REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2021/29872

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED YES

26 April 2022
Date **Signature**

In the matter between:

VOLTEX (PTY) LIMITED T/A ATLAS GROUP **Applicant**
(REGISTRATION NUMBER 1964/006740/07)

and

RESILIENT ROCK (PTY) LIMITED **Respondent**
(REGISTRATION NUMBER 2011/118259/07)

Heard: 27 January 2022
Judgment: 26 April 2022

JUDGMENT

MOVSHOVICH AJ:

Introduction

1. This is an application for the winding up of the respondent on the basis of the latter's inability to pay its debts. The applicant places reliance on section 345(1)(c) of the Companies Act, 1973.

2. The applicable principles are as follows:

2.1 a liquidation application is not a mechanism to obtain payment of disputed debts. As such, if the respondent shows that the debt is genuinely and reasonably disputed, the application for winding up should generally fail,[1] even if it is likely (on a balance of probabilities based on the pleaded cases) that the applicant will succeed in establishing its claim on the merits.[2] This is the import of the *Badenhorst* principle or rule.[3]

2.2 It has been suggested that the *Badenhorst* principle may only be applicable in applications for provisional liquidation, not final liquidation.[4] This is said to be so because in applications for final relief, the *Plascon Evans* principle is applicable. It is indeed trite that a court is obliged to apply *Plascon Evans* and is thus required to decide the matter on the basis of the respondent's factual version together with such facts in the applicant's papers as the respondent does not substantively dispute (unless the respondent's version is palpably implausible, not *bona fide* or clearly untenable).[5] But *Plascon Evans* is concerned largely with rules of procedure and evidence; not the substantive requirements for an

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[1] *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A).

[2] *Payslips Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C), 783.

[3] See a recent pithy restatement of the principle in *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* [2016] ZASCA 168 (24 November 2016), paras [1] and [11].

[4] *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC).

[5] *National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA); and *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

application to succeed. It seems to me that the *Badenhorst* principle is not a rule of procedure of evidence, but relates to substantive requirements: ie, what a party must establish to make out a claim or establish a defence. In this context, the *Badenhorst* principle is applicable as much to provisional winding-up as to final winding up.

2.3 How one goes about satisfying these substantive requirements and on what evidence the Court can base its conclusions is a matter of process and procedure, including *Plascon Evans*. *Plascon Evans* may, of course, make it more difficult for an applicant to overcome the *Badenhorst* principle on motion. To state that at the provisional liquidation stage the *Badenhorst* principle applies and the application should generally be dismissed if there is a dispute as to liability on *bona fide* and reasonable grounds, but to hold that what is required at final stage is simply proof of the indebtedness on the balance of probabilities (with the possibility of establishing this by way of a referral to oral evidence) may paradoxically impose a *lower* standard of proof of debt at the final liquidation stage than at the provisional stage. This seems to me undesirable and not consonant with the authorities. At least the same and possibly higher substantive requirement in relation to the debt should be imposed at the final liquidation stage.

2.4 An applicant for liquidation also bears the burden of satisfying the Court that the respondent company is unable to pay the aforesaid debt: that is, it must establish the respondent's commercial insolvency.[6] In this regard, a mere failure to pay, without more, is not co-extensive with an inability to pay and, in the absence of

[6] *Corner Shop (Pty) Ltd v Moodley* 1950 (4) SA 55 (T), 59 - 60; *Standard Bank of South Africa Ltd v R-Bay Logistics CC* 2013 (2) SA 295 (KZD), para [24].

a statutory deeming provision such as section 345(1)(a) of the Companies Act, 1973, an inference of an inability from a failure is inherently problematic.[7]

2.5 In considering whether to grant a final order of liquidation, the Court should also apply the *Plascon-Evans* principle.[8]

2.6 Even where the requisites for a winding-up order are established, the Court retains a discretion to refuse it, but the discretion is a narrow one, to be exercised judicially in "*special or unusual*" circumstances.[9]

3. The current liquidation application presents several of the challenges foreshadowed in the authorities. I first set forth the background before analysing how the above principles play out in the case.

Factual background

4. The applicant and the respondent concluded an agreement in or around September 2020. A credit application was filled out by the applicant's representative with the respondent's details and then signed by the respondent's Mr Sam Comfort Mhlaba on 21 September 2020 ("**the credit application**"). That application was not countersigned by the applicant and in fact appears to have no place for counter-signature. The application provided certain terms for the purchase of goods by the respondent from the applicant, including delivery, transfer of risk and payment of the purchase price. Clauses 11 and 12 provided that the payment terms are 30 days from the statement date unless otherwise agreed in writing, and required the respondent to

[7] *Corner Shop* (*ibid*, 60); and *Meyer & Kie v Maree* 1967 (3) SA 27 (T).

[8] *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA), para [9]

[9] *Ibid*, paras [12] and [13].

object to any item on a statement from the applicant within 10 days of the statement's dispatch.

5. Clause 19 also provided that the terms set forth in the application contain the entire agreement between the parties which may only be amended by the written and signed further agreement of the parties.

6. Whilst the respondent acknowledges the above context of the credit application, it states in the answering affidavit that it was "*never the intention or agreement of the parties that the respondent would pay within 30 days from the date of the applicant's statements to the respondent*". The applicant alleges that the agreement to supply goods to the respondent was concluded orally on 21 September 2021 at the same time as the credit application was signed and, in this regard, "*it was expressly agreed that the electrical goods to be supplied by the applicant were exclusively for [a property development in Randfontein [("**the project**")] pursued by the respondent, which was a property developer]. [The credit application] was signed on the basis of and pursuant to this [oral] agreement. It was further agreed that any debt due by the respondent to the applicant in respect of such electrical goods as may be supplied and delivered by the applicant to the respondent would not be payable until the monies due to the respondent in respect of the project were released. Such monies are presently being held in Trust by Adams & Adams Attorneys*." "The respondent thus concluded that "*[t]he alleged debt is not due, owing or payable.*"

7. The respondent's representative states that he had no hand in completing the credit application (contrary to the applicant's averments) and merely initialed and signed on the credit application as he was "instructed" by the applicant's representative, Mr Mervin Cameron, to do so.

8. There is thus a dispute as to the contents and circumstances surrounding the conclusion of the agreement between the parties. Given that the dispute also concerns payment terms in respect of the invoiced amounts, the dispute is germane to the claim made by the applicant. It needs to be determined whether a *bona fide* and reasonable basis has been laid by the respondent for disputing the indebtedness.

9. In support of its version of the agreement, the applicant also relies on certain correspondence exchanged between the parties in April 2021. On 16 and 29 April 2021, the applicant wrote to the respondent to request payment of R 17,384,712.60. It also signaled in that correspondence that alternative payment arrangements could be made. It appears that on 29 April 2021, there was then a meeting held between the applicant and respondent's representatives regarding the aforesaid amount. Pursuant to that meeting, the respondent sent through a proposal to settle the amount in three monthly instalments from May to July 2021, and apologising for the inconvenience of a "delayed" payment. The respondent avers that the correspondence is privileged and inadmissible as it was part of settlement negotiations. The applicant on the other hand contends that the correspondence was simply an acknowledgment of liability, and an undertaking to pay the acknowledged debt in instalments.

Analysis

10. Given that these are motion proceedings, where evidence cannot be weighed up for its probabilities when considering final relief, and where in provisional liquidation proceedings all that is required of the respondent is to set forth a *bona fide* and reasonable basis for resisting the claim for indebtedness, I cannot come to the conclusion that the 30 April 2021 letter is admissible. In any event, in its terms, while it recognises the "outstanding" amount of R 17,384,712.60, it says nothing about

whether the amount is payable. The key issue in dispute are the *payment* terms originally and bindingly agreed. Moreover, the letter expressly states that the respondent "*propose[s] to settle the outstanding amount*" in a particular sequence.

11. In my view, the respondent's version of the agreement between the parties is indeed improbable. If it were true, then the applicant would effectively have agreed to defer payment for potentially a substantial and indeterminate period, until the funds for the project became available, which may, possibly, never have come to pass. The credit application form also appears relatively clearly to state the payment terms, and it would be odd for those terms to be signed and different terms to be orally agreed beforehand or at the same time as the signature.

12. But it may also be that one should not read too much into the signature of a standard form credit application (which was not even counter-signed by the applicant) as it could not possibly reflect anything that was actually agreed orally just prior to its signature. It is unclear how the *Shifren* clause[10] in the credit application subsists alongside the oral agreement between the parties, but these are not insuperable obstacles in light of remedies such as rectification, the importance of context in interpretation, and the fact that the credit application would have to be interpreted and understood against the background of what had been discussed and agreed. Moreover, if the terms were strictly 30 days, it is unclear why the applicant continued to supply the goods without demur to the respondent until February 2021.

13. I do not think it is appropriate or possible for me to resolve the disputes in favour of the applicant on the papers. Although the respondent's version is questionable and improbable in several respects, I am of the view that it is sufficient to constitute a *bona*

[10] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en ander* 1946 (4) SA 760 (A).

fide and reasonable basis for disputing the payment terms (and thus the claimability) of the debt. I am fortified in my view by what Megarry J stated in *John v Rees* [1970] Ch 345: "*As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change*."[11]

14. In addition to the above, and importantly, the applicant has presented no direct evidence that the respondent is unable to pay its debts. The onus in this regard (on a balance of probabilities) rests on the applicant. No notice under section 345(1)(a) was sent. The applicant has also not proffered any evidence of the respondent's creditors, debtors, assets or liabilities.

15. All that the applicant mustered in its founding papers is the allegation that given the facts as set forth above (and in particular the respondent's failure to pay on the instalment dates set out in the 30 April 2021 letter), the Court should draw an inference of an inability to pay the debts. I am not satisfied that the letter is admissible, but I also do not think its content would assist the applicant. The mere failure to pay on agreed dates is in itself not evidence of an inability to pay, particularly where there is no evidence that the *proposed* payment dates set forth in the 20 April 2021 letter were agreed by the applicant. Moreover, while it is debatable whether the respondent's version of the original agreement as to payment terms is probable, I do not think that on the papers it may be concluded that its view of claimability of the debt was not at the relevant times genuinely held. If that is so, then its failure to pay the debt gives

[11] At 402. Cited with approval by the Supreme Court of Appeal in *National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA), para [22].

rise to no inference of insolvency. After all, it genuinely believed it had no obligation to do so. Drawing a far-reaching inference as to commercial insolvency requires more.

16. In all the circumstances, the liquidation application falls to be dismissed. The applicant, if it believed it was entitled to payment, should have launched court proceedings specifically seeking the enforcement of its debt (by way of action or otherwise). Liquidation proceedings were inappropriate.

17. There is no reason why the usual principle concerning costs should not apply, with costs following the result.

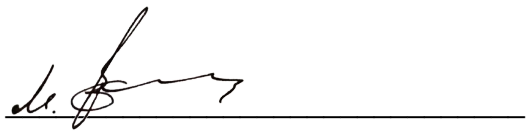
Order

18. I thus make the following order:

18.1 the application is dismissed with costs.

Hand-down and date of judgment

19. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 15:15 on 26 April 2022.



VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel:	N Segal
Applicant's Attorneys:	Orelowitz Inc Attorneys
Respondent's Counsel:	BP Geach SC
Respondent's Attorneys:	Rina Rheeders Attorneys
Date of Hearing:	27 January 2022
Date of Judgment:	26 April 2022