respondent owns business.

- 21.5. The Sheriff is directed to attach all property which appears to belong to the respondent and transmit to the Master an inventory of all property attached by him or her in terms of section 19 of the Insolvency Act No 24 of 1936.



Pillay AJ
Acting Judge of the High Court

Appearances :

For the Applicant :

Advocate D R De Wet

Instructed by :

Tim du Toit Attorneys
(ref: C Lang)

For the Respondent :

Advocate M van der Merwe

Instructed by :

Smit & Hugo Attorneys
(ref: A Venter)