



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.1606/2012

In the matter between:

PERI FORMWORK SCAFFOLDING

(ENGINEERING) (PTY) LTD

Applicant

and

PHUTFUMA BUILDING CONSTRUCTION (PTY) LTD

1st Respondent

MASTER OF THE HIGH COURT

2nd Respondent

Neutral citation: *Peri Formwork Scaffolding Engineering (PTY) LTD vs Phutfuma Building Construction (PTY) LTD and Master of the High Court (1606/12) [2014] SZHC 82*

(15th April 2014)

Coram:

Hlophe J

For the Petitioner:

Mr. F. Joubert (On instructions from S. V. Mdladla and Associates)

For Respondent:

Mr. N. Manzini

Date Heard:

12th July 2013

Date Judgment Delivered:

15th April 2014

Summary

Liquidation Proceedings – Respondent allegedly failing to pay its indebtedness to Petitioner – Before opposing papers could be filed, parties settle matter where an acknowledgement of indebtedness is signed by the parties – Therein Respondent acknowledges to be indebted to Petitioner in a specified amount which is less than that claimed in the petition plus other amounts comprising costs, sheriffs costs, interest as well as collection commission – Respondent disputes indebtedness and claims Petitioner concealed some important facts – Whether alleged concealment has a bearing on the facts - Respondent alleges further that its indebtedness was paid to the Petitioner – No proof of such payment to counter the debt acknowledged as owed - Effect of the acknowledgment of Debt/Deed of Settlement on Respondent’s liability.

Liquidation proceedings – Proceedings instituted in terms of Section 287 (a) as read with Section 288 (a) to (c) of the Companies Act No.8 of 2009 – Whether Respondent indebted to Petitioner and failing to pay such indebtedness to it – Effect of acknowledgment of Debt/Agreement of Settlement is to prove Respondent indebtedness to Petitioner – Whether a real dispute exists on Respondent’s indebtedness – Notion of Commercial Insolvency – Requirements of the principle – Whether principle applicable to the present matter – Acknowledgment of debt taken together with undisputed failure to pay in terms thereof is proof that Respondent is unable to pay its debts – Provisional liquidation confirmed with costs.

JUDGMENT

- [1] The Petitioner instituted the current proceedings under a certificate of urgency and on an ex parte basis seeking an order of this court *inter alia* calling upon the Respondent to show cause why an order winding up the first Respondent in the hands of 2nd Respondent in terms of Section 287 (a) as read with Section 288 (c) of the Companies Act 2009 following its alleged failure to pay its debts, cannot be confirmed alongside other orders which include the appointment of attorney SabeloMasuku as the liquidator of the first Respondent; the publication of the order made in one publication of the local daily newspapers; the costs of the application as part of the liquidation costs as well as directing that all the orders sought operate with immediate and interim effect pending finalization.
- [2] It is common cause that the petition concerned was brought to court on an ex parte basis resulting in this court granting a rule nisi on the above prayers to operate with immediate and interim effect pending finalization of the matter.

The natural effect of the said rule was to provisionally wind up the first Respondent in the hands of the 2nd Respondent.

- [3] In support of the Petition, it was contended that the Petitioner, then known as WiehahnFormwork and Scaffolding (PTY) LTD and duly represented by a certain duly authorized officer, on the one hand and the first Respondent duly represented by its Managing Director, DumsaniDlamini, on the other hand, concluded a lease agreement in terms of which the Petitioner allegedly leased scaffolding to the Respondent for a period of 10 (ten) years at a sum of E200, 000.00 per month. It was a further term of the said agreement that in the event of the lessee failing to make timeous payment of all the outstanding monies on due date, then all amounts outstanding would immediately become due and payable and that the Petitioner would be entitled either to cancel the agreement or to insist on specific performance of any of its terms. If it chose to cancel the agreement, the Petitioner would be entitled to repossess the goods concerned (the scaffolding) and claim damages as it may have suffered as a result of the alleged breach.

[4] It was contended by the Petitioner that the first Respondent violated the terms of the said lease agreement by failing to pay the agreed sum and was allegedly in arrears in the sum of E2, 468, 530.00 as at the time these proceedings were instituted. It was in an endeavour to enforce the said agreement that these proceedings were instituted seeking the reliefs set out above.

[5] It is not in dispute that before these proceedings could be instituted there had already been instituted other proceedings between the parties herein in terms of which the Petitioner as applicant sought an order inter alia authorising the repossession of the scaffolding allegedly leased by the Petitioner to the Respondent. The repossession of the said scaffolding was sought on the basis that the first Respondent had allegedly breached the agreement by failing to pay the agreed amounts in terms of the agreement signed between the parties. It was contended that it was as at that stage in arrears which were allegedly less than those eventually said to be due as at the time of the institution of the consent proceedings. These proceedings were filed under case No. 1284/2012.

[6] The facts discharged herein reveal that the said matter (repossession of scaffolding) was eventually settled between the parties as a result of which the scaffolding was handed over to the Petitioner. This was achieved at the time the current proceedings were already pending in court. The settlement concerned was apparently at the same time as the settlement of the current proceedings, which resulted in the preparation and signing of a document referred to as the:-

“Acknowledgment of Debt/Agreement of Settlement,”

Annexed to the petition. More about this document shall be stated herein below.

[7] The Petitioner also alleged that part of its grounds for instituting the current proceedings was the fact that there had been instituted other proceedings against the first Respondent by an entity called Central Bridge Trading 348 CC, which had sought an order to confirm the jurisdiction of this court over the first Respondent who was allegedly about to escape the jurisdiction of this court and relocate to Mozambique in an endeavor to escape its debts. The significance of this contention, was apparently to indicate that the first Respondent

was generally failing to pay its debts and that there had been instituted these proceedings in order to recover such debts.

[8] It was further alleged that the Swaziland Development and Savings Bank had also instituted summons against the Respondent claiming payment of a sum of E4, 129, 519.91 (Four Million One Hundred and Twenty Nine Thousand Five Hundred and Nineteen Emalangeni, Ninety One Cents) as well as the other reliefs and ancillary ones sought against the first Respondent. This was said to be another indicator that the Respondent was incapable of paying its debts.

[9] The foregoing factors, it was alleged were proof that the first Respondent was generally incapable of paying its debts particularly the one due to the Petitioner which was the basis of these proceedings. It was alleged further that Section 287 (d) read with Section 288 (c) of the Companies Act No. 8 of 2009 authorized the liquidation or winding up of a company that failed to pay its debts. As proof of the failure to pay its indebtedness, reference was made to certain letters of demand issued against the first Respondent.

These letters which were issued at varying times demanded payment of different sums of money allegedly due to the Petitioner. These amounts grew bigger as the time progressed apparently due to the fact that the leased items were still in the first Respondent's possession with the arrears accumulating all the time.

[10] It would appear from the facts of the matter that after the interim order issued by this court after the matter's first appearance before it and after the provisional liquidation order was served on the Respondents and before any of them could respond to the allegations made therein, the parties embarked upon the negotiations which resulted in the document bearing, the words; Acknowledgment of Debt/Agreement of Settlement, marked across its face, as stated in the foregoing paragraphs. The said agreement bears the date of the 26th October 2012 as the one on which it was signed.

[11] At paragraph 2 to 2.5 of the said document it is provided as follows under the subheading Acknowledgment:

“2. The first Respondent duly represented by DumsaniDlamini, hereby acknowledgesto be

indebted to the Applicant in the agreed amount of:-

- 2.1 E1, 200, 000.00 (One million Two Hundred Thousand Emalangeni) in respect of arrear rentals of the scaffolding equipment leased to the Respondents by the Applicant”.*
- 2.2 Interest thereon at the rate of 9% per annum from July 2012 to the date of final payment.*
- 3.3 Legal costs in Case No. 1284/2012 in the amount of E25, 000.00 (Twenty Five Thousand Emalangeni)*
- 2.4 Deputy Sheriff’s costs in the amount of E20, 000.00 (Twenty Thousand Emalangeni).*
- 2.5 10% Collection Commission.*

[12] According to clause 3.1 of the Deed of Settlement the above amounts were to be paid in instalments of E120, 000.00 (One Hundred and Twenty Thousand Emalangeni) per month which were to be payable on or before the 7th day of each month beginning on the 7th October 2012.

[13] The facts reveal that the first Respondent subsequently failed to comply with the settlement terms as stated above and in particular failed to pay the agreed instalments. The Petitioner reacted by

reopening the hitherto settled liquidation proceedings. There does not seem to have been any difficulty with this development from both sides as the first Respondent appears to have simply filed its answering papers, and responded to the allegations contained in the petition. This was in my view, proper when considering the Supreme Court Judgment in *Swaziland Development and Savings Bank vs Mbusi Ananias Dlamini Supreme Court Case No.83/2012, (Unreported)*.

[14] In the said matter, the Supreme Court reversed the judgment of the High Court to the effect that a Deed of Settlement which had purported to bring about finality in a matter did not necessitate the commencement of the proceedings afresh, if the judgment debtor failed to comply with its terms. It was in fact ruled that it was in order for the judgment creditor to execute the judgment that had purportedly been settled, there being no need to commence the proceedings afresh. In the present matter, therefore the Acknowledgment Of Debt and Deed Of Settlement did not mean that the proceedings had to be started afresh. This is all the more so when considering clauses 5 and 6 of the Deed Of Settlement which

recorded that same did not amount to the novation of the obligations of the first Respondent nor was it prejudising any other steps the Petitioner may have been entitled to take in law.

[15] In its opposing papers or answering affidavit, the first Respondent attacked the procedure adopted by the Petitioner and later the substance of the Petitioner's case. On the procedure, it was contended that the Petitioner had concealed or had failed to disclose all the facts in the matter yet it had approached this court on an ex parte basis which in terms of the law, in this jurisdiction, entitled the court to dismiss the proceedings on this point. In this regard this court was referred to the case of ***MV Rizcun Trader v Manley Appledore Shipping LTD 2000 (3) SA 776***, with particular reference being made to what was expressed in the following words at page 793:-

“As by the nature thereof an ex parte application has to be decided on a one – sided version of events and, more particularly, as the evidentiary criterion is prima facie proof, the uberimafidei rule places a duty on a litigant who approaches the court in an application of that nature to

disclose every circumstances which might influence the court in deciding to grant or with hold the relief”.

[16] It was contended that the petitioner had failed to disclose that because as at the time it instituted the said proceedings, it had been paid several amounts by the first Respondent as could be seen in annexures. “D1” to “D5”. It was not immediately clear what the import of this allegation is given that it was neither alleged nor proved that the Respondent was no longer indebted to the Petitioner or put differently, that all the amounts owed the Petitioner were paid. I say this because paying a portion of an outstanding debt is not the same thing as extinguishing an outstanding debt. The position is even worse where the remaining balance was admittedly already due.

[17] The Respondent contended as well that the Petitioner had misled the court into believing that there were pending proceedings instituted by an entity known as the Central Bridge Trading 348 CC under Case No. 1286/2012 when the reality was that such a case had already been settled between the parties as a result of which it was

withdrawn. The Petitioner, it was argued, misled this court and wanted it to believe that the first Respondent was incapable of paying its debts, yet the basis used was not correct.

[18] It was further argued that the first Respondent was not insolvent because a different company represented by the Petitioner's counsel, had loaned the first Respondent a sum of over E4, 000, 000.00 (Four Million Emalangi) which would not have happened if the belief that first Respondent could not its debts was genuine.

[19] On the basis of the above alleged non-disclosures, the first Respondent prayed that the petition be dismissed with the provisional liquidation not being confirmed. In considering the matter closely, I cannot say that the non-disclosures referred to, if they are indeed such, are material to the issues at hand and are likely to have influenced the court that granted the provisional liquidation order otherwise. This is because whether or not the Respondent was indebted to the Petitioner was eventually agreed upon with a specific amount being agreed to be outstanding as at that stage. Furthermore, in so far as some of the disclosures made would have simply shown

that the Respondent's assets exceed its liabilities, such was not relevant as the reliefs sought are clearly based on the notion of Commercial Insolvency as opposed to Actual Insolvency which are to be discussed fully herein below.

[20] Responding to the substance of the matter, the first Respondent contended that it was not indebted to the Petitioner. I note that no proof indicating such payment was placed before court nor was there an allegation how same was paid. The Respondent seems to have made a bald statement in this regard, particularly when considering the contents of the Deed of Settlement signed by the Respondent.

[21] Given the prominence the Deed of Settlement assumed in the matter and as would be expected, the first Respondent tried to give an explanation on why it had signed the Acknowledgment of Debt or Deed of Settlement document. It claimed that it was not because it was owing the Petitioner any amounts in particular those set out on the document itself which was filed in court as annexure "D8". I observed however that in its explanation, there is no denying the signature appended on the said document nor is there a contention it

did not sign same. All I note is that the Respondent seems to be saying he signed it without the involvement of his attorneys because he may not have signed it, had they been involve. Be that as it may it seems clear that when Mr. Dlamini signed the document concerned he believed that it favoured him because he was in his own wordstrying to evade the liquidation of the Respondent by signing it. Implicit in this is that he knew the Respondent was owing the Petitioner amounts it was failing to pay. Clearly this cannot avail him if one considered the Caveat Subscriptor Principle, which cautions against signing and disputing liability afterwards.

[22] In its explanation the first Respondent's Managing Director asserts that he was approached by the Petitioner's Attorney, Mr. S. V. Mdladla, who asked him to sign the Acknowledgment of Debt and Deed of Settlement, which shall hitherto be referred to as the Deed of Settlement. He says this was subsequent to the hearing of argument in Case No. 1284/2012, in which the Petitioner had instituted proceedings against the first Respondent for the repossession of the scaffolding allegedly leased by the Petitioner herein to the first Respondent. The first

Respondent's(Respondent's) Managing Director, Mr. DumsaniDlamini, says that Mr. Mdladla approached him then and told him that he had instructions to liquidate the Respondent for failure to pay its debt to the Petitioner herein. He allegedly went on to show him papers he referred to as the petition itself. Mr. Mdladla allegedly told him further that the only way to avoid the liquidation concerned was for him to sign the Deed of Settlement referred to above. It was because of this threat that he said he signed the Deed of Settlement. In fact when he did so, he says, he had not been afforded an opportunity to consult with his attorney. This contention is however not probable when considering that his not being indebted to the Petitioner would have been reason enough for him not to sign such a document or even not to allow himself to be threatened. The fact that he was threatened with liquidation if he did not sign can only mean that he knew there was a ground for the liquidation threatened because if there was none he would not have feared the said threat. Clearly he signed the Deed of Settlement concerned because he knew his companywas owing the Petitioner the amounts reflected on the Deed of Settlement.

[23] It is not in dispute that part of the terms of the Acknowledgment of Debt were those set out above where the Respondent acknowledged he was indebted to the Petitioner in the sum of E1, 200, 000.00 (One Million two hundred Thousand Emalangeni) together with interest thereon calculated at the rate of 9% per annum, as well as legal costs for Case No. 1284/2012 at E25, 000.00, the Deputy Sheriff's costs in the sum of E20, 000.00 (Twenty Thousand Emalangeni) and 10% Collection Commission. It is important to pay particular attention to the fact that the real matter being settled was in terms of the Deed of Settlement, Case No. 1606/2012, which is no doubt this petition or these current proceedings.

[24] The Respondent's Managing Director asserts further that in signing the Deed of Settlement aforesaid, he had signed a document he would not have signed had he had legal advice. I find that assertion to be very strange and devoid of merit if I consider the fact that the first Respondent's Managing Director himself asserts that he signed the document in question to save his company from liquidation. There is no doubt he understood as a businessman what liquidation was and how it comes about, hence the desire to save his company

from same. Furtherstill, there was no reason for him to fear liquidation if he did not know what it was particularly if he did not know that there was a ground for it, which was the fact that the company was not in a position to pay the lease amounts which had necessitated settlement of the scaffolding repossession case together with the arrears which formed the basis of this petition. In any event I have noted that the Deed of Settlement concerned, annexure “D8” to the replying affidavit, is itself expressed in very simple language which Respondent would have had no difficulty understanding.

[25] It is important I refer to what the Deed of Settlement had itself provided in order to understand why the breach of its terms could not have necessitated the commencement of the proceedings afresh including what would be required of the Petitioner in the event of failure to comply with the terms of the Deed of Settlement as stated in paragraphs 4 and 5 of the Deed of Settlement.

4 Default

“Should the Respondents default in the due performance of any of their obligations in terms of this agreement of Settlement all of

which are material, including in particular if any payment is not made on due date, or in the event of a judgment having been obtained against the Respondents by another person and such judgment not being satisfied within 7 days of the date on which it is granted; then:

4.1 The full balance then outstanding in terms hereof will immediately become due and payable;

4.2 The Applicant shall in addition to any other rights which it may have in law, be entitled to enforce the provisions of this Agreement of Settlement as if it were a judgment of the court;

4.3 The Applicant shall be entitled to recover, in addition to all the foregoing amounts, all costs incurred by itself to its Attorneys in securing the Defendant's compliance [s] with the provisions hereof which costs may be taxed and recovered on the scale as between an Attorney and his own client and shall include the costs of all necessary attendances, tracing and opinions given.

5. Novation

Neither this agreement of Settlement nor any payment in terms hereof shall constitute a

novation of the present obligation of the Applicant to the Respondent.

[26] The Respondent's Managing Director also made an issue of the fact that whereas in the petition the Petitioner had contended that the Respondent was owing a sum of E2, 468, 530.63 (Two Million Four Hundred and Sixty Eight Thousand, Five hundred and Thirty Emalangi Sixty Three Cents); it was alleged per the Deed of Settlement that the Respondent was actually owing a sum of E1, 200, 000.00 (One Million Two Hundred Thousand Emalangi Only). I do not understand this complaint. Given that the amount agreed upon as owing in terms of the Deed of Settlement is much less than the one claimed in terms of the petition, such can only indicate that certain payments which had either not been credited to the Respondent's account as at the time the petition was instituted had since been credited or even that the parties had haggled and come to an agreement the said lesser sum was the genuinely outstanding debt. Furthermore whatever the reasons for the Deed Of Settlement to reflect the sum of E1, 200, 000.00 (One Million Two hundred Thousand Emalangi) as outstanding, it cannot detract

from the fact that the said sum is the one agreed upon between the parties as representing the outstanding due debt by the Respondent.

[27] The first Respondent's Managing Director contends further that the latter was owed huge sums by the Swaziland Government to the knowledge of the Petitioner's attorney who had touted himself to it to give his firm the instructions to recover such outstanding amounts on its behalf. It was alleged the Petitioner's attorney had said that upon recovering the outstanding amounts from Government same would be used to settle the Respondent's indebtedness to the Petitioner. Clearly the legal effect of this assertion, besides perhaps sounding embarrassing to the Petitioner's attorney Mr. Mdladla without me having to make a finding on its truthfulness and or whether I believe it as it is irrelevant for my purposes hereof, is that the Respondent was not in the state of Actual Insolvency as its assets allegedly exceeded its liabilities. I have already alluded to the fact that a company would be liquidated even where it is not in Actual Insolvency, if it can be shown that same is in in a state of Commercial Insolvency. I reiterate that these notions will be referred to in greater detail herein below.

[28] The Respondent's Managing Director further justified his decision in signing the Deed of Settlement and effectively acknowledging indebtedness to the Petitioner by alleging that the Respondent had concluded a contract to provide services to the iron ore mine at Ngwenya area. This had allegedly resulted in the Respondent partnering with another entity called MBE Transport and Construction Services (PTY) LTD. Because the partnership between the Respondent and this entity, required a loan from a financing entity called Ingula Commercial Finance (PTY) LTD, he found himself obliged to sign the Deed of Settlement in this matter in order for his company to access the loan concerned. This in turn resulted in the release of the scaffolding to the Petitioner.

[29] This court notes that whatever the motive in signing the Deed Of Settlement is of no concern to it as it only needs to concern itself with what the effect of such a signature is in law. It suffices for the court's consideration that the Deed of Settlement was deliberately signed by the Respondent and that ex facie itself obligations arose which remain in place as that agreement has not been set aside.

[30] The question to answer in these proceedings is whether or not it has been shown that the first Respondent is indebted to the Petitioner and whether such a debt, if it is there, is now due and owing with the Respondent failing to pay same. If the answer is that the Respondent owes the Petitioner amounts that he has failed to pay when they are due, then the orders sought have to be granted. The opposite is also true.

[31] As indicated above before answering that question it was argued that the petition should be dismissed in limine on the grounds that the Petitioner failed to make certain necessary disclosures. As can be seen above, the facts said to have been concealed are generally that the Petitioner did not disclose that certain amounts were paid to it and that the Respondent had sufficient assets to meet its debts or put differently that its assets exceed its liabilities as well as that it had to settle the matter in order to obtain a certain loan from Ingula Commercial Finance (PTY) LTD and not necessarily because, it was admitting that it owed.

[32] Having considered these facts closely, I have already pronounced myself on them where I have said I cannot agree that there were any material non-disclosures or that even if there were such non-disclosures as alleged they would lead to the dismissal of the petition herein. I say this because the facts of the matter reveal the Respondent unequivocally binding itself by means of a Deed of Settlement stating that it was indebted to the Petitioner in the sum of E1, 200, 000.00 which it later failed to pay as agreed. As this and other related outstanding amounts were in writing, it is clear that there would be no merit in the Respondent claiming to have paid certain amounts that were not revealed prior to the signing of the Deed of Settlement. It should be obvious such amounts were taken into account before setting out the sum of E1, 200.00.00 as the outstanding amount in the Deed of Settlement. In my view this explains why the amount sought in terms of the Deed of Settlement is less than that claimed in terms of the petition.

[33] The contention that the Respondent's assets exceed its liabilities as confirmed by a grant of a certain E4, 000, 000.00 (Four Million Emalangeni) loan by Ingula Commercial Finance, can only go to

prove the difference between Actual Insolvency and Commercial Insolvency, with which notions I shall deal hereunder.

[34] I am otherwise of the considered view that the other alleged non-disclosures were not germane to the matter at hand or put differently were not material to the issues at hand particularly when considering that the Deed Of Settlement signed between the parties, puts beyond doubt what was owed the Petitioner by the Respondent.

[35] According to section 287 (d) of the Companies Act No. 8 of 2009, a company may be wound up by the court if:-

“(d) the company is unable to pay its debts;”

[36] Section 288 provides instances which in law would be considered as deeming a company unable to pay its debts. The Section is couched as follows:-

“288. A company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that it is unable to do so-

(a) A creditor, by cession or otherwise, to whom the company is indebted in a sum not less than five thousand Emalangeni then due –

(i) Has served on the company by having it at its registered office, a demand requiring the company to pay the sum so due; or

(ii) In the case of anybody corporate not incorporated under this Act, has served such a 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 manner as the court may direct;

and the company or body corporate has twenty one days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company, is returned by

the Sheriff or Messenger with an endorsement that he has not found sufficient assets to satisfy the judgment, decree or order or any that any assets found did not upon sale satisfy such process; or

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

[37] Whereas in the matter at hand there was served two demands, it is clear particularly after the conclusion of the Deed Of Settlement by the parties, that reliance is not being placed on any failure to pay the amounts demanded after 21 days had lapsed, but is placed on the proof before court that the company is unable to pay its debts. This I say because even though the Deed Of Settlement acknowledges at least a sum of E1, 200, 000.00 (One Million Two Hundred Thousand Emalangeneni) and interest at 9% thereof together with the other agreed amounts, there is neither allegation that the said amount has already been paid, nor any proof it has since been paid, which means that such amounts remain outstanding. I have already rejected Respondent's argument that the Deed Of Settlement be not accepted

as proof of outstanding amounts between the parties, because he had a different motive in signing it.

[38] In terms of Section 287 (d) read with Section 288 (c), once it is shown that an amount above Five Thousand Emalangeni is owing and the Respondent is failing to pay it, it becomes clear that the company in question should be liquidated.

[39] In his own words as expressed in the Deed Of Settlement, the Respondent acknowledges his indebtedness to the Petitioner in the sum of E1, 200, 000.00 plus 9% interest per annum plus the costs of some other proceedings between the parties as well as the Deputy Sheriff's costs and Collection Commission. These amounts were not just owed the Petitioner as agreed but the Respondent failed to pay same as agreed in the Deed Of Settlement itself resulting in the liquidation proceedings being resuscitated. There was indeed no disputing the failure to pay in terms of the Deed Of Settlement by the Respondent which only contented itself with disputing the Deed Of

Settlement without having specifically challenged it or applied for it to be set aside.

[40] It was submitted on behalf of the Respondent that the amounts were being disputed including disputing the Deed Of Settlement itself. This it was contended should result in this court refusing to liquidate the Respondent on the grounds that the Respondent's liability was disputed. The principle being advanced in this regard was that courts would be slow to grant dissolution or winding up orders where there is a bona fide dispute as regards the Respondent's indebtedness or failure to pay the Petitioner outstanding amounts. Reference was in this regard made to the case of ***Goodman v Suburban Estates Ltd (In Liquidation) and Others 1915 WLD15*** as quoted in ***Klass v Contract Interiors CC (In Liquidation) and Others 2010 (5) SA 40*** at page 49 where the position was expressed as follows:

“...the court ought not [to] avoid a dissolution unless some unforeseen event such as the discovery of new assets has occurred or unless there has been some fraud or concealment

practised or unless the dissolution has become, either by reason of surrounding circumstances or through some contrivance of the parties, an instrument of injustice”.

[41] Whilst agreeing with the principle expressed herein, I am of the considered view that same is not applicable in this matter or that it is distinguishable from the facts of this matter. As regards the concealment I have already indicated that if same is there, it is not material or relevant to the matter at hand, when taking into account that the debt founding the dissolution was agreed by the parties in terms of the Deed of Settlement. I therefore cannot see any fraud or concealment practised on the question whether or not there is any outstanding due debt to the Petitioner which the Respondent has failed to pay. I also cannot say that there has been disclosure or revelation of facts which make the dissolution process an instrument of injustice as alluded to in the above cited case.

[42] Furthermore the failure to disclose that the ***Central Bridge Trading 348 CC v Phutfuma Construction (PTY) LTD High Court Case***

No. 1180/12 was settled between the parties is in my view of no consequence when considering the ground for dissolution which is the failure by the Respondent to pay its debts as confirmed by the Deed of Settlement, in terms of which the Respondent was indisputably failing to pay.

[43] As regards the contention that the first Respondent does not owe the Petitioner and that it is not about to dispose of its assets as well as that the Petitioner had no faith in its assertion that the Respondent was about to dispose of its assets, when considering the period it took to execute the provisional liquidation order, I can only make mention of the fact that the question whether the Respondent owed the Petitioner some money it was failing to pay, was settled when the Deed Of Settlement was signed by the Respondent's Managing Director acknowledging the extent of the Respondent's indebtedness to the Petitioner and its subsequent failure to pay the agreed amount. Furthermore the ground relied upon for the dissolution of the Respondent, is not a fear of any disposal of assets by the first Respondent but that it is failing to pay its indebtedness to the Petitioner.

[44] Whether or not the Respondent does have sufficient assets is again not a consideration in the circumstances of this matter. The consideration here is whether the first Respondent is capable of paying its debts. In this regard Mr. Joubert for the Petitioner drew the court's attention to the difference between the notion of Actual Insolvency and that of Commercial Insolvency. Bearing in mind the distinction between the two principles with which I deal in detail herein below there can be no doubt that the contention by the Respondent to the effect that it does have sufficient assets refers to the notion applicable in situations of Actual Insolvency as opposed to those of Commercial Insolvency as I have found is revealed by the circumstances of this matter. This I say because whatever the status of its assets is against its liabilities; there can be no realistic dispute that the Respondent has failed to pay what it acknowledged to be owing. This is in my view indicative of Commercial Insolvency as opposed to Actual Insolvency.

[45] In *Standard Bank of South Africa Ltd Vs R-Bay Logistics CC* [2013] 1 All SA 364 (K2D) the distinction between Actual

Insolvency and Commercial Insolvency was expressed in the following words:

“The two concepts (i.e. Actual Insolvency vs Commercial Insolvency) are quite different. The former involves the mere assessment of the value of a company’s assets and liabilities. The latter involves an assessment of the company’s cash flow, to determine whether it has the immediate wherewithal to pay its current expenses as they fall due”.

[46] The facts in this matter confirm the notion of Commercial Insolvency as stated in the foregoing excerpt when considering that the Respondent is shown as having failed to pay its indebtedness. In ***Rosenbach and Company LTD v Singh’s Bazaar’s (PTY) LTD 1962 (4) SA 593 (D)*** refers to the effect of a company’s failure to pay its debts which is expressed in the following words:

“If it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of Commercial Insolvency”.

[47] In the same judgment there was further quoted an excerpt from Palmer's Company Precedents, 17th Edition Part II as regards the effect of Commercial Insolvency and it was expressed in the following words:

“The court can wind up a company if it is commercially insolvent, that is, if it is unable to meet its current liabilities including contingent and prospective liabilities as they fall due”

[48] The facts in this matter reveal that the Respondent is unable to meet its current liabilities as they fall due. This according to the foregoing judgments depicts Commercial Insolvency. Once Commercial Insolvency is proved against the first respondent it follows that it cannot escape the grant of a dissolution order against it. Since the first Respondent has failed to pay its indebtedness, I am constrained to grant the dissolution or liquidation order as prayed for. Accordingly I make the following order:

[48.1] The rule nisi issued by this court on the 24th September 2012 and eventually revived on the 12th April 2013 be and is hereby confirmed.

[48.2] The costs of these proceedings are granted as prayed for in the petition.

Delivered at Mbabane on this theday of April 2014.

**N. J. HLOPHE
JUDGE - HIGH COURT**