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

CASE NO: 3678/2021

REPORTABLE:
OF INTEREST TO OTHER JUDGES:
REVISED.

20/06/2022
DATE

SIGNATURE

In the matter between:

CLEANJACK SA (Pty) Ltd — Applicant

And

FEEDEM GROUP (Pty) Ltd — Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This is an application wherein the applicant seeks an order for the final winding up of the respondent in terms of the provisions of section 344(f) of the Companies Act 61 of 1973("the 1973 Companies Act") read with the provisions of section 344, 345 and 346 thereof as well as the provisions of Item 9 of schedule 5 of the Companies Act 71 of 2008 ("the Companies Act"). The order is sought on the ground that the respondent is unable to pay its debt as and when they became due as described in section 345 of the 1973 Companies Act.

FACTUAL MATRIX

[2] The parties concluded a written agreement on 27 October 2017 in Meyersdal, south of Johannesburg, in terms of which the applicant was to supply the Respondent with the CleanJack SA system for a period of 36 (thirty-six months) to enable the respondent to monitor the attendance and working hours of its employees at Cristal Solutions, a division of the Respondent. The Applicant was to supply, install and activate the systems, but did not charge for the installations.

[3] As at the 30th March 2020, the respondent had been in arrears with its monthly payments of R27 524-11 from the end of February 2020 which had allegedly escalated to R165 144-36 on 17 July 2020, when the Applicant served the Respondent with a notice in terms of section 345 of the 1973 Companies Act, and to R247 716 -69 when the founding affidavit was deposed to on behalf of the applicant.

[4] On the 26 March 2020 the government of South Africa declared the state of

national disaster following the rampant effects of the Covid-19 pandemic. Amongst the restrictions imposed was the prohibition of persons from physical attendance to their workplace for a period of 21 days, save in respect of those rendering essential services. The lockdown period had an adverse economic effect on many companies.

[5] In a letter to the applicant dated 30 March 2020, the respondent had sought the suspension of its payment obligations due to the Covid19 pandemic and sought to cancel the agreement.

[6] Despite the lockdown, the applicant had sought payment and persisted, during arguments in court, that the amount R27 524-11 for the month of February 2020 had already been due and owing, that is, prior to the declaration of the state of disaster on 26 March 2020. It is notable that the respondent had not disputed its indebtedness to the applicant in that amount, yet contends that the applicant was not its creditors. It is worth noting as well that the respondent ostensibly seeks to rely on its purported cancellation of the agreement in support of the assertion that the applicant was not its creditor.

ANALYSIS

[7] I deem it necessary, on the facts above, to the state that the respondent's blanket denial of its indebtedness to the applicant is without merit in light of the amount it owed to the applicant for the month of February 2020 and in respect of which it had sought a suspension of payment.

[8] Depending on the finding on validity of the respondent's cancellation of the

agreement, there may be merit in the respondent's dispute of the claimed amount of R247 716-69 allegedly owing in October/November 2020 on which these proceedings are premised. This application was launched on 27 January 2021.

[9] The respondent grounds its cancellation of the agreement on the Covid19 pandemic lockdown ("the force majeure"). The respondent's entitlement to rely on the force majeure is disputed by the applicant. It comes as a relief that the applicant had reconsidered its stance and accepted that the Covid19 lockdown indeed constituted a force majeure (applicant's heads of argument). Clearly, the prohibition of physical attendance by employees to their respective workplaces precluded the respondent from earning an income and from utilising the CleanJack systems. This, coupled with the applicant's insistence on payments, necessitated that the respondent cancels the agreement. In my view, the respondent had no alternative in the circumstances and the cancellation was, therefore justified. This finding impacts the monthly amounts allegedly accumulated subsequent to the cancellation of the agreement and which had been in dispute prior to the launch of these proceedings.

THE LAW

[10] It is trite that the court has a discretion whether or not to grant an application for the liquidation of a company. The caveat to the exercise of such power is that the discretion must be premised on judicial grounds (see *Irvin & Johnson Ltd Oelofse Fisheries Ltd* 1954 (1) SA 231 (E). It is imperative that the court considers the grounds and the reasons proffered for the liquidation sought (See *Leca Investment (Pty) Ltd v Shiers* 1978 (4) SA 703 (w)).

[11] The legal principles guiding the court's approach in the exercise of discretionary

powers were aptly laid down in *Orestisolve (Pty) Ltd t/a Rssa Investment v NDFT Investments Holdings (Pty) Ltd* 2015 (4) SA 449 (WCC) at paras [15] and [16] in the following terms:

> *"[15] Section 344 (f) states that a company may be wind up by the court if "the company is unable to pay its debts as described in section 345". Section 345 sets out three circumstances in which a company "shall be deemed to be unable to pay its debts". Relevant to the present case are the first and third circumstances, namely non-payment in response to a statutory demand (para (a) and actual (proven) inability to pay debts (para (c). As to statutory demand, a company is not deemed to be unable to pay its debts merely because an established claim has not been paid or secured; what must be shown is that the company has 'neglected' to pay or secure the claim. The English cases hold that the word 'neglected' is not apt to describe a refusal to pay where the claim is bona fide disputed on some substantial grounds (see, for example, Re a Lympne Investment Ltd [1972] 2 ALL ER 335 (Ch) at 389; Re a Company (No 033729 of 1982 [1984] WLR- 1090 (ch) at 1093 B-G; Palmer's Company Law Vol 4 para 15.215; the position in Australia is the same: see KL Traders Ltd [1954] VLR 505 at 508-511). This interpretation of the word 'neglected', which has support in South African authority (see, for example, Ter Beek v United Resources cc & Another 1997 (3) SA 315 (c) at 328G-330H; Nedbank Ltd v Applemint Properties 22 (Pty) Ltd [2014] ZAGPPHC 1042 paras 20-21, is essentially the Badenhorst rule in a different guise and thus does not in truth give a respondent an additional string to its bow".*

*[16] In ter Beek supra, where the court was considering a statutory demand given in terms of the Comparative provisions of the close corporation Act 69 of 1984, Von Reenen J found that the company was not, at the time of the statutory demand, bona fide disputing the claim on reasonable grounds. He thus concluded that the company had indeed 'neglected' to make a payment (at 330 G-H). He went on to express the view, however, that the deeming effect of a statutory demand could be neutralised by evidence rebutting the inference of an inability to pay - in that case, evidence of protracted settlement negotiations (**at 30I-332A**). This view was cited with approval by Malan J (as he then was) in Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (w) paras 5 and 6".*

[12] With regard to the word 'deemed', the learned Judges said the following:

"The word "deemed" appears in the introductory portion of s345(1) and thus applies to all three methods of determining a company's inability to pay its debts, yet one could not sensibly say that satisfactory proof of an actual inability to pay a company's debts (para (c) is a rebuttable presumption. As I see it, once one of the three circumstances in s345 (1) is established, the ground for winding-up specified in s344(f) is satisfied.... However, the reason for the company's refusing to make payment in response to the statutory demand might, particularly in conjunction with other circumstances, provide a basis for the court to exercise its discretion against liquidation"

[13] It is worth emphasising that the present application is premised on the allegations that the Respondent's indebtedness to the Applicant is to the tune of R247 716-68, which includes the undisputable debts of R27 524-11 as at the end of February 2020. Noteworthy also, is the fact that the section 345(1) notice served on the Respondent specifically referred to the debt owing as at 28 October 2020, being the sum of R247 716-69.

[14] It needs be stated that amount claimed, particularly in light of the Respondent's termination of the agreement, had in dispute at the time this application was launched. This dispute was known to the applicant.

[15] Payment of the amount owing as at the end of February 2020 would have constituted partial payment and unlikely to have resolved the matter between the parties, regard being had to the larger amount claimed in these proceedings. For the Applicant to succeed, it would have had to rely on and demonstrate, that the Respondent was unable to pay the undisputed amount which, in my view, was the R27 524-11 that was owing as at the end of February 2020. The subsequent alleged accumulated amounts were in dispute. In *Frank Hermens Wholesale (Pty) Ltd v Palma (Pty) Ltd* (1986) 10 ACLR 257 SC (NSW) the court held that even where a part of the amount claimed is disputed on substantial grounds, the omission by the respondent to make payment of the total amount claimed will not result in the inference that the respondent is unable to pay its debts.

[16] The question that arises is whether the respondent's disputing of its indebtedness to the applicant in the amount claimed in these proceedings is

bona fide and founded on reasonable grounds and/or whether the applicant had ignored a well-grounded reasonable dispute and launched the application merely to enforce payment. The principle in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) not only forbids the granting of an order for the liquidation of a respondent company where a bona fide dispute regarding the payment exists, but also the bringing of a winding-up application of a company merely to enforce payment. The circumstances in the applicants clearly militate against these well settled legal principles.

[17] In addition to the applicant's case being thumped by the *Bardenhorst* principle, the application of the *Plascon–Evans* rule also weighs in favour of the respondent and against the granting of the winding up order sought. It is apposite to refer to the *Orestisolve* matter in which the Court stated thus:

> *"I must emphasise, though that the Badenhorst rule is conventionally formulated as requiring a company to satisfy the court of two things: its bona fides and the reasonableness of its grounds for disputing the claim… Bona fides is a question of fact. At the stage of a final order, it must be assessed in accordance with the Plascon-evans rule. Even though the onus on a particular issue in motion proceedings might rest on the Respondent, this does not reserve the operation of the Plascon-Evans rule (see Ngqumba en 'n Ander v Staatpresident en Andere 1988 (4) SA 244 (A) at 259E- 263D; Rawlins & Another v Caravantruck (Pty) Ltd [1992] ZASCA 204 1993 (1) SA 537 (A) AT 541I- 542B. And bona fides, in the context of the Badenhorst rule, does not in my view require that the company should hold a belief that at trial its defence to the claim*

would definitely succeed or even be more likely than not to succeed. It would be sufficient, I think, that the company genuinely wishes to contest the claim and believes it has reasonable prospects of success. I mention bona fides at this point, because it bears on the two remaining issues to be addressed below, namely inability to pay debts and discretion. A finding that a company is not bona fide in disputing the Applicant's claim would usually go hand in hand with a finding that the claim is being disputed solely for the purpose of delay; and such a purpose would often support an inference that the company is unable to pay its debts and militate against the exercise of a discretion in its favour"

[18] The Applicant, by seeking a final as opposed to a provisional winding- up order, raised the bar in that it has to establish the factual commercial insolvency of the Respondent. The applicant falls short of meeting this requirement. The overall facts of the present matter leave me with little to no doubt that the applicant sought to enforce payment rather than legitimately believing that the respondent was unable to pay its debt and ought to be wound-up. In this regard the court in stated thus;

"A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be

stigmatized as a scandalous abuse of the process of the court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debts is not disputed on some substantial ground, the court may decide it on the petition and make the order".

CONCLUSION

[19] It has to be stated in conclusion, that the applicant has not demonstrated that the respondent was commercially insolvent as at the end of February 2020. The audited financial statements of the respondent showing that its assets exceeded its debts at that stage have not been discredited. The finding that the respondent was entitled in light of the force majeure to terminate the agreement points to the reasonableness and bona fides of the opposition this application based on the amount claimed. Importantly, the applicant had been alive to the disputes, yet chose to pursue the matter, irrespective. The application must fail in these circumstances.

COSTS

[20] The general principle is that cost follow the outcome of the litigation. The

respondent has asked for a punitive costs order against the applicant. I take onto account in this matter that the respondent had requested a meeting with the applicant to try and resolve the matter and the applicant had chosen to take the hard stance of dragging the respondent to court – this despite the existence of a dispute, not only in respect of the amount, but the applicant's performance in terms of the contract. The Badenhorst principle weighs in favour of the respondent.

ORDER

[21] Consequent to the findings in this judgment the following order is made:

1. The application is dismissed.

2. The applicant is ordered to pay the costs on an attorney and own client opposed scale

M. MBONGWE, J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA, GAUTENG
DIVISION, PRETORIA.

APPEARANCES

For the Applicant	Adv. J Minnaar
Instructed by	DDP Attorneys Inc.
	PRETORIA

For the Respondent	Adv. S. Swiegers
Instructed by	LEE & MCADAM Attorneys
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	PRETORIA

JUDGMENT ELECTRONICALLY TRANSMITTED ON JUNE 2022.