IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Civil Appeal No. 61/2016

In the matter between:

EASIGAS SWAZILAND (PTY) LTD **1st APPELLANT**
EASIGAS BOTSWANA (PTY) LTD **2nd APPELLANT**

AND

MACS INVESTMENTS (PTY) LTD **RESPONDENT**

Neutral Citation: *Easigas Swaziland (PTY) LTD, Easigas Swaziland (Pty) Ltd and MACS Investments (61/2016) [2017] SZSC22 (31st May, 2017)*

Coram: **RJ CLOETE JA**
SB MAPHALALA JA
JP ANNANDALE JA

Date Heard: 19th April 2017
Date of Judgment: 31st May 2017

Summary

Appeal against dismissal by the High Court of a provisional liquidation application, brought as a matter of urgency. Multi-pronged challenge to judgment. Multiple grounds of appeal all intertwined and dependant upon singular decisive issue. Question to be determined is whether or not provisional liquidation should have been ordered – Fundamental reason for dismissal being a dispute over indebtedness at all, with averred counterclaim of about one half of the quantified creditors' claims. Remainder of amount also challenged. Threshold of dispute: Bona fide, reasonable and substantial dispute over averred amount. Held: Provisional Liquidation application correctly dismissed. Appeal dismissed, with costs.

JUDGMENT

Annandale JA

[1] Over some years gone by, Easigas and Macs Investments developed a mutually beneficial business relationship. The appellants, Easigas Swaziland (Pty) Ltd and Easigas Botswana (Pty) Ltd, used to supply Liquid Petroleum Gas (L.P.G) products such as bulk LPG, containers and refilling equipment to Macs Investments (Pty) Ltd. The latter Company, respondent on appeal and in the High Court, operates a retailing business in Swaziland

through which sales of L.P.G featured as its main line of business. All went well and business prospects were set for a rewarding future. After all, almost everyone uses gas stoves, light, heaters, braais, geysers and whatever else during a normal lifetime in Africa!

[2] As is the unfortunate position in so many business ventures, the symbiotic relationships and interdependent mutual benefits for both business partners started to deteriorate. It culminated in costly acrimonious litigation wherein the appellants felt constrained to try and salvage whatever their interests were. They applied to the High Court to issue a provisional liquidation order against Macs Investments, to appoint a provisional liquidator and to ultimately have the respondent company wound up, liquidated and then to receive their share of whatever remains of the spoils there would be, or so they thought.

[3] The High Court did not accept their views and claims, to the greater extent because the respondent company disputed their claims and raised a counterclaim as well, thereby successfully persuading the High Court to refuse the application before it, with costs. It is against the refusal of a provisional liquidation order where this appeal lies.

[4] For sake of convenience and completeness, the temptation remains to reproduce the grounds of appeal as it is set out in the relevant Notice. However, the twelve (12) grounds, with one of them split into some nine (9) subsections, runs to some eight (8) pages and it would unnecessarily overburden this judgment if it was to be reproduced in full. Suffice to say that the learned judge *a quo* is criticized from multiple angles. I will soon revert to some of the criticisms levelled against numerous facets which underlie the appellant's case, and which were most ably argued by Mr Flynn, but before doing so, it is apposite to briefly chronicle the events.

[5] By Notice of Motion dated in October 2015, certified to be a matter of urgency by the attorney of the appellants, the High Court was asked to order "Provisionally winding up the Respondent in terms of Section 287 (d) of the Company's Act 2008 owing to its inability to pay its debts" (sic). The usual relevant ancillary relief, such as the appointment of a Provisional Liquidator, etcetera, was also prayed for. On a suitable return date, the respondent company would then have to show cause why a final order for its liquidation should not be made.

[6] Indicative of the applicants' aspirational hopes of securing just such an order and the exhaustive manner in which the application

has been prepared, is amply demonstrated in the Notice of Motion. The record on appeal contains some 243 pages in which the notice, affidavits and annexures are replicated. It details the voluminous letters of correspondence, e-mails, and computer generated printouts, *inter alia* to demonstrate the long history of attempts to sort out their financial affairs. Various mooted options and plans to reach a viable solution join hands with accusatory rhetoric.

[7] Equally vigorous and robust opposition to any notion of any provisional liquidation thoughts were soon enough registered by the respondent. In its opposing answer, almost half as bulky as the founding papers, issue is taken with most of the contentions against itself. Before a replying affidavit was filed, which was done in January 2016 by way of a further 312 pages devoted to it, the matter came before the High Court on the 14th December 2015.

[8] Although the respondent has it that the application should there and then have been dismissed since it "… demonstrated to the court that it was disputed on *bona fide* and reasonable grounds, and that in fact, it was in a position to pay its debts," the Court ordered otherwise. The parties were instead ordered to first conduct a debatement of accounts. In the event of non-resolvement, trial dates late in January 2016 were already set aside to hear the matter.

[9] The matter was not settled and it returned to court. No trial was conducted, but the application was determined on the full sets of papers which had by then been filed, after hearing of argument. The learned judge, in a well-reasoned and motivated judgment, considered the issues before her in a careful assessment of fact, figure, law and procedure. She correctly appraised herself of the ample matter before her. The record on appeal occupies just over 700 pages, without regard to the bundles of legal authorities, further documents and so on. When all is said and done, and when this matter is seen for what it is, the real and substantive issue for decision is crisp, very short and straight forward.

[10] Was the Court *a quo* correct, or mistaken, to refuse provisional liquidation? In so doing, this Court unanimously agree that the centre of the matter lies within the ambit of the determinative and substantive legal reasoning behind the order. It is this: Was the Court correct to hold, as it did, that *it is not my duty in these proceedings to make a finding as to which financial statement ought to be admitted or rejected. My task is to order liquidation on a liquid claim. The submission of two contradictory financial statements by the parties is again an indication that the debt is highly contested and is not suitable for liquidation proceedings"*.

[11] It already requires the avid reader of quotations like this, acutely observing that herein, if potentially fatefully out of context, the learned judge in the Court *a quo* most unfortunately in a written judgment which is in all other respects sound in law but without the preposition, stated: “My task is to order liquidation on a liquid claim.” Instead, the task in the hands of the court was to consider an application for *provisional liquidation*, not final.

[12] The consequences of a provisional liquidation order upon the business of the respondent will in all likelihood be disastrous. Under the administrator’s hands, the route would have included a winding up and closure of the business, unless it deviates from the usual form. Inability to pay debt, cash flow deficiencies, lay-offs and suchlike are not favorable for business recovery and the presence of such factors invariably open the door for liquidations. The creditors who are entitled to a share of the remains also are usually enjoined to write off certain percentages when final winding up is approved by the courts and only cents out of each Lilangeni remain to be distributed. Accordingly, both creditors and debtors are reluctant to follow this procedure, unless it becomes inevitable.

[13] Historically, the inability to pay one's creditors had an entirely different character and consequences, compared to the present day situation where debtors who are unable to service their debs are no longer incarcerated. As *obiter* as it may be, and purely for the sake of both interest and a sigh of relief, the Twelve Tables, numbers 3 and 4, which was promulgated in 451 B.C, makes for scary reading. In those days, a debtor's creditors enjoyed the option, in the event of his being unable to pay his debts, either for selling him into slavery or of literally cutting his body into pieces, with the additional advantage of incurring no liability in case anyone cut more or less than his just share! In the 5th edition of the Law of Insolvency in South Africa by Mars, Hockley, the then incumbent editor, expresses the thought that while this harsh practice was in accordance with the usual severity of the Roman Law towards debtors, there is no doubt that through the concept which was known as reduction to slavery, *manus injectio*, was regularly resorted to. Even so, certain authors, such as Livy, Book IV Chapter 9, expressed some doubts as to whether indeed the cruelty and absurdity of cutting a debtor into pieces was actually put into practice. Eventually, around AD 320, reduction into slavery was replaced by imprisonment for a debtor's inability to pay a judgment debt.

[14] Nowadays, civil society and especially the interests of free commercial activities rather choose to see a properly regulated process of dealing with unpaid debts, such as court judgments. Also, as in the present matter, liquidation and sequestration proceedings are required to travel down formalistic and well demarcated paths. It is precisely because our law requires of an applicant to persuade the court that a respondent debtor is unable to pay its debts in order to obtain a provisional liquidation order, that the debtor must by necessity be able to avoid such an order if it manages to persuade the same court that it has triable issues with the claims. The ebony and ivory keynotes which reverbate throughout the entirety of this appeal are that such protestation must be in good faith and that it is reasonable. It is in the course of a subsequent trial where all of these issues are to be ventilated and considered. The same applies to the counterclaim.

[15] After dismissal of its application, however hard as the creditors may find it to accept it, their claims will now have to be prosecuted in an action, as per the ordinary course of claims for overdue debts. It would be fundamentally unjust to the respondent if it was to have been placed under provisional liquidation as was sought. If judgment is ultimately obtained against the respondent company, it

will then have to either satisfy such judgment within the time limits available to it, or to then face liquidation. But, not now.

[16] Condensed to its essence, the nub of the matter centres around a two pronged approach to motion proceedings as was instituted in the High Court. Did the respondent sufficiently dispute the single creditor's debt on *bona fide* and reasonable grounds?

[17] If the Court found it to be so, should it have exercised its discretion in favour of a provisional liquidation, and all of the attendant consequences which would invariably follow from the onset, or should it have dismissed the application, as was done.

[18] In order to decide if there is a real and tangible dispute, compliant with it being both in good faith and reasonable, the adjudicator is enjoined to be persuaded either way, in accordance with a judicious and intelligent consideration of the totality of evidentiary material which is before the court, as well as due regard being given to relevant jurisprudence and sources of law.

[19] In my considered view, the learned judge correctly and properly assessed the issues in order to conclude that there exists a real and substantive dispute between the parties, specifically about the

indebtedness issue, persuasively demonstrated to be both bona *fide* and reasonable in nature. Meaningful and numerous perspectives clash in full glory. Counterclaims of magnitude come to the fore. "Admissions" and "compromises" by the score have singularly contradictory interpretations. Accusations abound around an alleged intention to take over the business of the respondent by subterfuge, far below the value appraisal of the gas distributor. Balances of accounts are significantly different, dependant upon which version it is based upon.

[20] Cash flow improvement over recent times and short term in-house finance by the respondent company is a common issue between the parties. This came about when the appellants would no longer supply LPG to the local company. The measures which were then adopted by the respondent company entailed cash purchases over a relatively sustained period of absent credit facilities with the appellants. It furthermore received gas from a different supplier, which obviously strained their relationship even further. The disenchanted appellants complain that their equipment and storage facilities on site are being used without their acquiescence or payment.

[21] The *reasonableness* of the dispute, real or imaginary, sufficient to refuse an order for provisional liquidation under the hands of a well-known and often appointed local attorney *qua* provisional liquidator, was assessed in accordance with the dictates of law, as was invariably required of the Court for to it correctly exercise its discretion. Ultimately, the issue of current indebtedness, the ability or otherwise to pay its debts, hinges on an assessment by the court as to whether the application is to be granted or refused. In turn, it is not unlike its cousin, summary judgment. If resisted, the court again has to determine if the resistance to such a drastic legal remedy is sufficient to avoid summary judgment and instead have the matter referred for trial. The reasonableness and propriety of an indicated defence is assessed to examine the presence of a reasonable *bona fide* defence, which if successfully prosecuted in the course of trial, has reasonable successful prospects of either fully or substantially, or even sometimes to partially defeat a claim. Again, the defence need not be pleaded with sufficient detail and clarity as in the actual pleadings to be used during a trial, but it must expose itself as suited for trial.

[22] The *ratio decidendi* for dismissal of the provisional winding up of the respondent company is clearly elucidated in the judgment by the Court below. The learned judge concluded that the respondent

has established that its alleged indebtedness is disputed on reasonable and *bona fide* grounds. In law, the respondent does not have an onus to show that there is no indebtedness in existence, or to negate the claim of indebtedness. Instead, it requires a finding that it contests the indebtedness on *bona fide* and reasonable grounds. I shall soon revert to a concise analysis of the issues as pronounced upon by the High Court, and its findings in relation to indebtedness and the consequent disputes about it, juxtaposing it against the requirements of law.

[23] Before doing so, it would be remiss of me if the underlying rationale and motive behind the application is not first dealt with. Covetousness of the respondent's business by the applicants is time and again flagged as the real and substantive actual reason why liquidation proceedings are embarked upon, instead of action proceedings whereby any indebtedness to the applicant companies could expeditiously be prosecuted. Of course the applicants disavow any such a notion. Mr Flynn repeatedly stated, and correctly so, that the applicants have a legal right to apply for a provisional liquidation under the relevant legislation. As always, to exercise a legitimate right has its limitations. It does not automatically result in a provisional liquidation order, despite the right to apply for it. The application for just such an order was

launched and ultimately refused. The rationale behind the relevant legislation is precisely for this very same reason, namely judicial oversight. In the present appeal, the High Court was enjoined to consider the matter before it objectively, in all of its totality. When this was done, due regard was given to the right of the respondent to also be heard. It painted a very different picture of the alleged state of its indebtedness and liquidity, rising to the challenge.

[24] The material reason for dismissal of the application did to not lie in the alleged hostile takeover of a business. Nor did the Court hold that the respondent company is in "ship shape" condition, cash in the bank and money to spare. The application was also not premised upon an averred siphoning off of company funds in order to feed any "sister companies". Nor did the High Court hold that claims which were relied upon by the appellant have any tendency to be disbelieved. Equally so, no findings were made that the resistance to the claims were meritorious, likely to defeat action proceedings against it. Further umbrage was sought under the auspices of a counterclaim, which itself has also not been pronounced upon. In essence, the *ratio decidendi* is founded upon holding that the issues placed before it were such that in the particular circumstances, all other things being equal, there is an established *bona fide* and reasonable defence, which if ultimately

was found to be valid and proven in the course of a trial, might well result in a wholly different outcome, other than indeed now ordering provisional liquidation.

[25] That the Court found numerous persuasive manifestations of factual disputes, contrary to the contentions of the applicants, bears no gainsay. Although the appellants steadfastly assert that their claims are liquidated and that contrary versions can hold no water, so to speak, the chasm between the opposing accounts is too wide to result in ordering the relief as prayed for. There are also factual disputes which relate to other issues, over and above the respondent's liability. Offers of compromises, undertakings reneged upon, underhand tactics, e-mailed agreements and so on, again have divergent and irreconcilable versions.

[26] Guidelines as to how factual disputes should be approached in an application such as the present were laid down most persuasively by the South African Appellate Division in Kalil v Decotex Ltd and Another (*infra*). These indicators were condensed by Brand J (as he then was) in Payslip Investments Holdings CC v Y2K TEC Ltd 2001 (4) SA 781.

> "According to these guidelines, a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for oral evidence, depending on *inter alia*, the strength of the respondent's case and the prospects of *viva voce* evidence tipping the scales in favour of the applicant. With reference to disputes regarding a respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and *bona fide* grounds. In this event, it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general".

[27] The High Court considered a further arrow in the quiver of the respondent, namely its reliance upon factual disputes between the parties. In the whole, there are numerous instances in the papers before the court below and before us, where differing perspectives of the same aspects abound. It comes from both sides.

Compromised undertakings cloud surrounding circumstances. Whether e-mail correspondence which is relied upon by the opponents are authentic and unchallenged as evidentiary material before a trial court remains to be seen. The actual evidence which is to be presented for adjudication, in accordance with the tenets of law and the legal advice they follow, is yet to be decided upon in order to determine the matter.

[28] In Hulse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (CPD) at 219 F-I, a most useful and concise guideline was formulated by Thring J, *mutatis mutandis* virtually applicable to the matter at hand. He said that:-

> "Apart from the fact that they dispute the applicants' claim, and do so *bona fide*, which is now common cause, what they must establish is no more and no less than that the grounds on 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, in this matter, have to prove the company's defence in any such

> proceedings. All that they have to satisfy me of is that the grounds which they advance for their 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 a trial… it seems to me to be sufficient for the trustees in the present application, as long as they do so *bona fide*, … to allege facts which, if proved at a trial, would constitute good defence to the claims made against the company". We cannot hold otherwise.

[29] Whilst I appreciate the argument of advocate Flynn insofar as the *bona fides* of both the stated defences to the claims which are detailed in the application as well as the counterclaim insofar as it might be concerned, fact remains that the respondent placed material before the court *a quo* which was considered and found to be not only what might be a *bona fide* defence, but also that it is not unreasonable. The respondent actually went the proverbial extra mile and openly disclosed exactly what and where it differs, and correlating the evidence that it proposes to ventilate in the course of a trial. By now, the evidentiary arsenal has been opened up for scrutiny, even though much less would also have sufficed.

This Court shares the same considered view as expressed by the High Court on the matter. Ultimately, to allow the appeal would fly in the face of the appropriate order that was issued by the learned Judge below, contrary to having the diverse factual, legal and evidentiary contested issues appropriately adjudicated upon by a court of competent jurisdiction in the course of a trial.

[30] The contradistinction between the present matter and what has conveniently been referred to above, summary judgment, lies in the ambit and scope of just what is required of a litigant who wishes to avoid judgment. Henochsberg on the Companies Act (5th ed.vol 1 at 693-4), with hindsight of relevant judicial pronouncements and interpretations, authoritatively says under the heading "Abuse of the process of the court":

> "In addition to its statutory discretion, the Court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the *bona fide* bringing about of the company's liquidation for its own sake, e.g. the attempt to enforce payment of a debt *bona fide* disputed….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; the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt (Badenhorst v Northern Construction Enterprises (Pty) Ltd, 1956 (2) SA 346 (T) at 347 – 8 and authorities there cited; Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd, 1971 (1) SA524 (T) at 529 -30; Walter McNaughton (Pty) Ltd v Impala Caravans (Pty) Ltd 1976(1) SA 189 (W) at 191; Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd 1979 (1) SA 265 (W) at 269; and see Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 980; and see e.g. Re a Company (No 0012209 of 1991) [1992] 2 All ER 797 Ch)). Where *prima facie* the indebtedness exists the *onus* is on the company to show that it its *bona fide* disputed on reasonable grounds (Meyer NO v Bree Holdings (Pty) Ltd 1972 (3) SA 353 (T) at 354-5; Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd 1978 (1) SA 70 (D) at 72; Machanick case *supra* at 269). It is submitted that where this *onus* is discharged, the

> application should fail even if it appears that the company is nevertheless unable to pay its debts (cf Mann v Goldstein [1968] 2 All ER 769 (Ch) at 773-5) …. It is submitted that 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 applicants lacks *locus standi*, but because winding-up proceedings are inappropriate for the purpose of determining whether or not he does."

[31] In order to persuade this Court to go against the very grain of these sage *dict*ae, and moreover to override on appeal the inherent reasons for dismissal of the application by the High Court, the appellants are faced with an insurmountable hurdle. The appellants' strenuous argument is that it is entitled to an order once it meets the requirements. Yes, the respondent company would be deemed to be unable to pay its debts if it is proven to the satisfaction of the court that the company is unable to service its obligations, such as when it is unable to meet current demands on it, its day-to-day liabilities in the ordinary course of business, i.e when it is commercially insolvent. This has variously been interpreted to mean: "inability to pay debts absolutely due",

"inability to pay its debts as they fall due," "if it is unable to meet current liabilities as they become due." None of these have been shown to exist, over and above the apprehension held by the applicants. One could be forgiven for harbouring a thought that the applicants took it that once their urgent application was enrolled, the bluff of the respondent would be called. by then, it would be in unsalvageable *mora*.

[32] Throughout the issues, it is to be borne in mind that no judgment against the respondent has been relied upon to bolster the application for provisional liquidation. Let alone any unsatisfied judgment, sounding in money, coupled with a *nulla bona* return by the deputy sheriff. Nor is there any reliance upon pending litigation against the respondent company. The first time when judicial intervention came to be sought was when, on none other than a certified and alleged basis of urgency, a provisional liquidation order was applied for, and rightly refused.

[33] In Investec Bank v Lewis 2002 (2) SA 111 (C) at 116, the Court considered the well-known "Badenhorst rule", that where a respondent disputes his or her liability on *bona fide* grounds, it is improper for an applicant to seek to recover a disputed debt by sequestration proceedings rather than by the usual action

procedure. Reliance was placed on the oft quoted dictum of Corbett JA in Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 980 – B:

> "In regard to *locus standi* as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds."

[34] Otherwise put, per Henochsberg on the Companies Act, 4th ed at 582, where yet again the present case scenario is expounded upon, the learned author succinctly states:

> "Winding up proceedings ought not to be resorted to in order by means to enforce the payment of a debt the existence of which is *bona fide* disputed by the company on reasonable

grounds; the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt".

[35] In their application before the High Court, the applicants/appellants prayed for an order to provisionally wind up the respondent company in terms of Section 287(d) of the Companies Act of 2008, "owing to its inability to pay its debts". As already stated, learned counsel for the appellants pegged much of these aspirations on an order *ex debito iustitiae*, almost an entitlement without further ado to a winding up order. In terms of section 288 (c) of the Companies Act, a company is 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.

[36] Rising to the challenge, the respondent company sought to refute the claim of insolvency. It filed papers to demonstrate the contrary, eventually to persuade the court that a provisional liquidation order would be unsuitable. It *inter alia* relied upon having been able to maintain a staff compliment of some 25 employees over a protracted period of time. Further, it also remains in good standing with the tax department and all of its other creditors. It continued to say how it has managed its ongoing

business without recourse to new encumbrances and loans in the usual course of business. Also, should circumstances so require, its director would be able to generate a quick cash flow injection from his own resources.

[37] Moreover, the respondent sets out how it has been able to continue with its usual business operations, without the former benefit of a debtors account with its suppliers, the appellants. This was done by way of paying in cash for deliveries over a period of time. Substantial amounts of money was repeatedly paid in cash for deliveries. This hardly tallies with the operations of an in solvent company.

[38] The respondent also took issue with the alleged refusal by the applicants to submit to arbitration, as they recorded in their agreement which had since lapsed. Even so, the High Court did not base its decision on anything to do with a failure to have the matter submitted to arbitration. Nor did it err in its analysis and conclusion of the actual persuasive issues before it.

[39] The applicant's claims are set out in a notably long-winded application running up to its eventual conclusion, some twenty-nine (29) sub-paragraphs later. To the first applicant, E3 303 933

"on its own version" (sic), and in addition, to the second applicant, E 2 061 412. 18. This totals to E 5 364 345.18, to the nearest cent. These figures are flexible, in accordance with differing versions. The certificate of urgency, in contradistinction, refers to E6 282 581. 69 and E2 330 392. 03 respectively, a total of E 9 212 973.72. Again, the amounts are stated by the applicants on affidavit to be E 6 882 581.69 and E 2 061 412.180, E 8 943 993.87 in total. As expected, various explanations for the differing amounts have been canvassed, but it impressed neither the Court below, nor this Court, to be equated to a liquid debt.

[40] With reliance on Hendrich Schulze *et al*, General Principles of Commercial Law, 8th ed. 2014 at 471 regarding the need for a debt to be liquidated in sequestration proceedings, the Court regarded a liquidated debt as "a claim is liquidated if its amount has been ascertained either by way of agreement or through a judgment of the Court". Section 282 of the Companies Act reads: "In the winding-up of a company unable to pay its debts, the law relating to insolvency shall in so far as it is applicable, apply *mutatis mutandis* in respect of any matter not specifically provided for in this Act."

[41] In her impugned judgment, the learned judge stated:-

> "In casu, it is common cause that the court has not made any such determination of the debt being liquidated. The court cannot do so in the present application. This is a reserve for action proceedings. There is therefore no judgment of the court for one to say the debt is liquid. I have further found that there was no agreement on the debt by the parties. It is in fact highly contested. For this reason again, the debt in the language of the law of insolvency is not liquid. It remains therefore that the debt cannot be a subject of liquidation application." Her assessment of the matter in this regard cannot be assailed.

[42] The one debt was said to have been liquidated through monthly instalments. The other debt was also called *en garde*. The dispute is detailed in correspondence by the respondents' attorneys. They demanded, based on the declared and disclosed dispute, a "comprehensive and proper debatement of accounts". The applicants are furthermore similarly informed that a "forensic auditor" has since been engaged. From this newly uncovered information, they again sought to fortify their insistence upon a debatement of account. Through such an avenue, it was suggested to them, it would be the most expedient and conducive manner in which to determine the ambit of their agreed and disputed areas.

[43] This all fell on deaf ears. The ultimate end thereof was that the judicial oversight and involvement in the liquidation process, as is stipulated in the legislation, resulted in fair play. It did not close the doors on a helpless litigant who at the barest minimum persuades the judicial ear to be opened in the course of a trial. It would then be the time to put the conglomerate of disputes, both factual and ideological, to the test. It would only be possible to have the many issues fully ventilated, testified to, tested for veracity and then being subjected to judicial scrutiny in the course of a trial.

[44] As just one practical example out of many others, the tiff about invoicing in Botswana Pula, payable in Swazi Emalangeni on one-for-one agreed billing rates, requires evidentiary material which has passed muster in the course of a trial to determine the applicability and consequences of the contrasting versions, and so forth. Allegations of all sorts of impropriety and misapprehension are rife. Bookkeeping records are challenged to and fro. All of this was before the learned judge.

[45] She applied her mind in a manner which resulted in a refusal of the relief. This Court has had equal access to all of the material which

was before the High Court. We have examined the claim which came up for consideration with anxious and enquiring minds. We have applied our minds to all of the issues which have relevance to the appeal. We have noted and anxiously consdered the meticulous and well researched argument as most ably presented by the appellants' counsel. However, an advocate on appeal can only present a case as far as law and fact can be embellished. Counsel cannot create new law, just as facts remain the way they are.

[46] Presently, we do not deem it necessary, or prudent, to also consider the more personal conflict which manifest in allegations and denials of ulterior motives. This would have pertained to abusing knowledge of a failed potential sale of the business, then said to have been countered and refused, resulting in resort being taken to short circuit a reasonable bargaining process and subverting it into a hostile taking over of the business by subterfuge. All of this, however relevant it could be or not be, does not affect our perception of the matter. Nor is it material insofar as the legal principles surrounding the refusal of the application for provisional liquidation goes.

[47] The final arrow, should the already abundant resistance be thought to be insufficient to avoid an adverse order, is in the form of a counterclaim. The respondent, all along, takes issue with the application procedure adopted against it. Since it eschews any notion of motion proceedings instead of action procedure, it contends to be incapacitated to some extent, by procedurally not being able to properly canvass a counterclaim, being fully aware that it involves a serious dispute of fact. Thus, its stated counterclaim is not as much of actually incorporating it in a fully-fledged appropriate pleading, but rather to make the Court aware of its scope and existence. Otherwise put, the counterclaim has been disclosed but not properly pleaded as such, because it is a factual dispute which is not appropriate for adjudication in motion proceedings. The whole point behind the counterclaim is to clearly indicate that once an action is instituted against it on the same factual contentions, there is a counterclaim in the wings, potentially in excess of the claims in convention.

[48] The learned Judge assiduously examined the voluminous material and issues before her. She correctly concluded that a creditor is required to have a liquidated claim, whether ascertained by way of agreement or through a judgment of the court. No judgment has been ordered in respect of any stated claim, nor was the purported

"agreement" established on any reasonable basis of persuasion. The Court further paid careful consideration to the relevant legislation, and in particular sections 287 and 288 of the Companies Act. From all of the available material, upon a proper application of law, the court had no alternative other than to dismiss the application. There was no misdirection. The glaringly obvious factual dispute, of visible magnitude, is omnipresent throughout the matter.

[49] In argument before us, Mr. Flynn had quite a mouthful to say about the manner in which the court below dealt with the matter. Certified to be of such urgency that the normal stipulations about time limits etcetera had to be overlooked when it first came before court, a debatement of account was soon ordered. The appellants vigorously disavow the direction and manner in which the application was temporarily deviated. The papers before us contrast the debatement meeting, perfunctorily so called, in which effect was to have been have been given to the (then unchallenged) directive by the court, with an alleged perfunctory attendance, without most of the material which was to have been debated remaining unavailable.

[50] Much of the criticisms against the impugned judgment also centres around so called “acknowledgments of debt”. The appellants are correct in arguing that they have *prima facie* established indebtedness, but contrary to the argument that such claims were unassailed, it was found that in each instance, at least something akin to a “triable defence” had been established. The manifestations of transfers between loan accounts and particularly funds transferred between “sister companies,” or *parasitical beneficiaries* in different parlance, took the application no further. The factual and interpretational disputes between the parties were of such abundance, regularity and stated antitheses that whichever alleged misdirection the court might have taken, the clear error would have been to hold that the claims are liquidated, well established, and that the respondent company was to have been placed under provisional liquidation, with all of its attendant maladies.

[51] The only *prima facie* good ground of appeal which seemingly is sound and meritorious, is that the Court made reference to “a final order of winding up” in paragraph 12 of the judgment. There, under a heading “Applicants’ main Prayers”, it is recorded that “The applicants pray for a *rule nisi* for: 3.1 an order for the final liquidation of the respondent should be granted” (sic). The Court

unfortunately and incorrectly recorded that: “The applicants base their prayer for a *final order* of winding up on various grounds.” We agree that this was not the case to decide. However, there was no material misdirection by the Court, save to incorrectly have used the wrong term, seemingly inadvertently. It remains an error, but without it having any adverse consequences to the appellants.

[52] The mischief contained in this spurious ground of appeal misconstrues their own application, which was to obtain a provisional winding up of the respondent company under Section 287 (d) of the Companies Act. By default, the obvious further prayer, once a provisional order is obtained, is to secure a return date on which the respondent is to show cause why a final order should not be granted. The court has nowhere demonstrated any misapprehension about the nature of the initial order it was beseeched with, to confuse a provisional order with a final one.

[53] More importantly, the court below did not incorrectly apply the criteria for a final order, instead of a provisionally sought order in anticipation of an eventual final order on the return date.

[54] Regard being given to the multiple and overlapping grounds of appeal, and more so with the silver hued and most eloquently articulated argument as presented by senior counsel for the appellants, it always remains to be recalled that civil litigation is not regularly known for its pleasing outcome to both parties. The law and the facts remain the way they are, however well it is otherwise sought to be presented and argued. We share the unanimous view that from whichever angle the ability or inability of the respondent to pay its debts is concerned, it is premature to now order provisional liquidation.

[55] The learned judge in the court below was therefore entirely correct to dismiss the application now subjected to appeal. Costs, which followed the event, was also correctly awarded against the unsuccessful applicant.

[56] Accordingly, it is ordered that the appeal be dismissed, with costs in favour of the respondent.

JACOBUS P. ANNANDALE

JUSTICE OF APPEAL

I agree

RJ CLOETE

JUSTICE OF APPEAL

I agree

SB MAPHALALA

JUSTICE OF APPEAL

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