REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No

2/2/2021
DATE

SIGNATURE

Case No.: 2019/7213

In the matter between:

OMV PROPRIETARY LIMITED Applicant

and

ALLEYROADS CONSTRUCTION PROPRIETARY LIMITED Respondent
(Registration number 2013/097718/07)

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ

1. The applicant seeks the winding-up of the respondent on the basis that the respondent is unable to pay its debts. The applicant asserts that the respondent is indebted to it for a balance of R46 718.37 for *"goods sold and services rendered by the Applicant to the Respondent"*, and which balance remains unpaid notwithstanding the delivery of a letter of demand in terms of section 345(1)(a) of the Companies Act, 1973.

2. The applicant's founding affidavit is terse. The applicant does not specify what goods were sold and what services were rendered. Although a statement of account is attached which reflects how the outstanding balance is calculated, after deducting payments made by the respondent over a period from invoiced amounts over a period, that statement does not set out what goods were sold and delivered and what services were rendered. Notably, no invoices are attached to the founding affidavit which presumably would have described the goods that were sold and delivered and the services that were rendered. This omission by the applicant, as will appear below, is significant.

3. But what is clear on the applicant's own version is that it both sold goods and rendered services. This appears from paragraphs 7 and 8.5 of the founding affidavit.

4. The respondent, faced with this terse founding affidavit, reciprocates with a similarly terse answering affidavit. The respondent asserts that *"[i]t was a material term of the agreement concluded between the applicant and the respondent that on conclusion of the installing of the concrete slabs, the*

applicant would supply the respondent with the relevant certificates and specifications".

5. The respondent continues that the applicant failed to provide the respondent with the relevant certificates and specifications.

6. The respondent continues in its answering affidavit that "[*t]he slabs <u>installed by the applicant</u> further suffers from a number of serious defects which, on face value, would suggest that the applicant employed a combination of poor workmanship and/or substandard materials and/or incorrect aggregate compounds, thus yielding a weak concrete which appears to be unfit for purpose.*"[1] The respondent attaches photographs of concrete slabs showing cracks.

7. The applicant's replying affidavit does little to clarify the situation. Remaining elusive are any documents, such as invoices, to demonstrate what goods were sold and delivered and what services were supplied by the applicant to the respondent.

8. The applicant in its replying affidavit contends that it is "*a materials supply company*. *Therefore, the Applicant supplied ready-mixed concrete to the Respondent. There was no agreement or undertaking by the Applicant to design, construct or install concrete slabs*". The applicant therefore reasons it cannot be responsible for the defects complained of by the respondent, such as the cracks in the concrete slabs.

[1] The emphasis is mine.

9. This response, for the applicant, has several difficulties. On the applicant's own version in its founding affidavit, it did more than sell materials to the respondent. As appears above, on its own version it also rendered services to the respondent. In the absence of the applicant clarifying what those services were, or even what goods were supplied, it cannot seek to sidestep the dispute raised by the respondent that the concrete slabs that the respondent contends were supplied by the applicant were defective. As stated, on the applicant's own version, it did render services and in the absence of an explanation what those services were, the respondent's version that those services included the installation of the concrete slabs cannot be rejected.

10. As I have already stated, the respondent does not in its replying affidavit adduce any contemporaneous documents that may be of assistance, such as the invoices. The only documents attached to the replying affidavit are three inspection reports. The applicant adduces into evidence these inspection reports to demonstrate that the applicant is in possession of inspection reports and that these could be made available to the respondent. During argument the applicant's counsel submitted that these inspection reports also demonstrated that the goods were not defective. An *ex facie* consideration of the inspection reports, which are technical in nature, does not assist in demonstrating that such goods as were supplied were not defective, or even what goods were supplied or what services were rendered.

11. The applicant seeks 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[2] where the respondent's version is effectively to be preferred over that of the applicant[3] unless the respondent's version can be rejected as far-fetched and fanciful.[4]

12. In my view, the respondent's version cannot be rejected as far-fetched and fanciful, and a final order cannot be granted. The respondent contends that the applicant installed defective slabs and the photographs show defects in the slabs.

13. Has the applicant crossed the threshold for a provisional winding-up order?[5]

14. It is not altogether a simple exercise in delineating precisely what threshold needs to be satisfied to enable a provisional liquidation order to be granted. A consideration of the various decisions that traverse the standard, such as the oft-cited *Badenhorst v Northern Construction*

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[2] *Paarwater v South Sahara Investments (Pty) Limited* [2005] 4 All SA 185 (SCA) para [3] and [4].

[3] Final relief can only be granted on motion if the facts as stated by the first respondent, together with the admitted facts in the applicant's affidavits, justify the granting of the relief: *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984 (3) SA 623 (A) at 634 E-G, as reaffirmed in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290 D-G. Effectively, any factual disputes ought to be resolved by accepting the respondents' version, save where such version is "*so far-fetched or clearly untenable that the court is justified in rejecting (it) merely on the papers": Botha v Law Society, Northern Provinces* 2009 (1) SA 277 (SCA) at para 4, with reference to *Plascon-Evans Paints*.

[4] Once the respondent's version is rejected as far-fetched and fanciful, there would only be one version before the court, namely that of the applicant and therefore the *Plascon-Evans* approach does not come into play as there are no longer conflicting factual versions.

[5] The exposition in the following paragraphs appears in my judgment handed down on 1 February 2021 in *Bravura Capital (Pty) Limited v Drive Path Trade & Invest (Pty) Limited*, case number 29755/2019, Gauteng Division , Johannesburg.

Enterprises (Pty) Ltd,[6] and *Kalil v Decotex (Pty) Limited,*[7] and the more recent pronouncements, reveals that they are not entirely reconcilable. Nonetheless, particularly useful is the judgment of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading 55 CC*,[8] from which the following can be extracted:

14.1. If there are factual disputes relating to the requirements for a winding-up <u>other</u> than respondent's liability to the applicant, has the applicant established those requirements on a *prima facie* basis, i.e. on a balance of probabilities with reference to all the affidavits (without employing *Plascon-Evans*).[9]

14.2. If there are factual disputes concerning the respondent's liability to the applicant and the applicant shows *prima facie* its claim on a balance of probabilities with reference to all the affidavits,[10] then the onus is on the respondent to show that the debt is *bona fide* disputed on reasonable grounds, i.e. the *Badenhorst* rule comes into play. If the respondent does demonstrate this, then the application should (rather than necessarily must)[11] be

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[6] 1956 (2) SA 346 (T) at 347H – 348C, and from which comes the often referred to 'Badenhorst rule'.
[7] 1988 (1) SA 943 (A).
[8] 2016 (1) SA 261 (WCC).
[9] Para 20.See also para 7 and 8 of *Orestisolve p/l t/a Essa Investments v NDFT Investment Holdings p/l* 2015 (4) SA 449 (WCC)*;* para 9 of *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24 (24 March 2017)
[10] The Full Bench of this Division in *Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC* [2012] ZAGPJHC 211 (30 October 2012), para 13 describes this as an exception to the general reluctance of the court in motion proceedings to decide disputes of fact purely on the basis of the probabilities, citing *Kalil v Decotex* at 979G-H. See also *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 80G to 81A.
[11] See the discussion in *Kalil v Decotex* at 980G-I as to whether the Badenhorst rule (namely that where the respondent disputes liability for a debt *"bona fide en op redelike ground"… "dan <u>moet</u> die aansoek afgewys word*") is inflexible, or is applicable only where it appears that the applicant is abusing the winding-up procedure as a means of putting pressure on a company to pay a debt that is *bona fide* disputed. This discussion features in *Hannover Group Reinsurance (Pty) Ltd and another v Gungudoo and another* [2011] 1 All SA 549 (GSJ) para 11 to 16, where the court expresses, in effect, doubt whether the Badenhorst rule is immutable, as contrasted to the

dismissed.[12] This means that even if the applicant can demonstrate its claim on a balance of probabilities, a provisional winding-up order can be refused if the respondent nevertheless demonstrates that the debt is *bona fide* disputed on reasonable grounds.[13]

14.3. *Bona fides* and reasonableness are two distinct requirements.[14]

14.4. 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*.[15]

14.5. 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.[16]

15. Generally, a referral to oral evidence has more of a role to play at the final stage than at the provisional stage.[17]

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court, at the provisional stage, doing *"its best to decide the probabilities by taking into account the full conspectus of allegations and denials as they appear in the affidavits, read as a while, placed before it."*

[12] Para 20, citing *Hulse-Reutter and another v HEG Consulting Enterprises* 1998 (2) SA 208 (C) at 218D – 219C. See also *Orestisolve* paras 7 and 8; *Afgri Operations* paras 6, 14, 17.

[13] *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783I.

[14] Para 23, *Standard Bank of SA Ltd v El-Naddaf and another* 1999 (4) SA 779 (W), at 748G-895B, which in turn cites *Badenhorst*.

[15] Para 24 to 26, citing *Badenhorst* and *El-Naddaf.*

[16] Para 26; citing *Hulse-Reutter*.

[17] In *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W), the court at 79H to 80E expressed a somewhat firm view that save in exceptional circumstances, a referral to oral evidence should not be resorted to at the provisional stage, and that a provisional order should be granted. Subsequent support for this approach by our Full Bench is found in *Total Auctioneering* above, para 14.

16. If at the provisional stage a *prima facie* case is not made out on a balance of probabilities with reference to all the affidavits, the application should be dismissed, unless the applicant seeks a referral to oral evidence. In that event, the more the balance on the probabilities is tipped in favour of the applicant, the more likely the referral and vice versa. It would only be in rare cases that a court would order oral evidence where the preponderance of probabilities on the affidavits favours the respondent.[18]

17. At the provisional stage, the court is not likely to refer the matter to oral evidence where the probabilities favour the applicant, and a *prima facie* case is made out (as it is only necessary at the provisional stage to make out a *prima facie* case with reference to all the affidavits). The court may grant a provisional order as the matter can be referred to oral evidence at the final stage if so requested by the respondent.[19]

18. At the final stage, although the cases do refer to the court being required to be satisfied on a balance of probabilities before granting a final order, the *Plascon-Evans* approach remains applicable.[20] It is not about assessing whether on all the affidavits the applicant has established its claim (as was the assessment at the provisional stage), but on the application of the *Plascon-Evans* approach where the respondent's version is effectively preferred.

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[18] *Kalil* ay 979E-I.
[19] *Kalil* at 979B-E.
[20] See *Paarwater* above, para 3 and 4.

19. It nonetheless remains open for the parties to seek a referral to oral evidence at the final stage,[21] and that is where a referral would be more commonplace than at the provisional stage. If at the final stage the probabilities favour the applicant, a referral to oral evidence is particularly apposite where *viva voce* evidence has reasonable prospects of disturbing the probabilities already in favour of the applicant. If at the final stage the probabilities favour the respondent, the court should dismiss the application rather than refer to oral evidence, particularly as liquidation proceedings are not the forum to determine *bona fide* disputed claims and where the *Plascon-Evans* approach effectively prefers the respondent's version.

20. Applying these principles to the present matter, the first step in considering whether a provisional order may be granted is to consider whether the applicant has shown *prima facie* its claim on a balance of probabilities with reference to all the affidavits.

21. In my view, the applicant fails at the first hurdle. It does not succeed in demonstrating that it *prima facie* has a claim on a balance of probabilities after considering all the affidavits. As set out above, the applicant hardly, if at all, gets out the starting blocks in demonstrating that an indebtedness is owing to it given the paucity of the evidence adduced by it in support of its claim in the founding affidavit. As sparse as the answering affidavit may be, it does, in my view, raise sufficient of a dispute that it would have been

[21] Uniform Rule 6(5)(g) expressly allows for such a referral. See also *Kalil* at 979B-E, citing *Wackrill v Sandton International Removals (Pty) Ltd* 1984 (1) SA 282 (W) at 285H – 86A.

expected of the applicant to deal comprehensively with that dispute in a replying affidavit (assuming that the applicant could have overcome a challenge that it may then be making out its case in a replying affidavit) so as to be able to persuade a court that upon a consideration of all the affidavits it has *prima facie* established its claim.

22. The applicant had two opportunities, in the founding affidavit and then in the replying affidavit, to set out its claim fully but failed to do so. The invoices that would presumably have shed light on what goods were supplied and what services were rendered, and so enable an assessment of the respondent's assertion that the applicant installed concrete slabs (and did not only supply ready-mixed cement) and that those slabs were defective, could have been assessed.

23. As the applicant has failed in its application, the respondent should be awarded costs.

24. Applicant's counsel submitted that given the terseness of the answering affidavit that each party should be ordered to pay their own costs should the liquidation application fail. Although an eyebrow could be raised at the terseness of the answering affidavit, upon reflection it may be unfair to fault the respondent for the terseness of its answering affidavit if the applicant in the first instance hardly, if at all, made out any a case in its founding affidavit.

25. What remains is the scale of the costs to be awarded against the applicant. The respondent sought a punitive costs order.

26. It is trite that a liquidation application is not be used *in terrorem* to enforce a debt that is *bona fide* disputed on reasonable grounds. There is no evidence that the respondent responded to the statutory section 345 letter served upon it in December 2018 and that therefore the applicant should have been forewarned not to institute liquidation proceedings two months later, in February 2019. The applicant cannot be faulted for having done so to such an extent that it should be ordered to pay costs on a punitive scale.

27. Once the answering affidavit was filed, the applicant persisted in its liquidation application. Respondent's counsel pointed out that the respondent in its answering affidavit stated that it had made payment into its attorney's trust account on 10 May 2019 coupled with a tender that the monies will be held as security pending the resolution of the dispute between the parties provided that the applicant instituted proceedings with thirty days. Respondent's counsel submits that that in light of this tender, the applicant's persistence in the liquidation proceedings constituted an abuse. I agree.

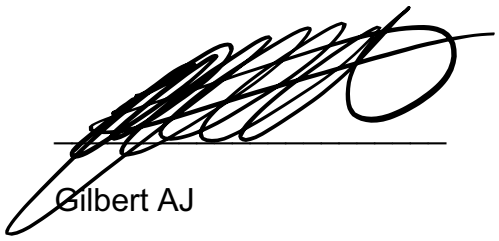
28. The applicant must have been alive to the dispute and that it should be resolved by way of a trial action. If the dispute was not *bona fide* asserted by the respondent on reasonable grounds, this should have be rebutted by the applicant with sufficient detail in its replying affidavit. The replying affidavit does not seek to substantively address the dispute that is raised by the respondent, or to seriously engage with the tender.

29. In my view, the use of liquidation proceedings, or at the very least the persistence in liquidation proceedings after receipt of an answering affidavit, should be discouraged where a suitable tender has been made by a respondent that will enable the dispute to be determined with security in place and which may avert liquidation proceedings that may otherwise drag out for many months placing the respondent in a precarious position. In the circumstances, a costs order on an attorney and client scale after the tender was made is appropriate.

30. The following order is made:

    30.1. The application is dismissed.

    30.2. The applicant is to pay the costs of the application, on a party and party scale until 10 May 2019 and thereafter on an attorney and client scale.



Gilbert AJ

Date of hearing:	27 January 2021
Date of judgment:	2 February 2021
Counsel for the Applicant:	Mr A M Viviers
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Counsel for the Respondent:	Mr Mostert
Instructed by:	Kyriacou Inc