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

Case No: 6919/2020

In the matter between:

ROOIBOS LIMITED Applicant

[Registration no: 1993/005745/06]

And

COCO SAFAR SEA POINT (PTY) LTD Respondent

[Registration no: 2017/299916/07]

JBO WORLDWIDE SUPPLIES (PTY)LTD Intervening Party

[Registration no: 2015/169655/07]

Before the Honourable Mr Justice Parker

Date of hearing: 14 September 2020

Date of Judgment: This judgment was handed down electronically by circulating same to the parties' legal representatives via email. The date and time for hand down is deemed to be 10h00 on 27 May 2021.

JUDGMENT

PARKER, J

[1] This is an application for a provisional winding up order. The application was brought against the respondent/company for its provisional liquidation by the applicant who is a 50% shareholder. The application was launched on 10 June 2020.

[2] The applicant as well as the intervening third party are the only two equal shareholders in the respondent company.

[3] The intervening third party was constrained to bring an application for leave to intervene and oppose the liquidation application. The applicant was not willing to agree to the intervening party thus intervening and opposing the application without the latter having to formally launch an application to intervene. JBO was duly granted leave to intervene in and oppose the application by order of this court on 25 June 2020.

[4] The application for the compulsory winding up of the respondent was initially premised on two primary grounds namely:

4.1 That the respondent was unable to pay its debts as envisaged in section 344(f) read with section 345(1)(c) of the Companies Act 61 of 1973 (the 1973 Act) and

4.2 That it was just and equitable to wind up the respondent in terms of section 344(h) of the 1973 Act.

[5] It was not contested that the applicant was both a shareholder and a creditor of the company. It was equally not contested that by virtue of these facts that the applicant had the necessary *locus standi* to bring the application.

[6] It was argued by the applicant that the central issue to be decided on was whether the respondent was commercially insolvent and/or whether it was in any event just and equitable for the respondent to be wound up.

[7] The intervening party (hereinafter referred to as JBO) opposed the liquidation application and sought an order dismissing the application as an abusive process because JBO contended that the applicant's main claim against the company, which allegedly arose from a 2018 lease agreement, the existence of which was disputed by JBO on *bona fide* and reasonable grounds. It was furthermore contended that this dispute was squarely placed in the knowledge of the applicant prior to the launching of the liquidation application.

[8] The application was initially premised on the fact that the applicant had the following three valid claims against the company:

8.1 The alleged 2018 lease agreement giving rise to a claim for rental;

8.2 The 2019 lease agreement similarly giving rise to rental payable. In respect of both claims, according to the applicant amounts have remained due and payable and unpaid and

8.3 The shareholder loan accounts of the applicant and JBO.

[9] In its founding affidavit, the applicant's case for commercial insolvency was primarily based on the first and second abovementioned monetary claims.

[10] In its replying affidavit, however, the applicant makes out a new case for commercial insolvency contending that in addition to the shareholders' loan accounts of the applicant and JBO, the respondent has suffered losses year on year during its two-and-a-half-year existence. These latter allegations only surfaced in the replying affidavit. In addition, a further ground was advanced and its heads of argument by the applicant namely that it would be just and acquirable to wind up the company as the relationship between the two equal shareholders had broken down completely in addition to the substratum of the company having disappeared.

[11] In opposing the application JBO contended, and throughout maintained, that the company was not commercially insolvent though it was conceded that it was factually insolvent. In explaining this position, JBO had contended that despite the challenges of the Covid pandemic imposed restrictions on the business, the company was in fact making a small profit.

[12] The notion that the company was making a small profit was strenuously disputed by the applicant who went through great trouble to illustrate that the company has been propped up by shareholder investments and was not genuinely generating profit and in fact was making major losses year by year.

[13] JBO also disputed that the company's substratum had disappeared and that it would be just and equitable to wind up the company.

Background:

[14] The company was incorporated in 2017, the shareholder's agreement being signed in December 2017.

[15] The restaurant operated under the auspices of the company, opened its doors for business during January 2018.

[16] Between January 2018 and March 2020 for approximately 27 months the company traded under adverse conditions, such as load shedding and the drought in the Western Cape which brought about the countdown to day zero, which had as a result severe water use restrictions during the first year of its existence. This was exacerbated by the fact that the landlord, where the restaurant premises are situated, was not able to secure more than 10% of the promised foot traffic. The situation was adversely affected by the crippling effects of the lockdown which commenced on 27 March 2020.

[17] A demand for payment of the aforementioned claims was made on 7 May 2020. On 19 May 2020, the company's attorneys, Cliffe Dekker Hofmeyr ("CDH") wrote to

the applicant's attorneys requesting the details and copy of the 2018 lease agreement. It was made plain that the company was not aware of any lease agreement, disputed that there was such a lease agreement either in writing or verbal. However, in order to meaningfully respond to the demand, the company's attorneys requested such documentation and/or other details of the alleged lease agreement. This request was not at all responded to and was repeated in writing again on 1 June 2020. Again this latter request was not responded to.

[18] Despite the information requested and the dispute about the 2018 claim, the applicant launched the application on 10 June 2020.

[19] Only after the comprehensive founding affidavit was filed in support of the intervening third party's application for such intervention, did the applicant's attorneys, Smith Tabata Buchanan Boyes ("STBB") on 26 June 2020 respond to CDH's letters of 19 May 2020 and 1 June 2020, in essence conceding that, despite the direct and firm averment in the founding affidavit that a written lease agreement was concluded on 30 January 2018, that such written agreement was in fact not concluded and signed on such date. It transpired that the said agreement was subsequently signed by various persons with the same being backdated to 30 January 2018.

[20] On 2 July 2020, CDH responded to STBB's letter of 26 June 2020. In its reply, CDH disputed the averments relating to the circumstances of the alleged 2018 lease agreement. These two letters are annexures "WL9" and "WL10", annexed to the JBO's

answering affidavit in the main application as no mention was made of the dispute relating to the 2018 agreement or CDH's letters of 19 May 2020 and 1 June 2020 in the founding affidavit.

[21] The application was brought on a founding affidavit comprising of 15 pages together with approximately 90 pages of annexures. JBO's answering affidavit comprised of 49 pages together with some 85 pages of annexures. The applicant filed a replying affidavit of some 57 pages (almost 4 times as long as the founding affidavit) together with 63 pages of annexures.

[22] As a result of the extensive replying affidavit, which not only contained a new case, not made out in the founding affidavit, certain very serious allegations of impropriety and downright dishonest and fraudulent conduct were made of and concerning persons associated with the respondent company and/or JBO. The latter launched an application for leave to file a supplementary affidavit dealing with these scurrilous accusations and new matter in the replying affidavit. The supplementary affidavit comprised of 23 pages together with a further 25 pages of annexures.

[23] When the application was argued before me on 14 and 15 September 2020, the applicant did not oppose the application for leave to file a supplementary affidavit by JBO. I duly permitted the further/supplementary affidavit of JBO.

[24] Regarding the 2018 alleged lease agreement, the pleadings reveal that there were discussions regarding what ought to be done with the assets forming the subject matter of the alleged 2018 lease agreement. The following extracts from the documents are instructive.

> 24.1 During the period 29 to 30 August 2018, Mrs Joubert and Jedeiken, accountants working on the financial statements of the respondent, debated the possible terms and whether a rental or management fee should be charged in respect of the assets. On 30 August 2018, Joubert writes *"The first sales transaction were on 17 January [2018] and. . . If at all possible, we should try and refrain from making firm decision on the treatment of the assets till after the 28 February [that is till after year end]. . . This will leave us time to evaluate the best course of action for the next financial year and will give us some breathing space."*

Jedeiken replies by asking: *"What would the loan relate to if there were no assets?"*

To which Joubert replies: *"If we called it a rent?"*, to which Jedeiken replies *"I'm fine with that but you should have an agreement to justify the charge . . . I would prefer each party invoice a management fee. . . which could be justified."*

> 24.2 At some stage Joubert opines: *"I think this is the answer . . .Just ignore it for the first year. No need for a management fee I would think."*

[25] None of the above correspondence between the accountants remotely suggests that the alleged 2018 lease agreement was in fact concluded. For one, the essential element of the lease agreement, namely fixed rental was never even

seemingly discussed. What was discussed was the possibility of no lease at all but rather a management fee structure.

[26] The alleged 2018 lease agreement was not included in the respondent's 2018 financial statements. However, in the 2019 financial statements, an amount of R6.676million is reflected as a liability, apparently arising from the alleged 2018 lease agreement. In preparing the respondent's draft 2019 financial statements, it would appear as if Piet Dry ("Dry") the new independent accountant of the respondent brings the alleged 2018 lease to the attention of Liebenberg of the respondent for the first time. Dry seems to then consult with Joubert who instructs Dry on behalf of the applicant, what the position was regarding the invested assets and how they should be reflected in the 2019 financial statements. This reflected the unilateral position of Liebenberg (on behalf of the applicant) without there being an agreement in regard thereto between the applicant and the respondent and/or JBO. When Dry requests a copy of the alleged 2018 lease agreement from Joubert, the latter replies that according to him there was no agreement. However, it later transpires when the document is produced that Joubert's signature is reflected on the 2018 lease agreement as a witness on 30 January 2018.

[27] It is common cause that the 2019 financial statements have remained unsigned primarily as a result of this dispute.

[28] This email exchange is not disputed by the applicant and in fact not at all dealt with in the extensive replying affidavit.

[29] It is apparent that when Joubert said that to his knowledge there was no lease agreement that is what he must have believed and it is an inescapable inference that at that stage the agreement had not been drafted and backdated yet in time for the liquidation application in June 2020.

[30] It is highly significant that it was for the very first time on 7 May 2020, that the applicant computes an amount of R1 718 235.09 in respect of rental arising from the 2018 lease agreement.

[31] It bears repeating that it is highly significant that the two letters written in rather quick succession on 19 May 2020 and 1 June 2020, requesting a copy of alternatively an indication of the terms and conditions of the said lease agreement of 2018, and despite it having been made abundantly clear that "neither our clients, nor their auditors are aware of the existence of such an agreement", the applicant ignored this request and simply launched the application knowing full well that this substantial claim was being disputed. What is more in the founding affidavit, the clearly false allegation is made that a written lease agreement was concluded on 30 January 2018.

[32] The replying affidavit crucially omits who had drafted the 2018 lease agreement and when it was actually signed by the persons whose signatures are appended thereto subsequently. It further also does not deal with why all of this was not dealt with in the founding affidavit.

[33] The further rather significant allegation by JBO that all the documents relating to this entire transaction from inception including shareholder's agreements and everything else amounting to approximately 20 agreements, were drafted by CDH except this lease agreement.

[34] It is against the above backdrop that JBO contended that the applicant has come to court with "dirty hands" in addition to the said claim in respect of the 2018 lease agreement being disputed on *bona fide* and reasonable grounds.

[35] Apart from failing to deal with this rather grave aspect, in the replying affidavit and for that matter in its heads of argument, when Mr Kantor (on behalf of the applicant) was probed about this in argument all he could respond to was to indicate that he had not drafted the application and that he did not have instructions dealing with the circumstances of the 2018 lease agreement. What he did say as a last gambit was that the clean hands complaint had nothing to do with *locus standi* particularly in respect of the other two claims and whether or not it would be just and equitable to nevertheless order the winding up of the company. This may have been the only way in which Mr Kantor could deal with it, in view of his lack of instructions in this regard

but it is clearly not an acceptable explanation, particularly if regard is had to the incontrovertible and most certainly undisputed fact surrounding the alleged 2018 lease agreement, and most importantly since the dispute was made known prior to the launching of the application.

[36] The 2019 lease agreement is less controversial in that it is not disputed by the respondent, or for that matter JBO, that some amount is owing in respect of this agreement.

[37] JBO however disputed the correctness of the amount claimed and had requested a reconciliation of the amount owed. Such reconciliation was called for on 1 June 2020, ten days before the institution of the liquidation application but the information was not furnished, nor included in the founding affidavit.

[38] What JBO in fact did was to pay the full amount demanded by the appellant, into JBO's attorneys trust account.

[39] In the replying affidavit, the applicant contended that the payment of the amount demanded into JBO's attorneys trust account does not resolve the issue of the respondent's insolvency in respect of this monetary claim.

[40] It is consequently common cause that the amount has been demanded, a reconciliation of the amount has been called for, suggesting that the amount claimed is being disputed. Whether or not such dispute is firstly *bona fide* and reasonable and secondly, whether it is in keeping with the terms and conditions of the agreement is another debate. I will hereunder deal with these aspects.

[41] In somewhat similar circumstances, the applicant made much of the fact that the landlord seemingly has a claim for unpaid rental. The landlord is not before the court nor is there any evidence that the landlord has claimed such outstanding rental. It was also undisputed that the respondent is not the lessee and as such responsible for payment of the rental and that it is JBO who would be liable for any rental which is determined to be due and payable. It is not being challenged that negotiations between the landlord and JBO have been ongoing with regard to reduction of the rental, *inter alia,* for reasons of failure on the part of the landlord to secure the guaranteed traffic and importantly as the result of the crippling economic effects of the Covid 19 pandemic.

[42] With reference to the third monetary claim being the shareholders' loans, it is in fact common cause that such loans in terms of the shareholder's agreement are not due and payable. Mr Kantor argued that the claim is nevertheless a valid one by virtue of the fact that it is a prospective claim.

[43] It is also not disputed that the applicant's loan is approximately one sixth of the amount as a loan owed to JBO, the only other shareholder. Paragraph 10 under the heading "*Loan Financing*" in the shareholder's agreement in subparagraph 10.3 states:

> *"10.3 Should the shareholders provide the required funds in proportions to their respective shareholdings at the time or in such other proportions as agreed in writing between the shareholders (**proportionate loan claims**) such proportionate loan claims will, unless otherwise agreed in writing:-*
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> *10.3.1*
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> *10.3.7 Be repaid as and when determined by the Board, provided that the proportionate loan claims will immediately become due and payable if –*
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> *10.3.7.1 The company is placed in liquidation or under business rescue, whether provisional or final and whether compulsory or voluntary; or*
>
> *10.3.7.2 The company enters into a compromise or other similar arrangements with its creditors generally."*

[44] It is common cause that the board had not determined that such loan accounts be repaid. It is equally common cause that the company has not been placed in liquidation or under business rescue, whether provisional or final and neither compulsorily or voluntarily.

[45] The applicant is clearly seeking to trigger the provisions of the above quoted subparagraph 10.3.7.1, by having the company placed under provisional liquidation. My understanding of the provisions of paragraph 10.3.7 is that the loan accounts will become due and payable if the company is placed in provisional or final liquidation. However until such time these loan accounts are clearly not due and payable. I am of the view, as envisaged by the provisions of the above paragraphs in the shareholder's agreement, that the loan accounts would become due and payable by simply launching an application of this kind.

[46] Regarding the additional ground introduced in the applicant's heads of argument, namely that the company has been making losses year on year since inception and is in fact not making a small profit as contended in the answering affidavit, I am of the view that the applicant has unduly elevated this aspect of "small profit" to enable it to argue that the company is commercially insolvent. I am in agreement with Ms Morgan, for JBO, that the notion of a "small profit" ought not to be interpreted too literally. Clearly what was intended to convey with the notion of a "small profit" is that the company is able to survive despite the extremely trying conditions, not least of all brought about by the unexpected and globally economically crippling

effects of the Covid 19 pandemic. This JBO has argued, was achieved through various cost-cutting measures.

[47] It was only raised in the replying affidavit, with the aid of a supporting affidavit furnished by one Bebb, a chartered accountant and former CEO and CFO of the respondent company from December 2019 to 9 June 2020, when he resigned. He therefore resigned literally a day before the launching of the liquidation application.

[48] Bebb's letter is full of serious allegations directed particularly against Wilhelm Liebenberg, the controlling mind of JBO and brother to the latter's sole director, Phillip Liebenberg. These allegations are used as a basis for the applicant to, *inter alia,* in its replying affidavit conclude that Liebenberg is *"Guilty of fraud, unethical behaviour, and reckless trading on behalf of the respondent."* There are further numerous imputations of dishonesty directed at Liebenberg as well as his wife, Caroline Sirois-Liebenberg; Phillip Liebenberg and the accountant director, Piet Dry.

[49] It is highly significant to note that all these allegations of dishonesty allegedly relate to and as such were known to the applicant before the liquidation application was instituted on 10 June 2020. However, none of these allegations were raised in the founding affidavit.

[50] I will deal with the effect of thus creating a virtually new case or raising significantly new matter in the replying affidavit later.

[51] It was under these circumstances, that JBO has sought leave to file the brief supplementary affidavit, which was admitted into the record, without any opposition.

[52] In its attempt to convince that the respondent is commercially insolvent, the applicant contended that:

52.1 For approximately three years, the respondent had incurred vast trading losses amounting to approximately R30million;

52.2 These trading losses had largely been financed by means of shareholder funding which had now dried up. When advancing this as a basis, it was conveniently omitted to add that the applicant had stopped funding the respondent some 18 months prior to the launching of the application and that it was JBO, the intervening party who continued to do so and is clearly willing to continue doing so and hence the opposing of this application;

52.3 It was argued that the respondent's commercial solvency stood or fell on the determination of whether or not the respondent was in fact making a small profit. I do not agree that this determination is in fact dispositive of whether or not the respondent is commercially insolvent;

52.4 An elaborate exercise was embarked on showing that during various financial years, the respondent had made trading losses, which situation only worsened during the lockdown period. JBO at no stage denied that losses had

been incurred during the first two and a half years of the existence of the respondent, but argued that there is nothing untoward about this and that it was perfectly in order for shareholders to fund the company, particularly in the initial stages and

52.5 It was further contended, without any semblance of proof of the fact, that the respondent had no liquid assets or readily realisable assets available, or access to funding to meet its expenditure and finance its operation.

[53] The applicant, as indicated previously had bolstered its argument of the respondent's commercial insolvency by adding grounds in the replying affidavit as well as in the heads of argument.

[54] Against the above contention of the respondent's commercial insolvency, JBO argued, in my view convincingly, that not only did the bulk of these grounds feature only in the replying affidavit and heads of argument, but even if these were to be taken on face value then:

54.1 It is unarguably so that the shareholder's loans are not due and payable;

54.2 No third party creditor is going unpaid. The conclusion is inescapable that the respondent is paying its debts as and when they fall due. The landlord is certainly not an unpaid creditor, firstly, because there is no evidence that the landlord has instituted the claim and secondly, if one were to be instituted it would be JBO who would be liable for any such rental and not the respondent;

54.3 It is also common cause that it is JBO (and only JBO) who is in fact in negotiations with the landlord seeking a rental remission;

54.4 With regard to the claim arising from the 2019 lease agreement, it is not disputed that there is sufficient money in the attorneys trust account to pay this claim and

54.5 It is argued that although the respondent and as such JBO has admitted that the company is factually insolvent, the vast majority of the losses of the company comprise of JBO's loan account claim. These are clearly shareholder losses and not third party debts. There is no evidence whatsoever that any third party creditors are going unpaid.

[55] It is trite that the mere fact that shareholders may bear losses does not equate to the court having to find that therefore the company needs to be wound up. In this regard see **Dippenaar N.O. and Others v Business Venture Investments 134 (Pty) Ltd and Another**[1] and **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another**[2].

[56] It does not however mean that the factual insolvency is irrelevant. It remains a factor in deciding whether or not a court should exercise its discretion to grant a

[1] 2014 [2] All SA 162 (WCC)
[2] 2015 (4) SA 449 (WCC)

liquidation. See **Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) in liquidation**[3]. At 503G the court stated:-

> *"It is a common occurrence for a private company. . . to finance its business operations by way of members' loans".*

[57] The above factors will in due course be taken into account when exercising my discretion whether it would still be just and equitable, nevertheless to place the company under provisional liquidation.

[58] In arguing that it would be just and equitable to liquidate the company, the applicant sought to demonstrate that the respondent's substratum had disappeared by hinting to the fact that the respondent's existence which had related to a particular purpose and which was specified in detail, had disappeared. My attention was directed to paragraph 3.4 of the shareholders agreement[4] which read as follows:-

> *"The company has been established:*
>
> *For purposes of establishing and operating the mothership and JBO and Rooibos will own the issued shares in the company on an equal basis".*

[3] 1993 (1) SA 493 (A) at 502E
[4] Page 74 of the record.

[59] The shareholder's agreement defines "mothership" as meaning the corporate flagship store be located in the Artem Centre Main Road, Sea Point, Cape Town. The corporate flagship store in turn is defined as:-

> *". . .a Coco Safar Brewery/Flagship store with many customers in designed elements which is a Third Wave Expresso bar and café serving signature baked goods, couture patisserie and confectionary with a unique coffee and Rooibos based beverage offering, as well as a breakfast, brunch and café fare, which also incorporated retail emporium, showcasing certain branded coffees and Rooibos capsules, signature single server systems and a curated micro-retailing experience of signature accessories and certain must-have products."*

See paragraph 2.1.19 of the shareholder's agreement page 68 of the record.

[60] It was argued that by virtue of the fact that JBO was in the process of negotiating deals in respect of the brand with off-shore partner investors which are not part of the respondent's business and substratum, that such substratum and disappeared.

[61] Ms Morgan, in my view, convincingly argued that JBO correctly contends that the respondent's substratum is a two-fold business of (1) the flagship restaurant which (2) supports the brand, for which it sought off-shore licencing opportunities and sales.

[62] If regard is had to the supplementary affidavit which in the main .....deals with various serious allegations and narratives of sabotage, then it is apparent that at a minimum there are negotiations with potential off-shore licence holders of the brand, which are seemingly sought to be scuppered. It follows that the issue of whether the

respondent's substratum has disappeared simply because it is negotiating deals abroad, is mired in allegations and counter allegations of subterfuge and skull duggery.

[63] In its attempt to convince that the substratum had disappeared in the founding affidavit, it was simply stated that the applicant's case of commercial and factual insolvency was based on the fact that the respondent could no longer carry out its main objectives.

[64] This argument ignores the fact that in the 2019 lease agreement, it was recorded that the applicant would not be required to advance the equivalent of JBO's funding of the respondent. It therefore follows that the terms of the shareholders' agreement were overridden by the 2019 lease to the effect that the applicant would no longer be required to advance funding.

[65] It has been the intervening party, JBO who continues to fund the respondent and is willing to do so and has the significant loan account as well as opposes the liquidation of the respondent.

[66] It can consequently not be said that the applicant has presented convincing argument that the substratum is in fact gone which might justify the winding up of the respondent.

[67] It was also argued that the result of a deadlock at board level was that the respondent was unable to pass a resolution authorising, *inter alia,* the respondent to oppose the liquidation application. It was JBO who had intervened in the application and then authorised Liebenberg to act on its behalf to do all such things as may be necessary to oppose the application. It was further argued that the internal disputes, distrust and allegations of misconduct on both sides, has resulted in the breakdown of relationships between the shareholders and the respondent. It was therefore argued that this is an additional reason why it would be just and equitable for the respondent to be wound up.

[68] Regarding the boardroom deadlock and the concomitant break in trust, it may be so that the board has difficulty operating but there is no evidence whatsoever that the board company is not able to operate. I would once again have to exercise a discretion in deciding whether it would also be just and equitable to wind up the respondent.

The legal principles applicable to the factual matrix in this instance

[69] It is trite that a liquidation application is not the way to resolve the shareholder's disputes. It is not in dispute that the applicant and JBO are at loggerheads and need to part ways. However, what needs to be determined is whether given the facts as outlined about the applicant, that the applicant is entitled to liquidation.

[70] There are various known alternative means by which shareholders can settle their disputes or part ways. The applicant could for example have issued summons against the respondent, particularly since it was well aware of the disputes raised by the respondent and JBO. The relationship between the parties is governed by the shareholder's agreement and the dispute between them may have been resolved in terms thereof including through the dispute resolution clause.

[71] It is also trite that a shareholder applying for liquidation on the grounds of it being just and equitable must come to court with "clean hands". See **Apco Africa (Pty) Ltd v Apco Worldwide Inc.**[5]

[72] I am of the view that the applicant *in casu* has in fact indulged in an abusive process to achieve the aim of parting ways with JBO. I am further of the view that this was done against the backdrop of the respondent and/or JBO having disputed the applicant's claims, particularly so the claim based on the 2018 lease agreement and to a lesser extent the claim based on the shareholder's loan agreement, *bona fide* and on reasonable grounds. This dispute was known to the applicant before the liquidation application was launched. Attempts were made to address the dispute and to clear up any confusion but such attempts by JBO and/or the respondent were met with complete silence and no response.

[5] 2008 (5) SA 615 (SCA) at para 21 and 30.

[73] From the known facts in this matter, some of which are common cause whilst others are not disputed, it is an unavoidable inference that the 2018 lease agreement which was eventually produced, duly signed, had been backdated to 30 January 2018 and importantly that such backdated agreement had been fabricated to facilitate the liquidation application. It must be borne in mind that in the founding affidavit the allegation is made that the written lease agreement was concluded on 30 January 2018, but the applicant was unable to produce such document until the liquidation application was launched which was some two and a half years after the agreement allegedly came into existence.

[74] Where such an abuse of a process is in fact apparent, a liquidation application ought to be dismissed on such ground alone, even if the respondent is unable to pay its debts (which I am of the view is not necessarily the case here). In the matter of **Hülse-Reutter and another v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening)**[6] Thring, J at 218E-I stated:

> *'Abuse of the process of the Court:*
>
> *In addition to its statutory discretion, the court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide bringing about of the company's liquidation for its own sake, eg. the attempt to enforce payment of a debt bona fide disputed. . .*

[6] 1998 (2) SA 208 (C)

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 (Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956(2) SA 346 (D) at 347-8 and authorities there cited; . . .Kalil v Decotex (Pty) Ltd 1988(1) SA 943 (A) at 980. .

Where prima facie indebtedness exists the onus is on the company to show that it is bona fide disputed on reasonable grounds . . . It is submitted that, where this onus is discharged, the application should fail even if it appears that the company is nevertheless unable to pay its debts . . . It is submitted that where the debt is disputed, and hence the applicant's locus standi as a creditor, the application will be dismissed (if the dispute is bona fide and on reasonable grounds), not because the applicant lacks locus standi, but because winding-up proceedings are inappropriate for the purpose of determining whether or not he does."

Similar sentiments were expressed in Badenhorst v **Northern Construction Enterprises (Pty) Ltd**[7]**.**

[75] I am of the view that it has been established on the probabilities that the applicant has undoubtedly indulged in an abuse of the process if regard is had to the circumstances surrounding how the claim based on the alleged 2018 lease agreement, arose and how it was pursued. This narrative was further exacerbated by the way in which the application was crafted where the founding affidavit consisted of 15 pages whilst the replying affidavit was almost 60 pages. Not only was the replying

[7] 1956 (2) SA 346 (T)

affidavit four times as long as the founding affidavit but it was accompanied by affidavits by persons who came forward with rather serious allegations of fraud and general dishonest corporate conduct of and concerning the respondent and/or JBO and persons associated with them. In addition, it revealed conduct on the part of some of the deponents to the affidavit which was indicative of possible corporate subterfuge, where secret recordings had been made by employees of the respondent concerning Wilhelm Liebenberg; Caroline Sirouss-Liebenberg and Phillip Liebenberg. The replying affidavit relies heavily on Bebb who through his confirmatory affidavit reveals that he had: for months made unlawful recordings of his employers at the respondent without their knowledge or consent; had refused to hand over the copies of these recordings to JBO even after making these very serious accusations allegedly based on the same recordings; had attended a secret Zoom meeting (again without the knowledge or consent of his employers, the respondent) with a party to litigation against the Coco Safar group in New York; appears to have absconded the corporate opportunity in Los Angeles created by the Coco Safar group and the respondent operating as the flagship store (as intended in the shareholders agreement). This opportunity was solely introduced to Bebb during the course of his employment with the respondent, and has apparently been taken up by him without disclosure to or consent from the respondent or the Coco Safar group. None of these breaches were disclosed by Bebb to JBO who had discovered these quite by chance.

[76] The replying affidavit further reveals that Martin Bergh, representing the applicant, a public company switched sides in the New York litigation against the Coco Safar group where he made an affidavit for the Coco Safar group's opponent in the

litigation while he was still a director of the respondent and in contradiction to the previous stance defending the respondent. This clearly also constitutes breach of a fiduciary duty.

[77] Needless to say none of the above was disclosed to the court in the founding affidavit or the replying affidavit.

[78] The Constitutional Court in **NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd**[8]stated:-

> *"The two core fiduciary duties are the no-conflict duty to avoid all potential conflict – of interest situations, and the no-profit duty which prohibits fiduciaries from obtaining any unauthorised profits for themselves, that has not been properly disclosed or consented to by the beneficiary."*

[79] In the circumstances it is, in my view, clear that the applicant does not come to court with clean hands and therefore in accordance with the SCA authority as embodied in **Apco (Pty) Ltd v Apco Worldwide Inc** *supra,* although the shareholders are at loggerheads, the respondent does not fall to be wound up on this just and equitable ground.

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[8] 2019 (5) SA 354 (CC)

[80] On the factual matrix as outlined above, I am of the view that the claims based on the alleged 2018 lease agreement as well as the shareholders lease agreement are indeed disputed on reasonable and *bona fide* grounds.

[81] Where an applicant at a provisional stage shows *prima facie* that a debt exists, the onus on the respondent (in this case on JBO) is to show that the debt is *bona fide* disputed on reasonable grounds. See **Orestisolve t/a SA Investments v NDFT Investment Holdings (Pty) Ltd**[9]**.** JBO does not have to show that the respondent is not indebted to the applicant, but merely to show that the debt is *bona fide* disputed on reasonable grounds. See **Kalil v Decotex (Pty) Ltd and another**[10]**.**

[82] A party challenging a liquidation application as an abuse of the process of the court on the grounds of a disputed claim must show that:

(a) The claim is *bona fide* disputed and

(b) The grounds for the disputing claim are reasonable.

It does not have to be established, even on the probabilities, that the company would, as a matter of fact succeed in any action which the applicant for liquidation might bring to enforce the disputed claim. The court need merely be satisfied that the grounds on which the claims is disputed are not unreasonable. To do that it is not necessary that the actual evidence that would be relied upon at the trial be adduced on affidavit or

[9] 2015 (4) SA 449 (WCC) at para 8
[10] 1998 (1) SA 943 (A) at 976

otherwise. It is sufficient, provided it is done *bona fide*, to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company(emphasis provided). See **Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd** *supra* at 219F-220B.

[83] The so-called "Badenhorst rule", is to the effect that if a debt is disputed on *bona fide* and reasonable grounds, a court will refuse the granting of a winding-up order. This was recently confirmed by the Supreme Court of Appeal in **Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd (1030/2015) [2016] ZASCA 168 (24 November 2016)** where it was held that:-

> *"In essence, the matter serves as a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds. This has become known as the "Badenhorst rule" after* ***Badenhorst v Northern Construction Enterprises (Pty) Ltd*** *1956 (2) SA 346 (T) at 347-348."*

[84] In conclusion on the issue of whether the claims are disputed; *bona fide* ; on reasonable grounds and whether or not the applicant has indulged in an abusive process, I am satisfied firstly, that the application is an abusive process and secondly, that the claims are not disputed on unreasonable grounds and are so done *bona fide.* It follows that a winding-up application is not the appropriate machinery for the applicant to use to enforce its claims, even if the company is unable to pay its debts, which I have indicated I am of the view that there is not enough evidence of. I retain a

discretion whether or not to grant a winding-up order although it has often been said to be a limited discretion which of course has to be exercised judicially.

[85] In exercising the discretion, I take into account that it has been demonstrated that the respondent substratum has not disappeared. JBO raises the following special unusual circumstances, which in my view support the contention that the liquidation application ought not to succeed:-

85.1 Though the respondent admittedly is factually insolvent, no third party creditor is going unpaid and there is sufficient authority that in those circumstances the respondent may continue to trade.

85.2 The parties' shareholder's agreement provides for the shareholder's loan claims not to be due and payable except in limited circumstances, precisely so that the respondent need not be hampered by a shareholder calling up its loan account at an inappropriate time. Sufficient funds have been provided in an attorneys trust account to pay applicant's claim arising from the 2019 lease agreement. This claim is clearly palpably capable of settlement.

85.3 Whilst the shareholders are at loggerheads, the applicant, a public company, does not come to court with clean hands; the circumstances surrounding the *bona fide* and reasonably disputed claim is sufficient proof of this.

85.4 In this regard further note has to be taken of the following extraordinary conditions:-

85.4.1 The Covid 19 pandemic which has wreaked havoc in the restaurant industry, specifically in relation to employment and as such:

" . . .it would be somewhat tragic for the court to order that the company be liquidated, in circumstances where it is able to pay its due and payable debts as they arise in the ordinary course of business, and where it is a restaurant able to maintain employment [of its 18 employees] and keep trading through the lockdown." See answering affidavit para 73 record page 181

[86] In addition to the further facts relating to the unsavoury conduct relating to the replying affidavit and supporting affidavit attached thereto constrained me to exercise my discretion against the granting of the application for provisional winding-up of the respondent.

[87] Regarding the claim arising from the 2019 lease agreement both **Dippenaar N.O.** *supra* and **Orestisolve** *supra* serve as authority for the notion that the focal point is whether or not funds are available to meet the respondent's obligations whether sourced from a bank, the shareholder or within the first respondent itself is not decisively important. In **Dippenaar,** Mabindla-Boqwana, J stated the well-established test for commercial insolvency:-

"The test to be applied in ascertaining whether a company is unable to pay its debts is whether it is commercially insolvent in the sense that it is unable to meet its day to day liabilities in the ordinary course of business. The facts to be taken into account are

whether there are liquid assets or readily realisable assets available out of which, proceeds of which, the company is in fact able to pay its debts."

Mabindla Boqwana, J further stressed that the question is whether the first respondent has been able to demonstrate its ability to pay its debts by virtue of its obligations being funded :-

". . .In this instance funds are sourced from the shareholder who may not require to company to demonstrate any creditworthiness."

She continued to state:-

"It does not matter where the funds are derived (as long as the funding arrangement is not unlawful).

[88] I have already stated that *in casu,* it has been established that the respondent is able to meet its liabilities as they fall due, albeit that those liabilities are being paid on its behalf by its equal shareholder JBO.

[89] I agree with the sentiment expressed by Mabindla Boqwana, J that:-

"The scenario in this instance is in my view akin to a holding company keeping its subsidiary afloat by bailing it out financially until it is able to get out of its financial crisis."

[90] In a situation similar to the one in this instance in **Orestisolve** *supra* Rogers, J stated:-

'[81] In my view [the company] is not commercially insolvent. If in due course it were established that [the company] is obliged to pay the applicant's claim, the company would, on the information available to me, have the liquid resources to pay it. There are no other creditors competing for [its] liquid resources.

[82] [The company's] commercial solvency, coupled with the fact that the company's largest creditor by far (albeit an insider)(in casu and equal shareholder) opposes liquidation, provides a sufficient basis for exercising my discretion against a final order [of liquidation]."

[91] I am of the view that despite the fact that, in so far as the claim arising from the 2019 lease agreement is concerned, the company/respondent can meet its obligations as they fall due, even though such liabilitys is being paid on its behalf by JBO, its equal shareholder. The question certainly remains, as was postulated in **Dippenaar** *supra* at para 39, whether it remains buoyant after having met those obligations. As was the case in **Dippenaar,** I am of the view that the respondent *in casu* does. By way of reiteration there is absolutely no evidence that any third party creditor is going unpaid. The restaurant is seemingly operating, albeit under severe strain and with the aid of significant cost-cutting measures. JBO has willingly invested much more than the applicant as shareholder funder is prepared to continue funding the respondent's operations and has opposed the liquidation application.

[92] The disputed quantification of the claim arising from this 2019 lease agreement is however in my view is not very convincing. The major complaint being that an amount in excess of the R13 000-00 per month is claimed whereas the agreement

only makes provision for R13 000-00, is rather artificial in that the increased amount clearly represents R13 000-00 plus VAT. Even if that is so it is difficult to comprehend why the applicant did not simply furnish such an explanation prior to launching the liquidation application. The artificial dispute does not detract from the fact that JBO has paid the full amount claimed in its attorneys trust account for payment of such amount if properly quantified.

[93] Regarding the fact that the said 2019 lease agreement provides for a debtor not being entitled to withhold payment in the event of a dispute but being obliged to pay it and reclaim any amount unduly paid, the question that arises is whether or not this fact and these circumstances constrain me to order the provisional liquidation of the company on the strength of this claim. In answering this question, I would have to be satisfied that it would be just and equitable to do so under all the prevailing circumstances.

[94] As stated above, the circumstances surrounding the claim arising from the alleged 2018 agreement, with specific reference to the falsehoods articulated starting from the founding affidavit, continued through in the replying affidavit with the narrative of how Bebb and others made supporting affidavits of and concerning information that they possessed prior to the launching of the application, only during the replying affidavit, together with, as I have stated earlier, the unavoidable inference that the scenario around this alleged lease agreement, on the overwhelming probabilities, was in fact fabricated to support the liquidation application. In addition, the application of the Badenhorst rule clearly renders the dispute *bona fide* and on reasonable grounds.

[95] Finally the obvious and very extraordinary circumstances created by the Covid 19 pandemic which has as one of its most serious consequences been the virtual decimation of businesses generally and the restaurant industry in particular, with the concomitant devastating loss of employment not only in South Africa but globally, it is indeed a very positive, if not laudable achievement for the respondent/restaurant to still be operating. Once again, it may be so that it is only able to do so with the input and significant investment of JBO, but as I have stated previously there is nothing untoward about that.

[96] I need to say something about the phenomenon of the rather strange, if not questionable, manner in which the affidavits in this matter were presented by the applicant with reference to the almost four times longer replying affidavit than the founding affidavit. Although there was no application for me to disregard the replying affidavit and to treat the contents as *pro non scripto* and even though I am not making such a ruling, I am still of the view that the applicant's conduct in this regard is worthy of the court's dismay and may contribute to an adverse cost order against the applicant.

[97] It is trite that an applicant has to make out its case in the founding affidavit and is generally not allowed to introduce new matter or bolster its case by introducing new causes or new features to the case unless exceptional circumstances justify such

behaviour. In this case, there was not even an attempt to justify it by even suggesting such circumstances.

[98] JBO has asked me to make a special order as to costs against the applicant. Ms Morgan submitted, *inter alia,* that the applicant had abused the process of this court in bringing the application at all in addition to being guilty of unacceptable conduct as well as the manner it was brought before court. She stressed that the applicant was well aware of the major grounds of opposition and particularly that at least two of the initial three claims were being disputed on reasonable and *bona fide* grounds but still persisted with the application.

Legal principles regarding costs:

[99] As was suggested by the Constitutional Court in the matter of **Biowatch Trust v Registrar, Genetic Resources, and others**[11] cost orders do not generally, excite the passions of constitutional academics, although they most certainly interest litigants or litigators. Cost orders "*come at the end of judgments as appendages to decisions on the merits.*"

[100] The Constitutional Court also in the matter of **Ferreira v Levin N.O. and others**[12] stated:-

[11] 2009 (6) SA 232 (CC)
[12] 1996 (2) SA 621 at 624 paragraph 3

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. . . "

[101] In the **Biowatch Trust** *supra* the court also held that:-

". . . 16. ....the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent or, as in the case of many NGO's, reliant on external funding.

17..... Courts are obligated to be impartial with regard to litigants who appear before them. Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. . . .

18..... This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the court."

[102] As far as the exercise of any discretion is concerned, it has been held that there are essentially two enquiries to be made. The first is to establish the material facts and the second is to evaluate those facts towards the correct objective. See **General Council of the Bar South Africa v Geach and others**[13].

[13] 2013 (2) SA 52 (SCA) at 70

[103] The requirement of the exercise of judicial discretion is essentially that the court's discretion should be based upon a consideration of each case and essentially it is a matter of fairness to both sides. "Judicially" clearly means "not arbitrarily". See **Merber[14]; Bruwer v Smit[15]**.

[104] With regard to the general rule that the successful party should be awarded his or her costs, it is trite that a departure from such general rule would only be justified if good grounds exist for such a departure. In the absence of such good or special circumstances/grounds, a successful litigant is entitled to a cost order in his or her favour.

[105] The Appellant division (as it was then known) as long ago as in 1913 in the matter of **Fripp v Gibbon and company[16]** established that the courts retain an overriding discretion, which when it is exercised judicially will have to take into consideration all the relevant circumstances of the case, such as the issues and the conduct of the parties in determining the award of costs that would be fair and just to the parties.

[106] It is trite that a court makes an order of attorney and own client or attorney and client cost in order to mark its disapproval of the conduct of the losing party. This

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[14] 1948 (1) SA 446 (A) at 453
[15] 1971 (4) SA 164 (C)
[16] 1913 AD 354 at 363

terminology however suggests than an award of attorney and client is a form of punishment. The treatment however, of such an award simply as punishment does not, however, convey a complete explanation of the grounds on which the practice rests; something more underlies it than the mere punishment of the losing party. See also **Public Protector v South African Reserve Bank**[17] where the majority of the Constitutional Court stated as follows:

> *"More than 100 years ago Innes, CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of [. . .] mala fides (bad faith); conduct, vexatious conduct and conduct that amounts to the abuse of process of court."*

[107] An award of attorney and client cost will not be granted lightly, as courts look upon such orders with disfavour and are loathed to penalise a person who has exercised his right properly to obtain a judicial decision. See **Mallison v Tanner**[18].

[108] In general, a court does not order a litigant to pay costs of another litigant on an attorney and client scale unless some special grounds are present. An example of this would be that the party concerned has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious or frivolous or that he has acted unreasonably in his conduct in litigation or that his conduct is in some way

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[17] 2019 (6) SA 253 (CC) at par 223
[18] 1947(4) SA 681 (T)

reprehensible. See **Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd**[19].

[109] It is trite that I do not need to find that the conduct of the applicant was *mala fide.* It is sufficient if I am of the view that the applicant was unreasonable.

[110] In **D and another v MEC for Health and Social Development, Western Cape Government**[20] Rogers, J stated *inter alia:-*

> *"[61] . . . The court must consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer."*

[111] In the present instance, I am of the view that the applicant acted not only most unreasonably but deliberately obstructively in, *inter alia,* deliberately withholding crucial information from the court until such information was disclosed not only in the inappropriately long and comprehensive replying affidavit introducing new matter but even during argument and in its heads of argument. The conduct of the applicant from even prior to the launching of the application caused the respondent and/or JBO to unnecessarily incur expenses along the way. This was done not only of filing comprehensive answering affidavit (in the application to intervene), but prior thereto by compelling it to bring an urgent application for leave to intervene, which it could have prevented. Lastly the saga around the application for leave to file a

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[19] 1979(3) SA 134 at 1344D
[20] 2017(5) SA 134 (WCC)

supplementary affidavit, which was once again a comprehensive application, not only necessitated by the replying affidavit and its contents, without any indication been given as to the applicant's stance in regard thereto.

[112] In the premises, I am of the view that at the very least the applicant has abused the process of this court in bringing this application. I am further of the view that if the applicant wished to enforce its claims and more specifically wished to extricate itself from this position there are other proper ways of doing so such as by instituting an action against the company and most certainly the application for liquidation and the manner in which it was developed is unacceptable. In this regard, I find myself in agreement with the legal position as set out in *Henochsberg on the Companies Act 5th Edition Vol 1 at 694 to 695* where it is stated that:-

> *"The process of the court is abused by an applicant who brings, or persists with an application after it has become clear that the debts is so disputed. Where that is the case, the court will make a special order for costs when dismissing the application. Thus in the Walter McNaughton case supra Eloff, J (as he then was), after pointing out that the company had been 'put to needless expense in resisting the application, although it had expressly warned applicant of the basis on which the application would be opposed), held that the conduct of the applicant in nevertheless persisting in the futile application which was doomed to failure from the beginning justifies a special order for costs."*

[113] In all of the circumstances, a special order as to costs is called for, as a mark of this court's disapproval of the applicant's conduct in this matter. In the result, I am of the view that the following order would be apposite.

ORDER:

The application is dismissed with costs, including the costs of JBO's application for leave to intervene as well as the application for leave to file supplementary affidavit, all such costs to be taxed on the scale as between attorney and client.

PARKER, J