



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE No: 514/11

In the matter between:

INDASU HOLDINGS (PTY) LTD

Applicant

And

ITEMATE SOLUTIONS (PTY) LTD

Respondent

JUDGMENT

HENNEY, AJ:

INTRODUCTION

[1] This is an application for the provisional liquidation of the Respondent.

The basis of the application rests on the fact that the Applicant, a landlord, rented out a certain premises to the Respondent at Octo Place, Electron Street, Techno Park, Stellenbosch.

THE APPLICANT'S CASE

[2] The Applicant alleges that the Respondent is justly indebted to it in the sum of R145 752,28 in respect of arrear rental of the said premises.

[3] The Applicant further alleges that the Respondent's monthly payments were erratic.

[4] The lease was terminated with 3 months notice at the instance of the Respondent dated 29 October 2010 with effect from 31 January 2011. The outstanding rent was demanded from Respondent on various occasions, one being an e-mail dated 9 November 2010. The Applicant alleges that despite this payment is still not forthcoming.

[5] The Applicant further alleges that this was due to the Respondent's financial predicament that it lacked the necessary funds to honour this rental payments.

THE RESPONDENT'S OPPOSITION

[6] The Respondent opposes the application and holds the view that the application is an abuse of the court process and that it is brought as a tactical manoeuvre in order to try and enforce payment of a debt about which there is a *bona fide* dispute and that there were numerous disputes between them about the amount due.

[7] The Applicant claimed that an amount of R145 752,28 was due and payable on 28 October 2010 on the due date and on the other hand after their respective accounting officers completed an investigation and they came up with an amount of R118 124,83 that was outstanding as at 9 November 2010.

[8] In amplification of this, the Respondent further alleges that the Applicant claimed that the lease expired 31 January 2011, whereas the amount claimed at the end of October is exactly the same amount which is claimed at the end of the lease period.

[9] **THE EVIDENCE**

When the Applicant filed the application on 18 January 2011, it was alleged that an amount of R145 752,28 was due and payable. The Respondent disputed this. It seems however, that not even the Applicant was sure of the amount owed by the Respondent even after they had instituted these proceedings.

[10] This fact is borne out by various e-mails between the Applicants and the Respondent's, the first of which is relevant is dated 19 January 2011 where the following is stated:

"Please confirm the following:

According to your books the balance outstanding for Itemate to Indasu is R118 125,33 - Up to what date is this????

Ps. I am still waiting for your recon's on Beans 4 and Indasu books.

**Regards,
Cathy Knight"**

In reply to this, the accounting officer of the Respondent replied:

"Yes that is correct. That amount is for the End of October 2010, you started doing the books at beginning November and all invoicing came from beans 4 books.

Luwirika brink"

[11] It seems that the sole cause of dispute about the correctness of the amount due to the Applicant was due to the fact that the Applicant alleges that rental was due for a longer period than that which the Respondent claims. The Respondent alleges that it was terminated on 29 October 2010, whereas the Applicant says it would have expired on 31 January 2011. To this effect, there are correspondence between the Applicants and Respondent, Cathy Knight dated 19 January 2011 at 3:59pm wherein she states that rent is owed to them when the lease expires on 31 January 2011.

[12] She further states that they will be invoiced not by Applicant but by Beans 4 for November 2010, December 2010 and January 2011. In reply to this, the Respondent later on 19 January 2011 at 4:04pm states that they dispute this. They had given one month's notice on 29 October 2010. They were locked out and from 18 November 2010, whilst they were only due to leave on 30 November 2010. In the light of this, they requested the Applicant to supply them with the necessary

necessary credit notes. He says further***"We are trying to solve this matter but require the correct invoices and credit notes to be able to make payment."***

[13] Thereafter once again on 20 January 2011 the Applicant sent an e-mail to the Respondent stating the following:

"Craig,

I understand you dispute renting D3, D4 and D7 from Indasu for December 2010 and January 2011. The remainder of the invoices were reconciled between Lu and Cathy were they not and both were content with the numbers?

So we have a discrepancy of R87 130,82 which is the rent for units D3, D4 and D7 for December 2010 and January 2011. The reason for this is that you say you gave us notice of termination of lease in October for the lease to terminate end of November and we say you did not give us notice of this kind.

We are willing to meet you half way on this disputed amount, if payment is made swiftly. Let us know what you think?

Sincerely

Francois Smuts"

EVALUATION

[14] It is therefore clear from the above that there is a *bona fide* dispute as to the amount due and payable.

[15] It is trite law that where there is a *bona fide* dispute of the rent owed that the liquidation of a company should not be resorted to. See **Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956(2) SA 346 (T)** at 347H-348C.

[16] In this regard, see also **Henocheberg on Companies Vol 1 (Issue 23)** at 694(1) where the authors state....."*Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt (the "Badenhorst rule" after Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 348 and authorities there cited...*")

[17] It is also further clear that at the time of instituting the proceedings on 18 January 2011, the amount due and payable was in dispute.

[18] What the court finds strange is the fact that the Applicant had after they were convinced that the Respondent is insolvent and not able to pay its debts, entered into negotiations to pay off the debt. From the evidence, I am not convinced that the Respondent is not able to pay its debts.

[19] It is clear that the Applicant wanted to make use of these proceedings to enforce the payment of the rent which was disputed by the Respondent. The Respondent in my view had ample *bona fide* grounds to dispute this.

[23] I am not convinced that an order for provisional liquidation would be in the interests of the creditors and the Applicant had failed to make out a case.

[24] I am of the view that the Applicant could have enforced the payment by issuing of a Summons against the Respondent.

[25] In the result, I make the following order:

The application for the liquidation of the Respondent is dismissed with costs.



HENNEY, AJ