

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 11530/2021P

In the matter between:

NILE DUTCH AFRICA LINE B.V.

THE APPLICANT

and

**CRYSTAL PIER SHIPPING PROPRIETARY LIMITED
JOHNINE WINSOME ELSIE MADDOCKS N.O
THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

JUDGMENT

Shoba AJ

[1] This is an application for the final winding-up of the first respondent.

Parties

[2] The applicant is Nile Dutch Africa Line BV (Nile Dutch), a company incorporated in the Netherlands, with its registered address in Rotterdam.

[3] The first respondent is Crystal Pier Shipping (Pty) Ltd (Crystal Pier). Crystal Pier is a company duly registered and incorporated in accordance with the laws of South Africa. Its registered office is situated in Pietermaritzburg, KwaZulu-Natal. The directors of Crystal Pier are Messrs Pravin Bechan Parsad and Rishaal Parsad (the directors).

[4] The second respondent is Johnine Winsome Elsie Maddocks N.O (Ms Maddocks) with her residential address in Pietermaritzburg. She is cited in her capacity as the business rescue practitioner of Crystal Pier.

[5] The third respondent is the Companies and Intellectual Property Commission, with its offices in Sunnyside, Pretoria.

Background

[6] Nile Dutch is a container shipping company. It specialises in container shipping from most parts of the world to Africa, and vice versa. Nile Dutch entered into an agency agreement with Crystal Pier on 1 June 2009 (the agency agreement).

[7] In terms of clause 1 of the agency agreement, Crystal Pier was appointed by Nile Dutch to act as its exclusive agent for all its owned and/or chartered vessels serving the trade to South Africa. Whilst the agency agreement had an initial duration of three years, it was extended on various occasions. The 10th (and final) addendum to the agency agreement extended the duration of the agency agreement until 31 January 2021.

[8] Due to the fact that Nile Dutch was not satisfied with the manner in which Crystal Pier was conducting its responsibility as an agent, the agency agreement was not extended beyond 31 January 2021. The agency agreement therefore terminated on 31 January 2021. Nile Dutch appointed a new agent for all its owned and/or chartered vessels serving the trade to and from South Africa.

[9] In terms of the agency agreement, the termination thereof obligated Crystal Pier to provide a full statement of account to Nile Dutch, accompanied by payment of all

amounts due to Nile Dutch. The purpose of this exercise was to determine and pay over all amounts due by Crystal Pier to Nile Dutch on termination of the agency agreement.

[10] Crystal Pier failed to provide a final statement of account or to pay over the closing balance to Nile Dutch, despite numerous requests from Nile Dutch.

[11] Nile Dutch prepared the relevant calculation itself, to the extent that this was possible without comprehensive information being made available by Crystal Pier. In terms of this calculation, an amount of USD1 261 355 is presently due, owing and payable by Crystal Pier to Nile Dutch.

[12] In May 2021, Nile Dutch submitted its claim to Ms Maddocks (the Nile Dutch claim). Ms Maddock confirmed that Crystal Pier accepted that the Nile Dutch claim was correct and did not dispute these 'close out balances'.

[13] On 29 January 2021, two days before the termination of the agency agreement, attorneys acting for Crystal Pier addressed a letter to Nile Dutch, alleging that Crystal Pier has an indemnity claim of USD1.1 million (the indemnity claim) arising from a dispute with SARS. Prinsloo argued that Crystal Pier could set the indemnity claim off against the amounts payable to Nile Dutch, which had at that stage already been calculated to be at least USD870 236. This amount, as stated above, has however since increased to USD1 261 355.

[14] In response to Prinsloo's letter of 29 January 2021, representatives of Nile Dutch, Sure Maritime, directed a letter to Prinsloo setting out the reasons why the indemnity claim had no merit. These included the fact that prior to the letter of 29 January 2019, Crystal Pier had never asserted any claim against Nile Dutch, this despite the fact that the dispute with SARS had been ongoing since 2015. Sure Maritime accordingly demanded immediate payment by Crystal Pier of an advance payment of USD1 178 401.93 on the total claim established by Nile Dutch. In the letter from Sure Maritime, Crystal Pier was further requested to provide Nile Dutch with the following

specified documents, in relation to its obligations: (a) to submit a full statement of account with supporting documents; (b) to submit a full statement of account with supporting documents; (c) to provide a complete overview of all invoices related to local costs; and (d) to provide an overview of all amounts currently outstanding to Transnet and National Port Authorities.

[15] No response was received from Crystal Pier and Nile Dutch instructed its Dutch lawyers, AKD Benelux Lawyers (AKD), to take formal steps to recover the amount due by Crystal Pier.

[16] The agency agreement includes a clause stating that where a dispute arises between the parties, a meeting should be held in an effort to resolve the dispute, whereafter any such dispute would be settled by arbitration. In its letter dated 12 February 2021, AKD therefore invited Crystal Pier to attend a meeting, as required by the agency agreement.

[17] In a response dated 15 February 2021, Prinsloo indicated that they were preparing a substantive reaction to the letter from Sure Maritime, and that in those circumstances, it would be premature to convene a meeting.

[18] On 25 February 2021, Prinsloo advised that Crystal Pier had been placed under business rescue. The directors nominated Ms Maddocks as Crystal Pier's business rescue practitioner.

[19] Nile Dutch brought an application to set aside the resolution which placed Crystal Pier under business rescue, and that Crystal Pier be placed into liquidation.

[20] On 14 September 2022, Mlaba AJ granted an order setting aside the resolution to place Crystal Pier under business rescue, and placed Crystal Pier under provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg.

[21] A rule nisi was issued, calling upon Crystal Pier and all other interested persons to show cause, if any, as to why Crystal Pier should not be placed under final liquidation.

[22] Crystal Pier is opposed to the final winding-up order. It contended that Nile Dutch does not have *locus standi*, as it has no debt owing to it or claim against Crystal Pier and that the arbitration award in favour of Nile Dutch was invalidly granted. In support of such opposition, a director of Crystal Pier, Mr Pravin Parsard, deposed to a supplementary affidavit.

[23] Nile Dutch filed a replying affidavit, which had been deposed to by Mr Jakobus Braal, and also filed a confirmatory affidavit, deposed to by Mr Richard Dobbe. Nile Dutch argues that the latest version is not only opportunistic and disingenuous but patently false, as the fact that Nile Dutch had a claim had been admitted by Ms Maddocks and Mr Parsad deposed to a confirmatory affidavit to that effect.

[24] The fact that Crystal Pier is unable to pay its debts is undisputed. What has to be determined is whether Nile Dutch has a claim against Crystal Pier and whether the dispute of such claim is reasonable and bona fide. Nile Dutch argued that from the first phase of the application, Crystal Pier did not dispute that Nile Dutch had a claim, and the provisional winding up order was granted. It was only when the rule nisi was issued, that the lack of a claim was raised as a ground for opposition.

[25] Crystal Pier's legal representative, during argument, did not dispute that there were a number of opportunities in which Crystal Pier could have averred that Nile Dutch has no claim but chose not to; instead Crystal Pier opposed the application, mainly on the ground that it had a counterclaim. The counterclaim which is now said to have been mischaracterised by Ms Maddocks to reflect an after –fact offset rather than a contemporaneous set off which would have occurred by operation of the billing process employed by the parties when Crystal Pier was Nile Dutch's agent. In essence, what Crystal Pier is arguing is that Nile Dutch is the one that is indebted to it.

[26] Crystal Pier's counsel argued that Mr Parsad was ill-advised into accepting that Nile Dutch has a claim against Crystal Pier and that the court will have to hear oral evidence to make a determination as to whether such assertion is true. Referring the matter to oral evidence was vehemently opposed by Nile Dutch, as it was of the view that such determination can be made on the consideration of the papers.

[27] Nile Dutch's legal representative argued that it was not possible for Crystal Pier's director not to have realised that the claim is not disputed, despite whatever advice he might have received from any person. In the confirmatory affidavit that was deposed to by him in support of the opposition of the initial phase of the application, he did not dispute the claim by Nile Dutch. It was further argued that the defence of a lack of a claim is a delaying tactic, which is not reasonable and bona fide.

[28] It is for these reasons that I deemed it appropriate to give a substantial background of the matter, as it will be crucial in making a determination on whether Mr Persad's claim that he deposed to the confirmatory affidavit without realising that the claim by Nile Dutch was admitted and that the counterclaim he initially raised as a defence was misconstrued, is credible.

Referral to oral evidence

[29] Before I engage on the determining whether Mr Persad's assertion is credible, I have to decide whether such determination can be made on the papers or whether the matter has to be referred for oral evidence.

[30] The principles applicable in making a determination whether proceedings brought on notice of motion can be adjudicated upon on papers without referring it to oral evidence were dealt with in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹ where the court, citing the general rule which was stated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,² held that

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634F-G.

² *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C).

'... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'

[31] The court further held that

'...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto* NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire case supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries case, supra* at 924A).'

[32] The discretion vested in the court when dealing with the question of hearing oral evidence is set out in *Pahad Shipping CC v Commissioner, SARS*,³ and was expressed by the court as follows:

'[19] In terms of rule 6(5)(g) a court has a wide discretion in regard to the hearing of oral evidence where an application cannot properly be decided on affidavit...

³ *Pahad Shipping CC v Commissioner, SARS* [2009] ZASCA 172; [2010] 2 All SA 246 (SCA) paras 19-20.

[20] However, it has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits... As was stated by Corbett JA in *Kalil* at 981E-F the rule is a salutary general rule. Unnecessary costs and delay can be avoided by following the general rule. But Corbett JA also stated that the rule is not inflexible. In *Du Plessis and another NNO v Rolfes Ltd* [1996] ZASCA 45; 1997 (2) SA 354 (A) at 366G-367A this court dealt with an application which was made for the first time during argument in this court. The application was dismissed but it is implicit in the judgment that, in appropriate circumstances, this court may decide that a matter should be referred to evidence even where no application for such referral had been made in the court below...'

[33] In *Iclear Payment (Pty) Ltd v Honeywell*,⁴ the court remarked as follows: 'In my view, to simply allow a litigant to resort to a referral to oral evidence when the shoe pinches in motion proceedings, would be to condone irregular procedure.'

[34] Crystal Pier should have anticipated that that the matter may have to be referred to oral evidence when Mr Persad signed a supplementary affidavit which was substantially different from the previous affidavit which he had confirmed. No notice was given to Nile Dutch, and the application was brought for the first time during oral argument. I am in agreement with Nile Dutch that it is extremely late and prejudicial to it and is intended to relieve the pinch of a shoe. The matter, therefore, will not be referred to oral evidence.

Mr Persad's credibility

[35] Mr Persad deposed to an affidavit confirming an admission by Ms Maddocks that Crystal Pier was indebted to Nile Dutch.

[36] A confirmatory affidavit is required when a person is mentioned in the primary affidavit, as without such affidavit confirming the correctness of what was averred in the primary affidavit, the evidence constitutes hearsay and is inadmissible. A confirmatory affidavit only serves to confirm the details in so far as they relate to that person.

⁴ *Iclear Payments (Pty) Ltd v Honeywell* [2023] ZAKZDHC 5 para 17.

[37] In *President of the Republic of South Africa and others v M & G Media Ltd*,⁵ the SCA remarked as follows on the meaning of personal knowledge.

'A court is not bound to accept the *ipse dixit* of a witness that his or her evidence is admissible. . . Merely to allege that that information is within the "personal knowledge" of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated.'

[38] Ms Maddocks, in deposing to the answering affidavit, in paragraph 4, indicates as follows:

'The information relating to the first respondent and its affairs has been provided to me by its director, Pravin Parsad. A confirmatory affidavit will be filed evenly herewith.'

Mr Parsad indeed deposed to a confirmatory affidavit, which reads as follows in paragraphs 2 and 3:

'The facts to which I depose in this affidavit are within my personal knowledge and are true and correct

I have read the answering affidavit deposed to in the proceedings by Johnine Maddocks and confirm that the facts depose to therein, in so far as they refer to me, the first respondent, or its directors are true and correct.'

[39] Mr Parsad may not be a lawyer, as argued by Crystal Pier's legal representative, but he is and was the director of Crystal Pier from the time it was communicated by the legal representatives of Nile Dutch that they intend to terminate the agency agreement up to a stage where the court granted a provisional winding-up order. All the processes that were engaged in, as describe in the history of the matter, were engage in whilst he was at the helm as a director. During this period, Nile Dutch did assert its claim or debt and it was not disputed.

⁵ *President of the Republic of South Africa and others v M & G Media Ltd* [2010] ZASCA 177; 2011 (2) SA 1 (SCA) para 38.

[40] Crystal Pier was placed under business rescue, and in response to the application to set aside the resolution placing it under business rescue, Ms Maddocks submitted the affidavit in which the debt was not disputed and Mr Persad confirmed it. Mr Persad is not some random, illiterate, unsophisticated person who was asked to confirm a complex argument; he had to confirm company debt owed to Nile Dutch. It is highly improbable that he would have deposed to the confirmatory affidavit without having had the knowledge and an understanding of what was being admitted.

[41] In fact, the affidavit by Ms Maddocks would not have been possible without information from Mr Persad, as he is the one who knew the affairs of Crystal Pier, including its creditors and those who have claims against it.

[42] I therefore find that Nile Dutch has a claim or debt against Crystal Pier, and Crystal Pier has failed to discharge its onus to show that it is disputed on bona fide and reasonable grounds.⁶

Arbitration

[43] The arbitration process formed part of the agency agreement as one of the methods that can be used to resolve disputes. After Nile Dutch had calculated and communicated its claim to Crystal Pier, it invited Crystal Pier to arbitration. Crystal Pier did not attend nor consent to the arbitration. Arbitration was conducted and Nile Dutch's claim was confirmed. The arbitration did not create the debt or claim; it simply confirmed it. A claim, which I have found, that was not disputed.

[44] In the circumstances, I am in agreement with Nile Dutch's assertion that Crystal Pier is unreasonably delaying the finalisation of the winding-up, and that it has no bona fide defence.

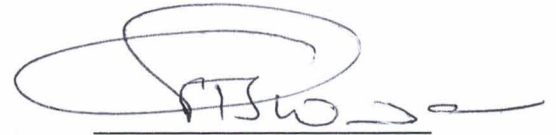
[45] I therefore find that it is just and equitable to order the final winding-up of Crystal Pier. There is no reason to deviate from the usual costs order.

⁶ *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24; 2022 (1) SA 91 (SCA).

Order

[46] The following order is granted:

1. The first respondent is placed under final winding-up in the hands of the Master of the High Court.
2. The costs of this application shall be costs in the liquidation.

A handwritten signature in black ink, appearing to read 'SHOBA AJ', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long horizontal stroke extending to the right.

SHOBA AJ

APPEARANCES

Case Number: 11530/2021P

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Date of hearing:

04 August 2023

Date delivered:

14 February 2024