IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 44188/2020

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

SIGNATURE **DATE** 27/5/2021

In the matter between:

TSHEPANG ELECTRICAL (PTY) LTD Applicant

And

MOKGOLOKWANE CIVILS CC Respondent

JUDGMENT

BARNARDT AJ

1. This is an application for the final winding up of the respondent due to the respondent's alleged inability to pay its admitted debts. The application is opposed, inter alia, on the basis that the debt is disputed, and that the demand was defective.

2. The respondent also brought an application for condonation for its failure to file its answering papers late, which application was opposed by the applicant.

CONDONATION

3. I considered the lateness of the answering affidavit, reasons for the lateness, and any possible prejudice suffered by the applicant due to the late filing of the answering affidavit and concluded that it is in the interest of justice to grant condonation.

4. I therefore order that condonation is granted, each party to pay its own costs occasioned by the condonation application.

FACTUAL BACKGROUD

5. In August 2018, the respondent was awarded a contract for the construction of 4000 low-costing housing units in Palm Ridge by the Gauteng Department of Human Settlement.

6. During January 2019, the respondent and applicant concluded a written joint venture agreement with certain terms and conditions, with a view to increase the respondent's capacity to complete the project.

7. It is common cause that the parties, during March 2020, due to certain issues between them, agreed to separate and exit from the joint venture. It is however disputed

whether the parties agreed on the monies owed and whether an agreement about the signing of an Acknowledgement of Debt was reached.

8. It is evident that there was an attempt to draft an Acknowledgement of Debt, but it was never signed despite correspondence to clarify certain issues.

9. According to the applicant, the respondent owed it an amount of R20 303 255, 97 on 23 June 2020, and a notice of demand, admittedly only for R7 919 737, 02, was served on the respondent on 14 July 2020.

10. In reply, the respondent confirmed that they were in the process of paying the applicant and on 17 July 2020 an amount of R608 431, 88 was paid to the applicant by the respondent.

11. The respondent stated in its answering affidavit that the undertaking that it was in the process of paying the applicant, cannot be understood outside the framework of how and when liability arises in terms of the joint venture agreement. According to the respondent, "the extent of the respondent's indebtedness to the applicant is still disputed and that payment will only be made to the applicant once the amount owing has been quantified."

12. The applicant averred that the respondent is unable to pay its admitted debts and that it would therefore be just and equitable that the respondent should be wound-up in terms of section 344(h) of the Companies Act as read with the Close Corporation Act.

LEGAL POSITION

13. The grounds for the final winding-up of a close corporation are the same as those that are applicable for the winding-up of companies. An applicant for the winding-up of a close corporation must rely on the grounds set out in Section 344 and 345 of the Companies Act, 61 of 1973.

14. Section 344 provides for instances in which a company can be wound up. Subsection (f) provides that a company may be wound up by the Court if it is unable to pay its debts as described in Section 345.

15. Section 345 reads as follows:

> "345. When company deemed unable to pay its debts.
>
> (1) A company or body corporate shall be deemed to be unable to pay its debts if–
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> (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due–
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> (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum due; or
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> (ii) in the case of anybody corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
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> (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
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> (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts."

16. It is trite that the unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent's company / co-operation that has not paid its debt. In this

regard, the following was stated in the matter of ***Standard Bank of South Africa v R-Bay Logistics***:[1]

> "[27] There has been judicial debate about whether, for the purposes of Section 344(f) of the old Companies Act, it is possible for the Court to conclude, upon evidence of actual insolvency, that a company is "unable to pay its debts". Certainly, proof of the actual insolvency of a respondent company might well provide useful evidence in reaching the conclusion that such company is unable to pay its debts but that conclusion does not necessarily follow. On the other hand, if there is evidence that the respondent company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under Section 344(f) has been proved. At that level, the possible actual solvency of the respondent company is usually only relevant to the exercise of the Court's residual discretion as to whether it should grant a winding-up order or not, even though the applicant for such relief has established its case under Section 344(f)."

17. In the matter of ***Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd & Another***[2] the following was stated with reference to the relevant legal principles:

> "[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a *prima facie* basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour **(Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943** (A) at 975J - 979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a *prima facie* case.)

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[1] 2013 (2) SA 295 – paragraph [27'

[2] 2015 (4) SA 449 (WCC) par. 7 - 8

[8] Even if the applicant establishes its claim on a *prima facie* basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. In the context of liquidation proceedings the rule is generally known as the **Badenhorst** rule, from the leading eponymous case on the subject, **Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346** (T) at 347H - 348C, and is generally now treated as an independent rule, not dependent on proof of actual abuse of process (Blackman et al, Commentary on the Companies Act Vol 3 at 14 - 82 to 14 - 8). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers, but also whether the claim is *bona fide* disputed on reasonable grounds. A court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out **(Payslips Investment Holdings CC v Y2K Tee Ld 2001 (4) SA 781** (C) at 783G - I). However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds **(Hulse-*Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane ad Fey NNO Intervening)* 1995 (2) SA 208** *(C) at 218D-* 219C)."

18. Upon reading and considering the affidavits and annexures thereto, and submissions by both parties, I am of the view that the following can *prima facie* be accepted:

18.1 The applicant served a statutory demand on the respondent and although various amounts were mentioned, the demand was for R7 919 738, 02.

18.2 The respondent conceded that it is indebted to the applicant in the amount of at least R3 000 000, 00. In this regard, I am of the view that the conclusion by Malan J (as he then was) in ***Body Corporate of Fish Eagle v Group Twelve Investments***[3] is important:

> "The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beek's case supra at 331F). If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts."

18.3 The alleged *bona fide* disputes regarding the geysers, vat and management fees were raised and discussed in the interdictory application and it is noted that the respondent in its answering affidavit, which was filed after the interdictory application, did not deal with them. In ***Wightman t/a J W Construction v Headfour.***[4] Heher JA discussed bona fide disputes as follows:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess

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[3] . 2003 (5) SA 414 (W) at 428B-C

[4] 2008 (3) SA 371 (SCA) at 375 G - 376 B

> knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

19. The respondent stated that it is solvent and claimed that the applicant did not produce evidence to the contrary. The respondent however, who is in the best position to show through its financial statements that it is solvent, opted not to attach any statements in support of its claim. In ***Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*** [5] the question of winding-up 'solvent' companies has been discussed:

> "[23] ... The so-called factual solvency of a company is not, in itself, a determinant of whether a company should be placed in liquidation or not. The veracity of this deduction may be illustrated, as in the present case, where the issue has arisen as to whether a company which is factually solvent, but commercially insolvent, is to be wound-up in terms of the new

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[5] Saflii (936/12) [2013] ZASCA 173 (28 November 2013)

> Act or the old Act. To attribute so-called 'factual solvency' to the meaning of the term 'solvent company' in the new Act would lead to an unbusiness-like result that would not make sense.
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> [24] Factual solvency in itself is accordingly not a bar to an application to wind-up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See Johnson v Hirotec (Pty) Ltd. It follows that a commercially solvent company (whether factually solvent or insolvent), may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act."

20. With due consideration of all relevant facts and case law, I am of the view that it would be just to grant a provisional order of winding-up of the respondent on the ground that it is unable to pay its debt.

21. In the circumstances I make the following order:

21.1 The respondent is provisionally wound-up.

21.2 A rule nisi is issued calling upon all persons to appear and show cause, if any, to this Court on/or before 10:00 am on 2 December 2021, why the respondent should not be finally wound-up, and why the costs of this application should not be costs in the winding-up.

21.3 This order, together with a copy of the Notice of Motion and annexures thereto, must be served upon the respondent.

21.4. The copy of this order must be served on:

21.4.1. Any registered trade union that as far as the Sheriff can reasonably ascertain represents any of the employees of the respondent.

21.4.2. The respondents' employees, if any, by affixing a copy of the order and the application to any notice board, to which the employees have access inside the respondents' premises, or if there is no access to the premises by the employees, by fixing copy to the front gate, where applicable, failing which, to the front door of the premises from which the respondents reside and/or conduct any business.

21.4.3. The South African Revenue Service.

21.4.4. This order shall be published once in the Government Gazette and a local newspaper.

21.5. The costs of this application to be costs in the administration of the estate of the respondents.

JFBarnardt

ACTING JUDGE JF BARNARDT
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 May 2021.

APPEARANCES

For the applicant: Adv. Silver
Instructed by: Beder Friedland Inc.

For the respondent: Adv R Tulk and Adv TR Monene
Instructed by: Mabuza Attorneys

Date heard: 11 March 2021

Date of judgment: 27 May 2021