


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 43314/19

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
4 March 2020	
	

In the matter between:

TENSILE RUBBER COMPOUNDS (PTY) LTD

Applicant

and

REMA INDUSTRIES

Respondent

JUDGMENT

1. The applicant seeks an order winding up the respondent. The application is opposed by the respondent which filed an answering affidavit. The applicant is a private company registered in terms of the company laws of the Republic of

South Africa. The respondent is also a private company registered in terms of the company laws of the Republic of South Africa.

2. Briefly the facts that give rise to the application are as follows. On or about 2 May 2018 the respondent applied for credit facility with the applicant. The object thereof was for the respondent to be supplied by the applicant with certain manufacturing goods on credit to the value of R250,000.00 per month, which would be payable after 30 days thereof. The facility was approved by the applicant and a written credit agreement was concluded.
3. The applicant alleges that the respondent initially honoured its payment terms in terms of the credit agreement but subsequently and since or about 1 November 2018 started to be in default of its payment obligations. It is further alleged that as at 11 February 2019 the respondent's total outstanding arrears amounted to R1,482,798.60. A meeting was held between the parties in order to discuss the respondent's indebtedness. Subsequent to the meeting aforesaid, an e-mail was sent by Mr Erdmann of the respondent dated 18 February 2019 confirming the details of the meeting and the payment proposal. In the e-mail aforesaid Mr Erdmann undertook that the respondent would pay the arrears in amounts set out in paragraphs 15.1 to 15.3 of the applicant's founding affidavit. The respondent did not comply with its undertaking and failed to adhere to the payment proposal.
4. The applicant caused a letter of demand to be sent to the respondent in terms of section 345 of the Companies Act, 61 of 1973 for the amount of R1, 414, 922.52. The letter was sent by the Sheriff and also personally served on Mr Erdmann.
5. The applicant brings this application for the winding up of the respondent on three grounds which are: respondent's inability to pay its debts as contemplated in section 345(1)(a); that it is to the satisfaction of the Court that the respondent is unable to pay its debts as contemplated by section 345(1)(c); and that it is just and equitable in terms of section 344(h) that the respondent be wound up.

6. The respondent has raised a number of defences including disputing the indebtedness itself on grounds that the goods manufactured and delivered to the respondent were defective or not of good-quality. The defences raised by the respondent are that the respondent take issue with the credit agreement; also that the replying affidavit raise new matter; a separate action against the surety; ostensible rescission of the agreement; *exceptio non adimpleti contractus* and lack of authority to depose to the replying affidavit.
7. I need not deal with all the defences raised as none of them have any merit. I however deal with the defence relating to whether the indebtedness is disputed on bona fide and reasonable grounds having regard to the principles set out in the Badenhorst rule.¹ Whilst the Badenhorst rule applied to the provisional winding-up, it offers no protection to the respondent because the debt is not disputed on bona fide and reasonable grounds.
8. I should point out that whilst the notice of motion seeks a final order of winding up of the respondent, the applicant's heads of argument seek a provisional winding up order. The test in relation to the final order as opposed to the provisional order of winding up is not the same. In respect of a final order sought, the onus rest with the applicant to prove on the balance of probabilities that the respondent is indebted to the applicant and has failed to satisfy the debt and/or that it is unable to pay. The Court deals with disputes of fact applying the Plascon Evans rule.² The version of the respondent prevails unless it is far-fetched and falls to be rejected outright. When a provisional order is sought, the Plascon Evans test does not necessarily apply as all what the applicant seeks to show is a prima facie case of indebtedness and inability to pay and the respondent will have an opportunity on the return date for the consideration of the final winding up order that the provisional winding up order should be discharged having regard to the Plascon Evans rule. Whilst the respondent disputes the indebtedness and raises *exceptio non adimpleti contractus* as a defence, this was raised for the first time in the answering affidavit. It is contradicted by the

¹ Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H – 348C

² Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E; 635C

admission of indebtedness which was made by the respondent including the e-mail referred to in paragraph 15 of the founding affidavit of the applicant setting out the proposed terms of the payment of arrears by the respondent.

9. I am satisfied that the applicant has satisfied the requirements for the granting of a final winding up order and that the dispute sought to be raised by the respondent does not rise to the level of genuine dispute of fact which upset the granting of a final winding up order. It is clear from the papers that the respondent is unable to satisfy the debt and a letter of demand as contemplated by section 345 of the old Companies Act has been served and received by the respondent.
10. Accordingly, I make the following order:
- 10.1 the respondent is wound-up and placed in the hands of the Master of the High Court of South Africa, Gauteng Division, Pretoria;
- 10.2 the costs are costs in the winding-up on an attorney and client scale.


MMP Mdalana-Mayisela
Judge of the High Court,
Gauteng division

For the Applicant: Adv FJ Labuschagne
Instructed by EY Stuart Inc

For the respondent: Adv SB Friedland
Instructed by Beder-Friedland Inc