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

CASE NO: 4219/2022

In the matter between:

SAKHANA CONSTRUCTION CC
(Registration Number: 2007/217697/23) **Applicant**

And

STRAND JUNCTION RETAIL (PTY) LIMITED **Respondent**
(Registration Number: 2005/025682/07)

JUDGMENT DELIVERED ELECTRONICALLY ON THURSDAY 03 NOVEMBER 2022

DOLAMO, J

INTRODUCTION

[1] This is an application for the liquidation of the respondent in accordance with section 346 (1)(b) of the Companies Act[1] read with the transitional provisions of the new Companies Act[2], the applicant alleging that the respondent is hopelessly insolvent as its

---

[1] Act 61 of 1973.
[2] Act 71 of 2008.

liabilities exceed its assets. The application is opposed by the respondent who disputes that it is indebted to the applicant nor is insolvent.

BACKGROUND

[2] The respondent, a property development company, was incorporated specifically to develop Erf 3755 and the remainder of Erf 3756 Strand in the Western Cape commonly known as the Heritage House ("the property"). The property belongs to Passenger Rail Agency of South Africa (PRASA). On 28 November 2007 the respondent and PRASA entered into a long-term lease agreement for the purpose of developing this property. After the conclusion of this agreement and during or about 2011 Faslodien Noor (Noor), the sole director of the respondent then, contracted with the sole member of the applicant, Sulaiman Levy (Levy), for the applicant to provide certain renovations and remedial work on the property for the respondent.

[3] On completion of the project on or about 15 December 2011, the applicant rendered to the respondent a bill of R750 000-00 on a document referred to as a "*Completion Certificate*". Levy alleged that it was specifically agreed with Noor, with whom he had a close personal relationship as a family friend and neighbour, that the respondent will remain liable for payment of the amount on demand by the applicant. This amount was reflected in the Annual Financial Statements (AFS) of the respondent for the year ending on 29 February 2020[3] under long term loans. The 2020 AFS were the only

[3] An explanatory note on the AFS under 8 stated that: "*The above loans are unsecured non-interest bearing*

statements which were attached to the founding papers though applicant submitted in argument that this had been the case with all the preceding years' AFS, an allegation which is challenged by the respondents.

[4] Levy submitted that since the death of Noor on 9 November 2020, the substratum of the respondent was lost in that there has been no development of the property. He had thereafter and on numerous occasions attempted to obtain payment from the respondent's sole director, Josephine Gwyneth Schooch (Schooch), but had always met with one excuse or the other as to why payment could not be effected. As a result, on 18 March 2022, the applicant served a letter of demand on the respondent. This solicited a response to the effect that the loan accounts occurred before Schooch became a director and shareholder of the respondent and therefore has no knowledge of the *causa* of the loan accounts. The letter further stated that it will appear that some of the loan accounts where created without any *causa* and benefit to the company, that such loan accounts have been included in the company's Annual Financial Statements (AFS) merely as provision for debts that are allegedly due by the company. It concluded by stating that the creditors must prove their claims against the respondent.

[5] Levy further stated that Noor's son had informed the applicant that at least three other creditors of the respondent have been paid what was due to them. The applicant

---

share loans and have no fixed date for repayment. The above have also deferred its rights to reclaim repayment until such time that the assets of the company, fairly value exceed the liabilities".

alleged that these payments constituted acts of insolvency in that the respondent has made these payments with the intent to prejudice the general body of creditors and/or to prefer one creditor above another. It was also averred that attempts were also made to negotiate settlements with other creditors and that this too amounted to acts of insolvency. It is trite that the acts of insolvency created in section 8 of the Insolvency Act[4] do not apply to a company since provision is made in the Companies Act for circumstances in which a company will be deemed to be unable to pay its debts for purposes of liquidation[5].

[6] Applicant submitted that it will be in the interests of the general body of creditors if the respondent is placed under liquidation in the hands of the Master of the High Court. Liquidators would then be appointed to investigate the insolvency of the respondent, look into the reasonable prospects of the discovery of its assets which would then be available to creditors, realise these assets, if any, and make a fair distribution of the proceeds so as to avoid any creditors obtaining preference over others.

[7] In opposing the application respondent submitted that applicant's claim was a contractual claim dating back to 2011 and that such a contractual debt has prescribed in terms of section 10(1) read with section 11(d) of the Prescription Act[6]. While admitting that many years ago certain renovations were undertaken on the property, presumably

---

[4] Act 24 of 1936.
[5] See *De Villiers NO v Maursen Properties (Pty) Ltd* 1983 (4) SA 670 (T) at 675 A – B.
[6] Act 68 of 1969.

by the applicant, Schooch submitted that Noor never advised her that the applicant's claim still existed. She further submitted that she must assume in the best interest of the respondent that the applicant was paid many years ago, and if it was not paid, that the claim has prescribed. The respondent stated that the applicant's claim would have been in the sum of R712 500-00 but that no invoice was attached as proof thereof.

[8] The respondent disputed that any reference to long-term loans in its AFS will somehow interrupt prescription. It reiterated what was stated in the letter by its attorneys that some of the loan accounts where created without any *causa* and that it was for the claimants to prove their claims, as she was not aware of such claims nor any transactions which may have preceded her appointment as a director of the respondent in September 2018. Schooch denied the allegation that the respondent's substratum has disappeared since the passing of Noor and submitted that no such case has been made out in the papers.

[9] Schooch contended that the respondent remains in business. According to Schooch the lease entered into with PRASA still subsists and endows the respondent with substantial value. In terms of clause 9 of the lease agreement respondent has the right to sublet any portion of the improvements which it makes on the land without the consent of the landlord. It is further entitled to cede, assign, mortgage, otherwise dispose of or in any way hypothecate the lease itself, the premises or a portion thereof to raise development funding. The respondent was paying the landlord its monthly rental for the

lease and sublets the property from which it derives income. In this respect it was submitted that its net income was more than sufficient for its current expenses. It has no employees and Schooch, as the sole director, was paid R2000-00 per month petrol allowance and that the company was able to pay its debts in the ordinary course of business and is commercially solvent. Schooch stated that the real value in the respondent lies in the fact that there are phases 3 and 4 of development to be completed on the land, which will include a shopping centre with tenants who have national profiles. This will be undertaken in the near future. Respondent also received an offer of R6 million for the purchase of its shares, loan accounts and rights in the lease.

[10] Schooch, who was in a romantic relationship with Noor, submitted that on 27 April 2018, Noor entrusted her with a Power of Attorney in respect of his affairs. He had taken out insurance policies on his life and had indicated who had valid claims against the respondent and which claims should be paid out of the proceeds of the insurance policies. The applicant's claim was not one of those claims that were to be paid out of the proceeds of the insurance policies.

[11] Noor had also been in a romantic relationship with Monica Herrmann, a German citizen, that lasted until his death in 2020. Herrmann and Schooch were not aware of each other or of their respective romantic relationships with Noor. Herrmann was aware of the renovations that were carried out at Heritage House back in 2011. According to Herrmann the full amount that was owed to the applicant for its services was paid. This was in the

sum of R242 560-00 and not the amount claimed by the applicant. This alleged payment, however was disputed by the applicant who stated that the payments were to Shaheed Noor (Shaheed), Noor's son, for professional services he had rendered to the respondent and not in settlement of its liability to the applicant.

[12] In an effort to show that the amount of R242 560-00 was payment to the applicant for the renovation work the respondent enlisted the services of a Quantity Surveyor to express a professional opinion on what was the real value of the work performed by the applicant. According to the report of this expert the applicant was paid a fair and reasonable amount for its services, which amount was more or less the same amount as that which was shown to have been paid to the applicant, though this is disputed by the applicant. This expert used the Completion Certificate that was rendered to respondent by the applicant in December 2011 as the basis for the calculation of what would be fair and reasonable payment for the work. Consequently, the respondent called upon this court to exercise its discretion and refuse to grant a provisional order of liquidation as there is proof that the applicant was paid in full for the renovations.

[13] The question for determination is whether the applicant's claim has been paid in full? If not, whether, in the light of the submission that the applicant's claim, or part thereof, has prescribed in terms of section 10(1), read with section 11(d) of the Prescription Act, the claim is resisted on *bona fide* reasonable grounds.

[14] Counsel for the applicant submitted that all the averments made in the founding affidavit have not been disputed by the respondent and, on this basis, argued that applicant has made out a case for the provisional liquidation of the respondent. In this respect Counsel pointed out that it was not disputed that the respondent owed the applicant the sum of R750 000-00 which indebtedness is acknowledged in the AFS; not disputed that Noor had a close personal relationship with Levy, was a family friend and neighbour, a relationship which transcended an ordinary business relationship; that Noor and Levy had agreed that the respondent will remain liable to the applicant for payment of the amount of R750 000-00 and that it will pay this amount on demand by the applicant; and that Levy accepted these payment terms. According to counsel, on these admissions, what remains is the determination of the question of prescription.

[15] Counsel for the applicant submitted that given the undisputed circumstances surrounding the conclusion of the repayment terms between Levy and the late Noor, which were clear and unequivocal, the demand for payment dated 18 March 2022 was a condition precedent for the debt becoming payable. He accordingly submitted that prescription only began to run from 18 March 2022 and that therefore the claim has not prescribed. In the alternative, he submitted that the respondent had tacitly acknowledged liability of the debt in its AFS.

[16] On tacit acknowledgement of liability Counsel relied on the judgment of the SCA

in *Investec*[7] where it was held, *inter alia*, that the test for tacit acknowledgement is objective. This is because the concept of a tacit acknowledgement of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by claiming *ex post facto* to have had a subjective intent which is at odds with the outward conduct[8]. On the strength of this authority Counsel argued that the conduct of the respondent, viewed holistically and in its proper context, amounts to a tacit acknowledgement of liability.

[17] On whether the *Badenhorst* principle should find application Counsel submitted that this principle is not inflexible and does not precludes this court from adjudicating upon these liquidation proceedings as it is not called upon to enter into a complex factual enquiry but rather decide a straight forward legal issue based on common cause facts: prescription.

[18] Lastly, Counsel submitted that the respondent is commercially insolvent as it has no liquid assets or readily realisable assets available to meet its liabilities. Counsel found support for his proposition in *ABSA Bank*[9] where it was held that it matters not that the company's assets, fairly valued, far exceeds its liabilities: once the court finds that it cannot do this (pay its liabilities when they fall due) it follows that it is unable to pay its debts within the meaning of section 345 (1)(c) as read with section 344 (f) of the

---

[7] *Investec Bank Limited v Erf 436 Elandsdorp (Pty) Ltd and Others* 2021 (1) SA 28 (SCA).
[8] *Investec, supra* at para [28].
[9] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 440G.

Companies Act. Counsel therefore asked for an order of provisional liquidation of the respondent.

[19] In arguing for the dismissal of the application with a punitive costs order Counsel for the respondent reiterated the version of the respondent, namely, that the debt which was due to applicant was paid by June 2015 and that any claim for the balance, if any, has prescribed. In what I regard as an alternative defence Counsel argued that the whole claim has prescribed. Counsel labelled the claim for payment of the sum of R750 000-00 an example of opportunistic claims made against the respondent and, it was for this reason, that the respondent had required creditors to prove their claims.

[20] On the alleged tacit acknowledgment of debt of the amount of R750 000-00 through its reflection in the AFS Counsel submitted that, from the wording of section 14(1) of the Prescription Act that the running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor, it was clear that an acknowledgment of debt after it has prescribed will not revive it. Counsel accordingly submitted that the reflection of this amount of R750 000-00 in the 2020 AFS does not constitute an acknowledgment of liability interrupting prescription as contemplated in section 14(1) of the Prescription Act as this arose after prescription. On this point Counsel questioned why the AFS of the other years preceding 2020, allegedly reflecting the said debt, were not made available. This submission, in my view, was intended to urge the Court to draw a negative inference from the failure to make the other AFS available.

[21] Counsel submitted that *Investec, supra,* does not assist the applicant. Counsel drew a distinction between the facts of this case and those of *Investec*. The main distinguishing factors in the *Investec* judgment is that the respondent in that case made periodical payments to *Investec* and one of its directors made various statements in correspondence with the bank in which the debt was expressly acknowledged, whereas in *casu* no such tacit acknowledgement of indebtedness was made. Counsel submitted that the payments that respondent relied upon to say that the debt has been paid in full were made in May 2015 and accordingly any balance, if any, had prescribed by May 2018.

[22] In arguing for or against prescription the parties relied heavily on the judgment of the Constitutional Court in *Trinity*[10] but each sought to extract therefrom principles that appear to support its case. It would therefore be apposite to take a closer look at this judgment, in particular, with regard to its treatment of the *Badenhorst* principle and its pronouncement on prescription. It is worth emphasising right from the outset that the Constitutional Court had to decide whether the claim by *Trinity* had prescribed which is what the parties had formulated as the legal question for determination by the Supreme Court of Appeal (SCA). It is this question, whether the claim had prescribed or not, that had led to a split decision in the SCA. The Constitutional Court was also divided: Cameron J (Khampepe J, Madlanga J, Mhlantla J and Pretorius AJ concurring in the majority judgment), on the one hand held that *Trinity's* claim has prescribed and, Mojapelo AJ

---

[10] *Trinity Asset Management (Pty) Ltd v Grindstone Investment 132 (Pty) Ltd* 2018 (1) SA 94 (CC).

(Mogoeng CJ, Nkabinde ADCJ, Jafta J and Zondo J concurring), on the other, held that the claim had not prescribed, respectively. Froneman J's who agreed with the majority judgment, wrote a judgment which specifically dealt with the question whether the *Badenhorst* principle is applicable only to factual disputes or extends to legal disputes as well.

[23] On the issues that were before the High Court (Yekiso J) the Mojapelo AJ judgment stated that:

> *"[28] Applying the Badenhorst principle, the High Court held that the defence of prescription raised by the respondent was indeed a valid defence. The High Court held further that it was not required to determine the merits of the defence or whether the defence raised was likely to succeed at trial. Accordingly, the application for provisional liquidation was dismissed. As the High Court found, whether the respondent is indebted to the applicant or not is a genuine and bona fide dispute. The dispute turns on whether the applicant's claim has prescribed. The High Court correctly applied the Badenhorst principle and dismissed the application. The dispute was indeed palpable and this was confirmed (in retrospect) by the very fact that the issue led to a split decision in the SCA and is now before this court."* (own emphasis)

[24] The real issue for determination, like in the *Trinity* matter before the High Court, is whether the defence of prescription and the other defences pleaded by the respondent in

casu raise a genuine and *bona fide* dispute. I accordingly do not have to finally dispose of the defences raised and in particular the prescription defence.

[25] In determining the question of prescription, which was the *facta probanta* before the Constitutional Court, the Mojapelo AJ's judgment examined the apparent tension between prescription and contractual freedom. The Learned Judge held that a contractual debt becomes due as per the terms of the contract. When no due date is specified, the debt is generally due immediately upon conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance, and that the debt becomes due only when demand has been made as agreed. Where there is such a clear and unequivocal intention, the demand would be a condition precedent to claimability, a necessary part of the creditor's cause of action and prescription will begin to run only from demand[11]. It is within the creditor's discretion to enforce or not to enforce the debtor's obligation to pay. But as for the creditor who makes a demand after a the prolonged delay, the court will interpret the agreement to discern the intentions of the parties and read in that such a right must be exercised by the creditor within a reasonable period. What is reasonable will depend on the facts of each case[12].

[26] Cameron J's judgment, on the other hand, held that ultimately, it is a question of fact whether the parties intended demand to be a condition precedent for the debt to be

---

[11] *Trinity supra*, at para [47].
[12] *Trinity supra*, at para [48].

"*due*". The Learned Judge referred to the never-never principle which finds application in situations, such as loans by family trust or a loan made to a close relative. In such a case the debt will not be due, in any sense, legal, technical or practical until payment is demanded. In such cases, the Learned judge held, the parties do not intend the debt to be due until demand is made, which contrasts strongly with any ordinary commercial loan agreement[13].

[27] By submitting that Levy and Noor had a close relationship as a family friend and neighbour the applicant attempted to bring the circumstances of the respondent's debt being only payable on demand within the purview of the never-never principle. Did the parties in this case intent that the creditor would be entitled to determine the time for performance and that the debt would become due only once demand had been made? There is little by way of details of the terms of the agreement save for the *ipse dixit* by Levy that he had agreed with Noor that the respondent will remain liable to pay on demand and the fact that the amount in question was reflected in the respondent's 2020 AFS.

[28] On the applicant's version, the respondent was obliged to pay R750 000-00 within seven days of the demand being made, this after a prolonged period of time when no such demand was made. The alleged agreement is silent as to whether payment within 7 days of demand was part of the agreement with Noor. This appears to be inconsistent with the relationship of family friends and good neighbours that Levy and Noor allegedly

---

[13] *Trinity supra*, at para [124].

enjoyed that the respondent would only have seven days to pay the alleged loan, after a hiatus period of more than a decade. Or is this seven day period within which to pay mentioned in the letter of demand and additional new term? Noor is no longer alive to confirm or deny Levy's statements. As was stated in *Investec, supra,* where a creditor lays claim to the debt which has been due for a long period, doubt may exist as to whether a valid debt ever arose, or, if it did, whether it has been discharged[14].

[29] The version of the applicant that payment of the alleged debt was deferred until such time as the applicant would have demanded payment, from which date prescription will start to run, is vehemently disputed by the respondent. It is not as simple as the applicant submitted that the facts are undisputed or that it is only the exigibility of the debt that is disputed. Far from it, on the facts alleged by the respondent, I am of the view that the claim of the applicant is disputed on *bona fide* reasonable grounds. The *bona fide* dispute in this case, in my view, is both factual and legal. Even if I am wrong and the issue is a legal one as the applicant submitted that and it is about its exigibility, can the *Badenhorst* principle still find application?

[30] The *Badenhorst* principle is to the effect that where there is a genuine and *bona fide* dispute concerning the respondent's indebtedness to the applicant, the application for liquidation should be dismissed. 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*

---

[14] *Investec, supra*, at para [28].

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[15]. In *Trinity*[16] Cameron J said:

> *"[86] ... "That [the Badenhorst] is less of a principle than a sensible rule of practice. It says that if you want to claim a debt you know is disputed, you should not bring liquidation proceedings to do it. You should claim the debt by way of action — and only once your claim has been established may you, if necessary, seek to liquidate or sequestrate.*
>
> *[87] When the dispute about the debt is not about whether it exists or its amount but about its exigibility, things are different. Then the doubt arises from a disputed principle, not contested facts. This means that the liquidating or sequestrating court is not diverted into a time-consuming and complex factual enquiry. The only point before it is a law point. That law point can be determined with precision and with dispatch."*

[31] "*Indebtedness*" for purposes of the *Badenhorst* rule is (a) an admitted liability and (b) that the debt is due and payable[17]. The liability in this case is not admitted. Neither is that fact that it is due. On the contrary the respondent argued, from the facts it alleged, that it is not indebted to the applicant, because the claim has either been paid or has prescribed. The question is whether this is disputed on *bona fide* reasonable ground.

---

[15] *Badenhorst* rule after *Badenhorst v Northern Construction Enterprises* (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 348 and authorities there cited
[16] At paras [86] and [87].
[17] *FirstRand Bank Limited v Nomic 153 (Pty) Ltd* (A165/2013) [2014] ZAWCHC 20 at para [28].

[32] The judgment of Froneman J in *Trinity* made it clear that the *Badenhorst* principle can be applied to legal disputes as well. This is clear from the following passages:

> *"[146] The High Court judgment is capable of being understood as saying that its refusal of the provisional liquidation order was based on the existence of a good faith dispute about the legal issue of prescription — in other words, it did apply the Badenhorst principle to a disputed legal issue. If that is a proper or feasible interpretation of the High Court judgment, which I think it is, then an appeal against it can only succeed if its application of the Badenhorst principle to legal disputes was incorrect. If not, its finding of a good faith legal dispute can hardly be faulted, given the difference of opinion on the merits of the prescription issue in both the SCA and this court.*
>
> *[147] The applicant argued before us that it was accepted practice that the rule does not apply to disputed legal issues, only disputed factual issues. That may or may not be correct, but hardly disposes of the legal question of whether the alleged practice is in accordance with the correct legal position. This question has not been authoritatively settled.*
>
> *[149] A similar kind of ambivalence exists in relation to deciding legal issues in temporary interdict proceedings. In Fourie Viljoen J held that a judge confronted with a legal issue needed to decide it, even if the relief sought was of a temporary nature. Decision of the legal point would dispose of the matter finally. Fourie has not been uniformly followed. In Ward Blignault AJ also adopted a kind of compromise approach to the effect that 'ordinary questions of law' should be finally*

decided even in interlocutory proceedings, but not where 'difficult questions of law' are involved.

[150] ...

[151] For these reasons I disagree with the acceptance in the first and second judgments that the prescription issue is properly before us. If it is then the reasons for rejection of the applicability of the Badenhorst principle to legal issues, even on undisputed facts, must be articulated. That has not been done, nor did the SCA deal with that issue. And to do so now, in the absence of full argument, is not appropriate.

[152] In the absence of a finding that the Badenhorst principle does not apply to disputed legal issues, there is no ground for faulting the dismissal of the application for provisional liquidation in the High Court. For different reasons than those of the majority in the SCA, I would nevertheless hold that the outcome should have been the same: the appeal must be dismissed and the dismissal of the provisional liquidation application in the High Court should be confirmed."

[33] Reference to the Froneman J judgment is not meant to create the impression that this court has finally determined that the applicant's claim has prescribed, but merely to show that the Badenhorst principle is available in the circumstances of this case. Where in an opposed application for a provisional winding up order and the affidavits reveal fundamental and crucial disputes of fact, and as we have seen from Froneman J's judgment, legal dispute as well an applicant need only establish a *prima facie* case of

insolvency[18]. But even if an applicant has established its claim on a *prima facie* basis a court will ordinarily refuse to grant an order if the claim is disputed on *bona fide* reasonable grounds[19]. Where *prima facie* the indebtedness exists the *onus* is on the respondents to show that it is disputed on reasonable grounds[20].

[34] In *casu* the dispute is clearly about the existence of the debt, with the respondent asserting that it has been extinguished by prescription. In my view, that is a *bona fide* reasonable dispute of the claim. In the discharge of its *onus*, the respondent does not have to prove its defences. However, it has to satisfy this court that the grounds advanced for disputing the claims are not unreasonable. In so doing, it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it will rely at the trial. It is sufficient if the respondent alleges facts which, if proved at a trial, would constitute good defences to the claims made by the applicants[21]. In my view, the respondent has discharged this *onus*.

[35] On the view I have taken that the claim by the applicant is disputed on *bona fide* reasonable ground I deem it unnecessary to deal in any detail with the other defences raised by the respondent. In this respect I agree with the respondent that while the disappearance of a company's substratum is a just and equitable ground upon which it

---

[18] See *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC) at paras [7] and [8].
[19] *Payslip Investment Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (C) at 783 G – I.
[20] *Orestisolve supra* at para [8].
[21] *Edge Geo LLC v Geothermal Energy Systems (Pty) Ltd* (6883/12) [2012] ZAWCHC 391 (14 December 2012).

may be wound up[22] this is not the case with the respondent. Its real value lies in its development rights enshrined in the lease agreement. On these grounds I am of the view that the application for the liquidation of the respondent stands to be dismissed.

[36] There was an application for condonation for the late filing of a supplementary replying affidavit which was opposed. The applicant was allowed to argue for condonation together with the merits. The grounds on which the respondent opposed the condonation application is that the applicant was unreasonable in the conduct of this matter. It was submitted that applicant brought the matter to court on an urgent basis and afforded the respondent only 48 hours to file answering papers. After the matter was postponed and the respondent had an opportunity to file supplementary answering papers, the applicant suddenly dragged its feet in filing its supplementary replying affidavit. The result was that the time-table for filing Heads of Argument was affected.

[37] It is common cause that the applicant brought the application on an urgent basis giving the respondent a mere 48 hours to file answering papers. This was despite the fact that respondent's attorneys have indicated in writing that the matter was not urgent and that by agreement it should be referred to the semi-urgent roll. When respondent's view was eventually vindicated by the court and the matter referred to the semi-urgent roll the urgency with which the applicant approached the court evaporated. This creates the impression that the applicant was trying to catch the respondent off guard and obtain an

---

[22] See *Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W).

order in circumstances where the respondent would not have had an opportunity to present its case. This kind of conduct is deplorable.

[38] The granting or refusal of condonation is a matter of judicial discretion and involves a value judgment by the court seized with the matter based on the facts of that particular case[23]. Although the explanation proferred by the applicant is shaky I deem it in the interest of justice to grant the condonation as the admission into evidence of the supplementary affidavit has elucidated the issues. But since the applicant is seeking the court's indulgence it must pay the respondent's costs of opposing the application for condonation.

[39] What remains is to deal with the question of costs. The applicant brought this application on an urgent basis forcing the respondent into a truncated timetable. I have already stated that when the matter came before me in the urgent court, I was not persuaded that the matter was urgent as to enjoy a place on the court's roll, and accordingly postponed it to the semi-urgent roll. Costs stood over for later determination. The respondent has been successful and the applicant must pay the costs, including the costs of the urgent application. The only question is on what scale the applicant should pay the respondent's costs?

[40] Respondent has asked for overall costs on a punitive scale. I am of the view that

---

[23] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para [35].

the costs of the urgent application ought to be on a punitive scale to express the court's displeasure, generally, with the tendency of abusing the urgent court and, specifically, in how the applicant conducted itself in this matter. The urgent court is intended to come to the aid of a litigant who cannot be afforded substantial redress at a hearing in due course.

[41] Applicant who comes to court on an urgent basis must comply with the provisions of Rule 6(12)(b) and set forth explicitly the circumstances which is averred render the matter urgent. The affidavit of the applicant on this leg of the requirement of Rule 6(12)(b) is woefully inadequate. All Levy, on behalf of the applicant, averred was that, with the benefit of hindsight, he should have consulted with his attorney sooner but did not explain what triggered the urgency. He only gave an incomplete chronology of events, stating that he could only secure a consultation with his attorneys on 14 April 2022 and thereafter launched this application.

[42] What appeared to have motivated the applicant to approach the court on an urgent basis is the unsubstantial allegation that Schooch who has been a director of the respondent since September 2018 would spirit away funds and possibility assets if left in control of the respondent. Given the applicant's description of the state of solvency of the respondent and the fact that Schooch has been in charge of the respondent since 2018, and most of the payments that were made were in 2021, there was no urgency in approaching, as the applicant did. The circumstances sketched above have persuaded this court that the applicant has abused the provision for the relaxation of the ordinary

rules of court to allow applicants to approach a court on an urgent basis in circumstances where this was not necessary. The attorney and client scale of costs is justified in the circumstances.

[43] The order I make is the following:

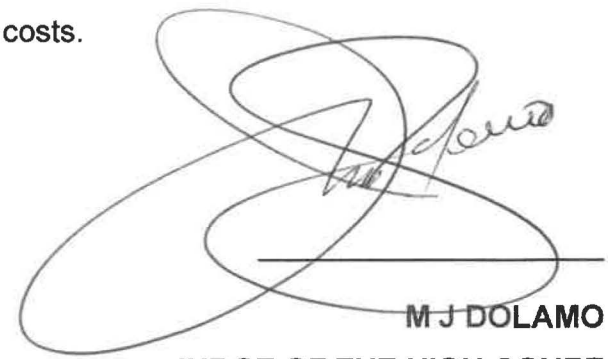
43.1 the application for condonation for the late filing of the supplementary affidavit is hereby granted;

43.2 the applicant is ordered to pay the respondent's costs occasioned by opposing the condonation application;

43.3 the applicant is ordered to pay the costs occasioned by the urgent application that was postponed to the semi-urgent roll and which costs stood over for later determination on an attorney and client scale;

43.4 the application for the provisional liquidation of the respondent is hereby dismissed; and

43.5 the applicant is ordered to pay costs.



M J DOLAMO

JUDGE OF THE HIGH COURT