



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

(1)	REPORTABLE: <u>No</u>
(2)	OF INTEREST TO OTHER JUDGES: <u>No</u>
(3)	REVISED: _____
Date: Signature: <u>[Signature]</u> <u>7/10/21</u>	

CASE NO: 2020/13410

In the matter between:

CJ POLYMERS SENDIRAN BERHAD

Applicant

and

**SAVINO DEL BENE (SOUTH AFRICA)
(PTY) LTD**

Respondent

Coram: Fourie AJ

Heard on: 3 May, 26 July 2021

Delivered: 8 October 2021

Summary: Opposed application for final winding up, on basis of alleged debt. Established principles applied to the facts. Found - Respondent discharged the onus of raising a bona fide dispute as to its liability to the Applicant, on reasonable grounds. Winding-up application dismissed with costs.

JUDGMENT

Introduction

1. This is an application for the final liquidation of the respondent. It is opposed.

The matter originally came before me in May 2021, when it was postponed to allow for the filing of further affidavits and completion of mandatory service requirements, which was duly completed, and the matter was argued on the merits on 26 July 2021.

2. Advocate Danie Preis SC, who appeared for the respondent at the hearing in May 2021, sadly fell victim to Covid-19, and passed away in early July 2021.
3. Mr Kevin van Huyssteen of Fluxmans Attorneys represented the applicant, and Advocate Andrew South SC represented the respondent at the hearing on the merits. I am indebted to both for the quality of their submissions, which have been of great assistance.
4. The applicant ("CJ Polymers") is a company incorporated and based in Malaysia. It is an international trading and distribution enterprise, specialising in the procurement and distribution of petrochemicals, polymers and textile raw materials.
5. The respondent ("Savino"), is a company incorporated in South Africa, and operates as the South African branch of Savino Del Bene S.p.A, a global logistics and forwarding company, founded over a century ago, with global headquarters in Florence, Italy.

6. Mr Isaac Solomon David ("Isaac"), owner and CEO of the Solomon David Group (Pty) Ltd ("SDG"), is a businessman who plays a central role in these proceedings, albeit that neither he nor his business are cited as parties. SDG is currently in business rescue.
7. CJ Polymers asserts that Savino is indebted to it to the tune of some R59 million rand, in respect of goods sold and delivered to Savino at its special instance and request, during the period April to December 2018. Savino disputes this, and asserts that at all times it merely acted as a freight forwarding agent for SDG, the actual purchaser of the goods supplied by CJ Polymers. Isaac has deposed to a confirmatory affidavit in support of Savino's version. There is no dispute that monies are owed to CJ Polymers for goods delivered to Savino – the issue is who is liable for payment.
8. The central issue for consideration is therefore whether, in the period in question, Savino purchased goods directly from CJ Polymers, or whether it acted as forwarding agent for SDG, the actual purchaser. Given the nature of the proceedings, the correct approach to addressing this dispute needs to be set out prior to engaging with the facts.

The *Badenhorst* rule and the correct legal approach to this dispute

9. The name of this rule is derived from the judgment in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T), where it was held that liquidation proceedings are not to be used to enforce payment of a debt that is disputed *bona fide* and reasonable grounds.

10. This rule has been applied and refined in numerous cases over several decades. In *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A), the Appellate Division held that this rule should not be applied inflexibly. In *Kalil v Decotex* and subsequent judgments, the following principles have emerged that apply to determining an application for final winding up (as opposed to provisional winding up), where the respondent disputes the debt on which the application is based, and where neither party has sought a referral to oral evidence:

10.1. Before granting a final liquidation order, the court must be satisfied that the applicant, who bears the onus, has established, on a balance of probabilities, the indebtedness of the respondent. (*Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) ("*Paarwater*") at para 3.

10.2. Once the respondent's debt has *prima facie* been established, the onus is on it to show that this indebtedness is disputed on *bona fide* and reasonable grounds, bearing in mind that the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide. (See *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* [2017] JOL 37585 (SCA) at para 12-13.) However, the onus on the respondent is not to prove that it is not indebted to the applicant, but rather that it disputes the debt on *bona fide* and reasonable grounds. (See *Kalil v Decotex* at 980C).

10.3. Per Marcus AJ in *Bravura*:¹

“*Bona fides* and reasonableness are two distinct requirements. ...As to whether the indebtedness is *bona fide* disputed, the court must look to the respondent's subjective state of mind. Bald allegations lacking particularity are unlikely to persuade a court that the respondent is *bona fide*. ... As to whether indebtedness is disputed on reasonable grounds, the court looks to whether there are facts, if proven at trial, that would constitute a defence. This requires more than bald allegations lacking in particularity.”

10.4. Where there are serious disputes in regard to essential matters that the applicant is required to prove, and the applicant has not sought a referral to oral evidence of such disputes, the *Plascon-Evans* test² applies to the resolution of factual disputes. Per Zulman JA in *Paarwater*, at para 4:

[4] ... In the circumstances the following test enunciated by Corbett JA in the oft referred decision of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* is of application:

“Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E–G to B:

‘... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the

¹ *Bravura Capital (Pty) Limited v Drive Path Trade & Invest (Pty) Limited t/a South Energy* (29755/2019) [2021] ZAGPJHC 3 (1 February 2021), available on www.saflii.org (“Bravura”), at para 27, and with reference to the decision of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016 (1) SA 261 (WCC).

² Formulated in *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634E–635C.

admitted facts in the applicant's affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'

. . . It seems to me, however, that this formulation of the general rule particularly the second sentence thereof, requires some clarification, and perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order . . . In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . Moreover there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. . ."

10.5. Marcus AJ in *Bravura* summarised the applicable approach crisply as follows:

"5. The applicant seeks as primary relief that the respondent be placed under final winding-up. Stripped of its nuances, the threshold that the applicant would have to cross to persuade the court to grant a final winding-up order (in contrast to a provisional winding-up order) is that of the usual *Plascon-Evans* approach where the respondent's version is effectively to be preferred over that of the applicant unless the respondent's version can be rejected as far-fetched and fanciful." (Emphasis added)

10.6. Per Rogers J in *Orestisolve*³:

"[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

³ *Orestisolve (Pty) Ltd t/a Essa Inv v NDFT Inv Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC)

probabilities on the affidavits but must instead apply the *Plascon-Evans* rule (*Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) para 4; *Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd* [2010] ZAWCHC 339 paras 8 – 10; *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and 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.)” (Emphasis added)

CJ Polymers' case against Savino, as pleaded in the founding affidavit

11. CJ Polymers alleges that it and Savino have an established business relationship, and that between July 2016 and December 2018, Savino ordered various goods from CJ Polymers from time to time, and (at least until April 2018) paid for the goods on receipt thereof. In each of the 42 transactions during the period July 2016 until 6 April 2018, Savino placed the order, received the goods, and paid CJ Polymers for the goods.

12. Savino appears to have a close business relationship with SDG and Isaac, and appears to have on-sold most of the goods ordered from CJ Polymers, to SDG. Where Isaac communicated an order directly to CJ Polymers (which often happened), he did so after obtaining the express approval from a Savino official, usually the National Sales Manager, Mr Munesh Maharaj. On the basis of these approvals, CJ Polymers fulfilled the orders placed by Isaac/SDG.
13. Between 14 April and 10 December 2018, Savino (via Isaac/SDG, with Savino's approval) placed orders for goods with CJ Polymers on 21 occasions, on the same basis as before, but despite receiving the goods, Savino has failed to pay for them. As at 30 August 2019, Savino is indebted to CJ Polymers in the amount of R54,463,399.20.
14. On 30 August 2019, a meeting was held between representatives of CJ Polymers, Savino and SDG. One of CJ Polymers' representatives kept a minute of the meeting, which records that Savino's representatives admitted that Savino was the buyer in respect of each of the transactions with CJ Polymers, and that Savino then on-sold the goods to SDG.
15. After the parties agreed to the above, CJ Polymers' representatives presented Savino's representatives with an account reflecting that Savino owed CJ Polymers some R56 million. Savino's representative, Mr Kobus Maree ("Maree") then did an about turn, and denied that Savino was the contracting party, and claimed that Savino was simply a logistics company that acted as a handling agent in the transactions between CJ Polymers as seller and SDG as buyer.

16. The meeting ended, attorneys' letters were exchanged, and in due course, CJ Polymers' attorneys issued a demand to Savino in terms of s345 of the 1973 Companies Act, claiming payment of the outstanding debt. The required period for payment having passed, CJ Polymers proceeded to launch this application for winding up.
17. CJ Polymers is adamant that there is no direct business relationship between it and SDG. In support of its claim, CJ Polymers attached approximately 400 pages of supporting documents for each of the 21 unpaid transactions. It asserts that the first few documents in each transaction clearly demonstrate that Isaac/SDG obtained permission from Savino prior to placing an order with CJ Polymers, thus supporting its claim that Savino is the buyer, who on-sells to SDG.
18. By way of example, Annexure E1 contains documents relating to an order for a total of 338,000 kilograms of Polyvinyl Chloride PVC Resin. The documents show that:
 - 18.1. On 26 March 2018, Isaac (on behalf of SDG) sent an email to CJ Polymers, asking that a contract for the purchase of these goods be arranged, with Savino as the buyer, and the cargo to be released to SDG.
 - 18.2. CJ Polymers then generated a sales contract, issued to Savino, with details of the goods ordered, the price, and various other details of the shipment and packing of the goods. This invoice was emailed to Isaac,

who forwarded it to Munesh Maharaj of Savino for approval. Maharaj responded on the same day with a single word – “Approved”. Isaac forwarded this email chain on to CJ Polymers, with the comment “approval below”.

- 18.3. Neither SDG nor Savino signed the order or CJ’s general terms of sale, which are attached to the order.
- 18.4. On 14 April 2018, CJ Polymers issued a Commercial Invoice to Savino, calling for payment in respect of a portion of the goods, in the amount of R3.77 million. This invoice seems to have been accompanied by a packing list and a Bill of Lading which lists Savino as the Consignee of the cargo.
- 18.5. A Marine Cargo Insurance Certificate issued by MSIG Insurance Malaysia in respect of this cargo, lists CJ Polymers as the insured, and SDG as the Consignee.
- 18.6. A declaration by the exported which appears to confirm the nature and quality of the PVC product, lists Savino as the Consignee.
- 18.7. On 10 May 2018, CJ Polymers issued a document titled “Release Order”, addressed to Savino, and instructing it to release the cargo (described in the document, and matching the goods ordered) to SDG.
- 18.8. CJ Polymers also issued a Delivery Order, instructing Savino to deliver the goods to SDG. This document contains a space for the customer

to sign for receipt of the goods, and is countersigned by an official of CJ Polymers.

- 18.9. On 14 May 2018, CJ Polymers sent an email to Isaac, copied to a Savino employee, containing as attachments the various shipping documents described above, with originals to follow via courier.
19. This example is typical of the 21 transactions that make up CJ Polymers' claim against Savino.

Savino's defence

20. Savino is not in the business of importing and selling PVC products. SDG is in this business. Savino is a forwarding and clearing agent and logistics business, and handles the South African operations of the global Savino Del Bene company.
21. SDG and CJ Polymers had an established trading relationship long before Savino entered the picture. Different forwarding and clearing agents were used at that time, to handle a portion of the logistics of the dispatch and delivery of goods from CJ Polymers (as seller) to DSG (as buyer).
22. Maharaj introduced Isaac and SDG to Savino during June 2016. He had previously had business dealings with them at his former employers, DSV and Kuehne & Nagel (also forwarding and clearing agents). Isaac was keen to use Savino as the forwarding and clearing agent in respect of SDG's purchases from CJ Polymers.

23. Savino duly commenced vetting SDG as a new client, which includes determining whether and in what amount to grant a credit facility to the client, as Savino will have to incur fees and expenses in landing the goods and attending to customs clearance. These fees are later recovered from the client. During this vetting process, SDG was required to put up security for the credit facility. Initially a credit facility of R2 million was granted, which was later increased to R5,5 million.
24. From time to time, Savino would invoice SDG for its services and expenses incurred on behalf of SDG.
25. During the vetting process, Savino was requested to attend a meeting with SDG's supplier, CJ Polymers. At this meeting, CJ Polymers' representative, informed Savino's representatives that Savino and DSV had been shortlisted as preferred freight forwarding agents, to attend to forwarding and clearing of goods purchased from CJ Polymers by Savino. Savino was then appointed, due to the global reach and solid reputation of the Savino Del Bene Group
26. During this meeting, the parties agreed to the following process for future business:
- 26.1. SDG would place an order with CJ Polymers for particular goods after negotiating a price, and taking into account SDG's credit facility with CJ Polymers;
- 26.2. CJ Polymers would then send a sales agreement to SDG for approval by Isaac;

- 26.3. Isaac would then forward the agreement to Savino for “approval”, meaning that Savino would approve its role as forwarding agent in the deal, taking into account the anticipated clearing and forwarding costs, and SDG’s credit limit with Savino. In other words, the “approval” emails relied on by CJ Polymers (see above) do not mean that Savino approved the purchase of the goods from CJ Polymers (this was entirely between SDG and CJ Polymers), but rather that Savino indicated its consent to its role as forwarding and clearing agent in the transaction between CJ Polymers and SDG.
- 26.4. CJ Polymers would arrange for shipment of the goods to Savino, who would attend to customs clearing and would take the goods into their warehouse. CJ Polymers would then issue a release order to Savino, directing it to deliver the goods to SDG.
- 26.5. SDG would then instruct Savino to issue an invoice to it, for the entire purchase price and Savino’s additional costs and fees. On receipt of payment, Savino would pay the purchase price of the goods to CJ Polymers, on behalf of SDG.
27. Isaac has deposed to an affidavit confirming the accuracy of the arrangement, as described in summary above.
28. Pursuant to the meeting and agreement on the process, some 68 transactions took place during the period June 2016 to December 2018. The

process agreed to was followed, except that in some instances SDG would pay the purchase price of the goods directly to CJ Polymers.

29. Upon receipt of the goods, SDG would on-sell it to its buyer. Normally SDG would only place an order with CJ Polymers once it had secured a buyer for the goods. Savino was not involved in this process at all. Isaac decided what to order from CJ Polymers.

30. In support of its version, Savino attached various documents, including:

- 30.1. Communications between SDG and CJ Polymers on price negotiations;
- 30.2. Rate terms provided by Savino to SDG for landing and clearing the goods;
- 30.3. Emails showing that Savino would only pay CJ Polymers once it received payment from SDG, and indicating that CJ Polymers was well aware that the payment originated with SDG;
- 30.4. A inquiry from CJ Polymers to SDG about when payment would be made on its account;
- 30.5. Affidavits from various employees, and from Isaac, confirming these allegations.

31. Maree, who deposed to Savino's main affidavit, strongly denied the applicant's version of events at the meeting of 30 August 2019, and in particular denies any admission that Savino is the buyer, and is therefore liable for outstanding payments to CJ Polymers.

32. Maree explains that when CJ Polymers presented a bill to Savino during the meeting, he was dumbfounded, and asked for an explanation as to the basis on which CJ Polymers was looking to Savino for payment, and not to SDG. No explanation was forthcoming. Isaac immediately confirmed that SDG was liable to CJ Polymers for payment, and not Savino. Isaac also stated that SDG had concluded an acknowledgment of debt agreement in favour of CJ Polymers in respect of its entire claim. At its insistence, Isaac had also signed a personal surety in respect of the claim. In both documents, Isaac and SDG undertook to settle the full liability of R56 million by 31 December 2019. These documents are attached to the answering affidavit, and were concluded on 30 August 2019, the same day as the meeting described above.
33. Pursuant thereto, SDG was placed in business rescue. In late 2019, CJ Polymers submitted a claim to the Business Rescue Practitioner, based on the debt, and the subsequent acknowledgement of debt signed by Isaac on behalf of SDG. In support of its claim against SDG, CJ Polymers attached a spreadsheet summarising the 21 transactions, totalling R56 million, that it did not receive payment for. The Business Rescue Practitioner duly accepted the claim. It is likely that this claim was not paid, and that resulted in the attempt to obtain payment directly from Savino.
34. In other words, CJ Polymers claims payment of this amount based on the same transactions, from both SDG (in the business rescue proceedings) and now as the basis on which it seeks the final winding up of Savino, and in both instances asserts that it seeks payment from the purchaser of the goods.

Assessment of the contradictory versions

35. There are various other disputes that arise in the papers, particularly in the replying papers, where allegations of fraud are made, and where CJ Polymers attaches a transcript of the meeting of 30 August 2019, which it appears to have secretly recorded. In a further answer to the new matter in reply, the admissibility and veracity of the transcript are attacked.

36. I do not intend dealing with these further disputes, as for present purposes they do not in my view materially affect the assessment of the key issues for determination; being whether, on the application of *Plascon-Evans*, Savino has raised a *bona fide* and reasonable dispute as to its alleged indebtedness to CJ Polymers.

37. In my view there is nothing far-fetched or fanciful in Savino's version that would enable me to disregard the version pleaded by it. The version is not lacking in detail, such that would call into question the bona fides or reasonableness of the dispute. On the contrary – Savino has pleaded a clear and credible defence, in meticulous detail and supported by documents and affidavits from key role players (including Isaac, who supports the version that SDG is the actual debtor). I am satisfied that Savino has discharged the onus of proving that the debt is *bona fide* disputed, on reasonable grounds, and — that the facts pleaded by it, if proved at a trial, would amount to a successful defence to a claim for payment. In the circumstances, it is not for this court to engage in an assessment of the overall probabilities.

Conclusion and costs

38. For the reasons set out above, the application must fail. I see no reason why costs should not follow the result. It should have been apparent to CJ Polymers, on a reading of the answering papers, that there was little hope in succeeding in an application for final winding up on the papers. It could have elected to withdraw the application and to issue summons against Savino for payment, or it could have sought a referral to oral evidence of the disputes. It did neither, and elected to proceed with this application. Choices in litigation have consequences, and in this instance support an order that costs follow the result.

39. The postponement of the matter on 3 May 2021 was largely the applicant's doing, in failing to attend to mandatory service requirements (which had to be rectified prior to the hearing of the matter), and in raising new matter in reply. The reserved costs of this postponement should therefore also follow the result.

Order

40. The application to place the respondent in final winding-up is dismissed with costs, which costs are to include the reserved costs of 3 May 2021.



Greg Fourie

*Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON: 3 May and 26 July 2021

DATE OF JUDGMENT: 7 October 2021

FOR THE APPELLANT: Adv A South SC

INSTRUCTED BY: Ryan Attorneys

FOR THE RESPONDENT: Mr K van Huyssteen

INSTRUCTED BY: Fluxmans Inc
