

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No.: 29808/2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 31 MAY 2021

In the matter between:

EAGLES LANDING HOMEOWNERS ASSOCIATION
(Registration number: [....])

Applicant

and

AHUJA PROPERTIES CC
(Registration number: [....])

Respondent

JUDGMENT

Judgment (handed down electronically by circulation to the parties' legal representatives by email, by being uploaded to the Case Lines system of the Gauteng Local Division, Johannesburg. The date and time for hand-down is deemed to be 10h00 on 31 May 2021

Matter heard on: Tuesday 04 May 2021

CONSTANTINIDES AJ:

1. The matter was by consent between the parties, heard via electronic videoconference on Microsoft Teams.
2. This is the return date of an opposed application in terms of which the Applicant placed the Respondent into provisional liquidation.
3. The following order was made by the Honourable Nel AJ:

"1. The Applicant is granted condonation for the late filing of the Replying Affidavit;

2. The Respondent is to pay the costs of the condonation application;

3. The Respondent is placed under provisional liquidation;

4. All persons who have a legitimate interest, including the Respondent are called upon to put forward reasons and show cause as to why this Court should not order the final liquidation of the Respondent on 30 March 2021, at 10h00, or so soon thereafter as Counsel may be heard;

5. A copy of this Order is to be served on the Respondent, by the Sheriff of the High Court, at the Respondent's registered office;

6. A copy of this Order is to be forthwith published in the Government Gazette;

7. A copy of this Order is to forthwith be forwarded to each known creditor, by prepaid registered post, electronically receipted telefax transmission or electronic mail reflecting a read receipt;

8. A copy of this Order must be served on:

8.1 every Trade Union operating at the Respondent's premises;

8.2 the employees of the Respondent by affixing a copy of the application and the Order to any notice board to which the employees have access inside the Respondent's premises, or if there is no access, by affixing copies to the front gate, failing which, the front door of the premises from which the Respondent conducts or conducted business; and

8.3 the South African Revenue Services.

9. The costs of this application are to be costs of the final liquidation application".

BACKGROUND

4. The Applicant is a Homeowners Association, incorporated as a non-profit organization.

5. The Applicant's functions were detailed in my predecessor's Judgment and should be read as if incorporated herein.

6. The Respondent is a Close Corporation and registered owner of six immovable properties which are situated within the Eagles Landing Residential Estate.

7. The Applicant sought to place the Respondent into provisional liquidation on the basis that the Respondent was deemed to be unable to pay or secure a debt demanded in terms of Section 69 of the Close Corporations Act, No. 69 of 1984, as amended. ("the CC Act")

8. The court placed the Respondent under provisional liquidation and held that despite the opposition that the Respondent was not a member of the Applicant, found that the Respondent is indeed a member of the Applicant and that the Applicant complied with the provisions of Act 69(1)(a) of the CC Act.

9. The Respondent has admitted that the normal levies due to the Applicant are outstanding in email correspondence. However, the Respondent places into dispute the penalty fees. Despite the Respondent providing alleged guarantees to the Applicant, same were not accepted as they did not constitute full payment.

10. Furthermore, it was found that the Applicant did not have to follow alternative dispute resolution procedures.

11. The Applicant's Counsel in argument and in its Heads of Argument referred to the case of **Orestisolve (Pty) Ltd t/a Essa Investments v. NDFT Investment Holding (Pty) Limited and Another**¹ which states the following:

*'[18] Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is bona fide disputed on reasonable grounds is part of the broader principle that the court's processes should not be abused. In the context of liquidation proceedings, the rule is generally known as the Badenhorst rule from the leading eponymous case on the subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd **1956 (2) SA 346** (T) at 347H-348C, and is generally now treated as an independent rule not dependent on proof of actual abuse of process (Blackman et al Commentary on the Companies Act Vol 3 at 14-82 - 14-83). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage, the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is bona fide disputed on reasonable grounds; a court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (Payslip Investment Holdings*

¹ 2015 (4) SA 449 (WCC)

CC v Y2K Tee Ltd **2001 (4) SA 781** (C) at 783G-I). However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds (Hulse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd **1998 (2) SA 208** (C) at 218D-219C.)

[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-Evans rule (Paarwater v South Sahara Investments (Pty) Ltd **[2005] 1 4 All S A 185** (SCA) para 4; Golden Mile Financial Solution CC v Amagen Development (Pty) Ltd **[2010] 1 Z AWCHC 339** paras 8-10; Badge & Others NNO v Midnight Storm Investments 265 Pty Ltd & Another **2012 (2) SA 28** (GSJ) para 14).

[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the Badenhorst rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is *bona fide* disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the applicant. At the final stage, therefore, the Badenhorst rule is likely to find its main field of operation where the applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is *bona fide* disputed on reasonable grounds and should thus not be determined in liquidation proceedings. (In the present case neither side requested a referral to oral evidence.)

[11] If, on the other hand, and with due regard to the application of the Plascon-Evans rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's claim, there seems to be limited scope for finding that the debt is nevertheless *bona fide* disputed on

reasonable grounds. It is thus unsurprising to find that the reported judgments where the Badenhorst rule has been relevant to the outcome have been cases of applications for provisional liquidation rather than final liquidation.

[12] Even where the facts are undisputed, there may be a genuine and reasonable argument whether in law those facts give rise to a claim. I have not found any case in which the Badenhorst rule has been applied, either at the provisional or final stage, to purely legal disputes. If the Badenhorst rule's foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute. But if the Badenhorst rule extends to purely legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. I have not conducted an exhaustive analysis of the English authorities but the position stated by the Court of Appeal in HMRC v Rochdale Drinks Distributors Ltd [2011] EWCA Civ 1116 paras 79-80 indicates that the equivalent rule in England finds application where the dispute is shown to be one 'whose resolution will require the sort of investigation that is normally within the province of a conventional trial'. A purely legal question would not have that character.

[13] I have used the expression 'bona fide disputed on reasonable grounds' in describing the Badenhorst rule. The South African cases, including Badenhorst itself, are formulated in such a way as to indicate two requirements, namely bona fides and reasonable grounds. The view that the rule comprises two distinct components was expressly articulated in Hi. i/se-Reutter v HEG

The Applicant must establish its case on a balance of probabilities. Where the facts are disputed the Court is not permitted to determine the balance of probabilities on the Affidavits but must instead apply the Plascon-Evans Rule (Paarwater v. South Sahara Investments (Pty) Limited 2005 (4) ALL SA 185 (SCA), paragraph 4 ..."

12. If there are genuine disputes of fact regarding the existence of the

Applicant's claim at the final stage, the Applicant will fail on ordinary principles.

13. It was held that once the Applicant for provisional sequestration has established the requisites for such an order on a *prima facie* basis, the Court has a discretion whether to grant the [final] Order. There is little authority on how this discretion should be exercised which perhaps indicates that it is unusual for a Court to exercise it in favour of the debtor.²

14. In an application for final sequestration the Court held in **First Rand Bank v. Evans**³ :

"[28] Once the applicant for a provisional order of sequestration has established on a prima facie basis the requisites for such an order the court has a discretion whether to grant the order. There is little authority on how this discretion should be exercised , which perhaps indicates that it is unusual for a court to exercise it in favour of the debtor. Broadly speaking it seems to me that the discretion falls within that class of cases generally described as involving a power combined with a duty. In other words where the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the court should ordinarily grant the order. It is for the respondent to establish the special or unusual circumstances that warrant the exercise of the court's discretion in his or her favour.

CHRONOLOGY

15. On the 30th March 2021 the matter was postponed to the Opposed Roll of the 3rd May 2021. Subsequently, the Rule Nisi was extended to the 4th May 2021 to enable the parties to argue the matter and the opposed application on the 4th May 2021.

² See: **H - 3 Caseli nes** , paragraph 4 of the Applicant's Heads of Argument

³ **2011 (4) SA 597 (KZD)** at p. 607 D - E

16. The Respondent purchased six erven situated in the Applicant. The Applicant sent a Notice in terms of Section 69 of the Close Corporations Act via registered post, demanding payment of an amount of R778 217.65. The Respondent admitted to receipt of the letter of demand on 22 July 2016 but alleged that one of the pages was missing.

17. On the 10th October 2016 the Applicant stated that its debt was now R990 378.27 and informed the Respondent of same and that it intended to proceed with the liquidation proceedings.

17.1. It is common cause that the Respondent was placed under provisional liquidation;

17.2. An amount of R4 590 781.88 had been paid into the Respondent's Attorney's Trust Account;

17.3. An unconditional tender of payment was made by the Respondent in the sum of R1 064 557.79 on 28 April 2021. The aforesaid offer was subsequently replaced with an "2....unconditional offer of immediate payment of the amount of R3 074 544.71" in terms of a Rule 34 Notice dated 12 May 2021. The aforesaid offer details the levies, stand/grass cutting costs, community schemes, ombud services levy, building penalty and interest in respect of each stand for the period of 1 August 2016 to 1 May 2021.

18. The Respondent has previously stated in its letter that it disputes the penalties that have been imposed by the Applicant and not the levies. The initial argument was that the Respondent was not a member of the Applicant and therefore disputed any form of liability for the levies payable to the Applicant and a further argument was that the Applicant has not proven inability to pay on the part of the Respondent.

19. The Respondent in its Opposing Affidavit stated that:

19.1. *"it is able to pay its debts and is therefore not commercially insolvent;*

19.2. *that a portion of the Applicant's alleged claim had become prescribed in accordance with the provisions of the Prescription Act, 68 of 1969; and*

19.3. *after litis contestatio during July 2019, the Applicant had issued eighteen separate Summonses out of the Johannesburg Magistrate's Court claiming recovery of its alleged claims on which it relied for purposes of the provisional liquidation order;*

19.4. *in accordance with the signed and audited financial statements of the Respondent as at the 29th February 2021, it was factually and commercially solvent;*

19.5. *consequently pursuant to Section 81(1)(c)(ii) of the Companies Act 2008, dealing with the winding-up of solvent companies, the Applicant had to show on a balance of probabilities that it would be just and equitable for the Respondent to be wound-up, an aspect not addressed at all in the Applicant's founding papers;"⁴*

20. It was further argued in the Respondent's Heads of Argument that the Respondent had undertaken a detailed analysis of the claims described in the Summonses and the Annexures, and how prescription affected the Applicant's alleged claims, and furthermore submitted that the claims that remained in dispute were identified and that an unconditional tender for payment of any and all amounts owing to the Applicant with interest was made and this could have resulted in the Applicant being deprived of its locus standi to proceed with seeking the confirmation of the provisional order.⁵

21. It was argued by the Respondent's Counsel that it is impossible from the Applicant's founding papers to ascertain the exact quantum of the claims against

⁴ Respondent's Heads of Argument - **3 - 84 to 3 - 85 of Caselines.**

⁵ Respondent's Heads of Arguments, **4.2 at B-85 of Caselines**

the Respondent. The Respondent submitted that the effect of prescription on any potential claims of the Applicant has rendered any interest calculation by the Applicant as part of its claims nugatory.⁶

22. The Respondent has confirmed that in the Section 69 demand dated the 14th June 2016 an amount of R778 217.65 was claimed in respect of the six property units. However, the Respondent persists with the defence that the complete copy of the demand was not sent or received.⁷

23. The Respondent had based its alleged *bona fide* dispute on the fact that there is a dispute as to the so-called "*building penalty*" or "*building penalty increase*" and the imposition of penalty levies and the building penalty and interest charged thereon.

24. The Respondent furthermore disputes the manner in which the interest calculation was computed. The Respondent alleges that any amounts claimed older than 1 August 2016 have allegedly become prescribed and he itemizes the prescribed claims under Annexure "P3".⁸

25. The Respondent then "unconditionally tendered immediate payment of the amount R1 064 557,79 to the Applicant ...".⁹

26. Due to the unconditional tender that has been made and the alleged bona fide dispute in relation to the Applicant's various claims, the Respondent sought the discharge of the Provisional Order of Liquidation with costs. Despite the allegation that the vacant stand cannot attract penalties, no further submissions to substantiate this are made in this regard by the Respondent.

27. The Respondent accepted liability for payment of its levies but denied that the amount of R542 142.89 is correct.¹⁰ The guarantee that was allegedly issued

⁶ Respondent's Heads of Argument, **para 8, at 3-86 of Caselines.**

⁷ **Para 9.1, page 87 of Caselines** Respondent's Heads of Argument.

⁸ **Para 28.11, FSA, Caselines 9 - 204**

⁹ Para 14 of the Respondent's Heads of Argument, 3-90

¹⁰ 19.2 of the Applicant's Replying Affidavit at 1-282.

under the cover letter of the Respondent's Attorneys dated the 13th June 2016 stated that payment in terms of guarantees were made entirely under protest and reservation of their client's rights to claim and obtain a refund of such payment to the extent that they included penalty levies. The aforesaid guarantees were rejected by the Applicant as they were conditional. There was an undertaking that once the properties had been transferred into the names of the parties that had purchased them, the argument relating to the guarantees has become moot as they did not materialise.

28. The crux of this matter is the following:

²⁸¹ In the email dated the 10th October 2016, and more specifically in paragraph 4, the Respondent admitted that at no time or instance did the Respondent refuse to make payment for their dues in respect of the levies as was allegedly communicated by its Attorney.¹¹

²⁸² To date the Respondent has not even paid its normal monthly levies which is highly relevant in this matter.¹²

29. The Applicant in the Replying Affidavit clarifies the quantum that is being claimed more particularly as follows:

"28.4 The difference between the amount of R990 378.27 and R577 188.47 is clearly relating to the increasing levies and penalties occurring to date."¹³

30. Despite having admitted that the Respondent is liable to make payment of the levies and contributions towards the levies, let alone the penalties to date, no payment whatsoever has been made to the Applicant by the Respondent.

31. The Respondent admitted to paragraph 13.24 of the Founding Affidavit

¹¹ Para 24.1, Applicant's Replying Affidavit at **1-286 of Caselines**

¹² Para 24.7, Applicant's Replying Affidavit at **1-287 of Caselines**

¹³ Para 28.4.1, Applicant's Replying Affidavit at **1-290 of Caselines**

which reads as follows:

"Each member who is not in possession of the requisite Occupational Certificate will be subject to pay 3 (three) times the monthly levy until such Occupation Certificate is handed to, and an acknowledgement received in writing from the Applicant"¹⁴

32. Therefore, it does not assist the Respondent to deny the penalty levies incurred due to failure to provide an Occupational Certificate to the Applicant.

33. The Applicant submits that the levies due and payable in terms of a Memorandum of Incorporation of the Applicant on a monthly basis far exceeds R200.00 as contemplated by the Respondent and therefore the Respondent is indebted to the Applicant for an amount in excess of R200.00. The Applicant therefore relies on Section 69 of the CC Act, read with Section 345 of the Companies Act No. 71 of 2008, as amended, for the confirmation of the Provisional Winding-Up Order of the Respondent.

34. It is trite law that once a respondent took ownership of the property in the estate, it becomes a member of the Home Owners Association by title.

35. Despite the disputes raised relating to the levies by the Respondent, the Respondent has failed to make payment of the normal levies which are not in dispute let alone the penalties that have been levied.

36. I am in agreement that the fact that the Notice in Terms of Section 69 of the Close Corporations Act was forwarded to the Respondent by registered mail and was not returned to the sender, is sufficient proof that same was received by the Respondent and there has been compliance in regard to the aforesaid Section of the CC Act by the Applicant.

37. The allegation that there was a missing page was not immediately

¹⁴ Para 35.1 of the Applicant's Replying Affidavit at **1-297 of Caselines**

addressed by the Attorney of the Respondent.

38. The Respondent is indebted to the Applicant at the very least for unpaid levies, as it is the registered owner of Stands 23, 24, 48, 49, 50 and 71 in the Applicant's Estate. The Respondent has failed to prove that it is not indebted to the Applicant in amount of at least R200.00.

39. The Respondent's allegation that its assets exceeded their liabilities does not assist the Respondent as it has failed to respond to or comply with the Section 69 Notice.

40. According to the Applicant, neither the Constitution nor the Memorandum of Incorporation of the Applicant makes any provision for the payment of levies via guarantees and levies are due and payable in advance and in cash.

41. The tender that was made by the Respondent on the eve of the hearing of this Opposed Application was not accepted by the Applicant as it was submitted that this tender does not settle even one quarter of the debt.

42. The business of the Respondent is to buy property and resell it or rent it. The properties in issue are empty plots and the Respondent has not sold same. A submission has been made on the part of Counsel for the Applicant that the Applicant has proven that a debt exists in excess of R200.00 and that the Respondent is commercially insolvent and unable to pay the debt and even if the Respondent made payment of the R1 million tender, there was a balance owing to the Respondent.

43. A Rule 30(A)(1) objection was filed prior to the hearing of the Opposed Application and the Applicant's Counsel has placed on record that he has no objection to the Court accepting the Further Supplementary Affidavit of the Respondent and has proceeded to argue on this Affidavit without filing further papers. The 30(A)(1) Notice has been withdrawn by the Applicant.

44. The Respondent's Counsel weighed heavily on the allegation that a portion

of the debt has allegedly become prescribed. It was argued that despite the submission that the Respondent is not insolvent as according to the recent audited financial statements, there are R1.2 million assets over liabilities. However, the Applicant's Counsel placed on record that in fact the alleged R1.2 million assets of the Respondent did not take into account the R4 000 000.00 owed to the Applicant.

45. It was submitted by the Respondent's Counsel that the Applicant should accept the tender and that the balance of the tender which was disputed, should be postponed to be argued at a later stage.

46. However, the Respondent's Counsel could not address the Court as to whether the payment of the amount tendered to the Applicant would not amount to an undue preference of creditors in the event of there being other creditors to which the Respondent owes money. The aforesaid was also not addressed in relation to the most recent unconditional tender which was made.

47. During argument the Respondent has failed to explain to the Court why all the building penalties were excluded in the recalculation of the levies due and owing to the Applicant. After reconsideration as is evident from the most recent tender made by the Respondent there is a concession that most of the penalties (which are allegedly not prescribed) are indeed due and owing to the Applicant.

48. The quantum that the Respondent admitted owing to the Applicant at the hearing was in fact in excess of the R1 million tender, however the Respondent basis its defence on the allegation that certain of the Applicant's claims have "prescribed".

49. The Respondent has not disclosed where the alleged funds which have been tendered come from. The copy of the account reflecting the funds describes the funds as follows: "*Funds for Mr Abuja*". In the most recent tender once again there is no indication where these funds have been sourced from by the Respondent.

50. In determining whether the Court should confirm the Rule *Nisi*, the Court finds that it is not necessary to determine the Respondent's argument on prescription or the exact amount due and owing at this stage as it is clear that the Respondent owes at least R200.00 to the Applicant. The Respondent claims that the unconditional tender should be accepted by the Applicant and that the balance of the alleged disputed matter of the Applicant's claim be postponed *sine die* and that the Rule *Nisi* be extended for that purpose. Furthermore, there should be a referral to oral evidence if a *bona fide and prima facie* dispute is found to exist.

RESPONDENT'S RULE 34 NOTICE

51. In terms of a Rule 34 Notice dated 12 May 2021 the Respondent made a further unconditional offer ("the Rule 34 Notice") of immediate payment of the amount of R3 074 544.71 to the Applicant.

52. The Applicant in the additional heads of argument raises the following issues in regard to the Rule 34 Notice :

52.1 That rule 34 applies to actions and not applications;

52.2 There is no indication in the notice that the Respondent has authorised his attorneys in writing to make this offer;

52.3 The latest offer falls short of R 1 500 000.00 of the total debt claimed which is allegedly now an amount of R4 590 781.88;

52.4 The offer calculates the debt from August 2016, whereas the Applicant claims from March 2014;

52.5 The Respondent's calculations of the interest rate is based on the prime lending rate instead of 10.5% as determined by the Applicant's directors;

52.6 This is a liquidation application and therefore the court is not required to determine the exact quantum of the debt, but only whether the Respondent owes a debt in excess of R200.00;

52.7 It is for the Applicant to prove the exact claim and quantum to the liquidator if the Respondent is finally liquidated.¹⁵

53. The Respondent's counsel in the additional Heads of argument states :

"22. *The salient importance of the fresh offer is that in accordance with the Respondent's detailed and motivated calculations as set out therein this is the maximum amount which the Applicant is entitled to claim from it in relation to claims which are not disputed on reasonable grounds...*

24.*On the probabilities therefore the **undisputed portion of any indebtedness** has been tendered in payment..*" (emphasis added)

THE LAW

54. An Affidavit of compliance with the Rule *Nisi*¹⁶ order was deposed to by the Applicant's Attorney, Mr Philip John Badenhorst on the 26th March 2021.

55. I am satisfied that the Honourable Nel AJ's Court Order has been complied with.

56. Relating to the Applicant's locus standi the relationship between the Applicant and the Respondent has been determined by Nel AJ and I request that same be read as if incorporated herein.¹⁷ Nel AJ states:

"[49] The Applicant did not attach a copy of the Articles of Association

¹⁵ Applicant's supplementary heads of argument paras 4-14

¹⁶ **9.9 - 1 of Caselines**

¹⁷ At 28 to 46, page 0007 to 49

*to its Replying Affidavit, but alleged that an owner becomes a member of the Applicant upon registration ('by virtue of title'), as a matter of law."*¹⁸

57. The Court finds that the Respondent is a member of the Applicant as confirmed in Nel AJ's findings and was bound by the Applicant's Constitution and Rules and therefore this establishes the *locus standi* of the Applicant.

58. In relation to the indebtedness of the levies and/or penalties, the disputes raised by the Respondent cannot be seen to be *bona fide*, as there has been an acknowledgement that, in the very least, the levies and penalties are due and owing to the Respondent albeit that the Respondent actually raises prescription as an alleged defence.

59. The subsequent Rule 34 offer also confirms that there are levies and penalties raised in the accounts of the Respondent. This notice is in effect an acknowledgement of the indebtedness by the Respondent to the Applicant.

60. The Applicant has aptly argued that the Respondent has not disclosed where the funds were sourced from to make the tender for payment to the Applicant.

61. Corbett JA in **Kalil v Decotex (Pty) Ltd**¹⁹ at 980B - D stated that:

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 [company in question] shows on a balance of probability that its indebtedness to the [creditor] is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the [company from which payment is claimed] is not to show that it is not indebted to the [creditor]: it is merely to show that the indebtedness is disputed on bona fide and reasonable

¹⁸ 000 - 11 at [49] of Nel AJ's Judgement

¹⁹ 1988 (1) SA 943 (AD) at 979 B - d

grounds.'

The low threshold of proof to counter the winding-up application

This dictum was quoted with approval by the Supreme Court of Appeal in *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 (2) SA 266(SCA)

62. The Applicant has relied on the deeming provisions of the Section 69(1)(a) of the CC Act as the basis for the alleged Act of Insolvency by the Respondent which reads as follows:

Circumstances under which corporation deemed unable to pay debts

69. (1) For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if- (a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

63. In terms of Section 25(2) of the CC Act, any document which has been served or sent by registered post to the registered office of the Close Corporation shall be deemed to have been served.

64. Nel AJ was satisfied that there was *prima facie* compliance with Section 69(1)(a) of the CC Act in respect of in terms of the Applicant's Letter of Demand in accordance with Section 69(1)(a) the CC Act and there is no reason for me to differ from that finding.

65. The Respondent's indebtedness was addressed by Nel AJ. To date no payments have been made even in respect of the admitted levies that are due and payable to the Applicant by the Respondent despite failed attempts to make

various conditional tenders of guarantees and an unconditional tender of R1 064 557.79 and the most recent tender of R3 074 544.71 in terms of the Rule 34 Notice to the Applicant and the provisional liquidators.

66. In an email dated the 10th October 2016, the Respondent has admitted that levies are outstanding by the Respondent to the Applicants and the most recent tender made²⁰ in the Rule 34 Notice tenders payment of an **"undisputed portion"** of indebtedness. (emphasis added)

67. Due to the aforesaid, I am satisfied that the Applicant has established that the Respondent is indebted to it in an amount exceeding R200.00 for purposes of the winding-up proceedings and that the Applicant is a Creditor of the Respondent.

68. The undisputed portions of the debt owing to the Applicant which is ordinary levies that are due and owing are in excess of R200.00.

69. The Respondent raised the issue that dispute resolution should have been followed by the Applicant, however the Respondent was also entitled to pursue that avenue and has failed to do so.

70. When a debt is **disputed in a bona fide and reasonable manner**, then the **Badenhorst v. Northern Construction Enterprises (Pty) Limited**²¹ Rule would apply. In this case the **Badenhorst** Rule does not assist the Respondents in this matter as it is quite clear that there are large amounts of money due and owing to the Applicant. (emphasis added) The defences which the Respondent has initially raised have subsequently been abandoned with the unconditional offer of payment in terms of the Rule 34 Notice. Therefore, it cannot be ruled that the Respondent has disputed the debt claimed in a **bona fide and reasonable manner**. (emphasis added)

71. The existence of the levies due are clearly *bona fide* and cannot be

²⁰ Respondents additional heads of argument para 24 caselines 3-98

²¹ 1956 (2) SA 346 (T) at 347 H

disputed by the Respondent as same has admitted to an "undisputed portion" of indebtedness due to the Applicant.

72. The issues raised by the Respondent at the eleventh hour such as the alleged prescription of a certain portion of the unpaid levies and penalties cannot be seen to be a *bona fide* dispute which is reasonable on the part of the Respondent, and the aforesaid defences relied upon by the Respondent cannot assist the Respondent in preventing the final winding up of the CC.

73. It was argued on behalf of the Respondent at the hearing that the Court should exercise its discretion and extend the Rule *Nisi* and make the tender an Order of Court and postpone the balance of the disputes for determination at a later stage.

74. The Court has a discretion in terms of Section 347(1) of the 1973 Act to be exercised in deserving circumstances. The Court rationale would be that there is a **convincing prospect of a liquidation being avoided** and that prospect must be seriously evaluated. (emphasis added)

75. Regrettably the Respondent has not provided any evidence of circumstances which would enable the court to exercise its discretion in favour of the Respondent. Therefore, the application to extend the Rule *Nisi* and to postpone the balance of the disputes must be refused.

76. In the circumstances I am satisfied the Applicant has on a balance of probabilities made out a case for the grant of the final winding-up of the Respondent.

The following order is made:

1. The Respondent is placed under final winding-up in the hands of the Master.
2. The costs of this application are costs in the winding-up.

H CONSTANTINIDES

Judge of High Court
Gauteng Local Division
Johannesburg
31 May 2021

Date of Hearing: 4 May 2020

Date of Judgment: 31 May 2021

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