

SOUTH AFRICA / JUDGMENT

BTW and Associates (Pty) Ltd v Maragela Consulting Engineers (Pty) Ltd (9193/2022) [2024] ZAGPPHC 222 (19 March 2024)

[2024] ZAGPPHC 222**COURT**

North Gauteng High Court, Pretoria

BEFORE

RJ Groenewald

CASE / FILE NUMBER

9193/2022

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 9193/2022****(1)****REPORTABLE: YES / NO****(2)****OF INTEREST TO OTHER JUDGES: YES / NO****(3)****REVISED: YES / NO****DATE:**

19 March 2024

SIGNATURE

In

the matter between:

BTW

& ASSOCIATES (PTY)

LTD

Applicant

and

MARAGELA

CONSULTING ENGINEERS (PTY) LTD

Respondent

Coram:

Groenewald, RJ (AJ)

Heard

on: 12 March 2024

Delivered: 19 March 2023 - This judgment was handed down electronically uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

1. This is an application in terms of which the Applicant seeks the winding-up of the Respondent company on the basis of:
 - 1.1. Section 345(1)(a)[1] of the Companies Act, 61 of 1973 (“the 1973 Companies Act”) in that the Respondent has failed to satisfy a demand for payment within 21 days of being delivered at the Respondent’s registered address; and/or
 - 1.2. Section 345(1)(c) of the 1973 Companies Act, in that it has been proven to the satisfaction of the court that the Respondent is unable to pay its debts.
2. It is not disputed between the parties that the Section 345 notice was served by the Sheriff at the registered address of the Respondent. The application is one which is primarily premised upon an allegation that the Respondent is commercially insolvent.
3. It is common cause that the Respondent appointed the Applicant to perform certain engineering services inter alia in respect of the structural design of reservoirs, the associated design of mechanical works on the project, the design co-ordination of the mechanical and electrical aspects and the supervision of the entire task as set out in a letter of appointment, dated 9 May 2016.
4. The appointment letter specifically provides, in relevant part, that:

“The fee for item 1 – 5 is One Million and Five Hundred Rand Only – (R1,500 000.00) Vat Excl which includes all disbursements and any other expenses as stated above.

The schedule of payment will be as per ECSA guidelines stages of Inception, Concept & Viability, Design, Development, Construction, Monitoring and Close-out.

...

Payments to BTW & Associates will be affected within 2 working days after Maragela Consulting Engineers receipt of the payments from Randfontein Local Municipality.”

(Own emphasis applied.)

5. It was common cause in the argument that the Respondent was appointed as a contractor of the Randfontein Local Municipality and that certain aspects of the work was in turn sub-contracted by the Respondent to the Applicant. The genesis of the dispute between the parties primarily arises from an interpretation of the above quoted extract from the appointment letter and more specifically as to when payment would be both due and payable.
6. The Applicant contends that it rendered services in accordance with the agreed fees and tariffs for the Respondent from 2016 until 2021. The Applicant contends that the Respondent is indebted to the Applicant in the total amount of R576 227.80 in respect of services rendered by the Applicant, plus interest, in terms of the agreement between the parties.
7. The Applicant delivered statements and invoices in respect of the above services, but payment in full was not received from the Respondent. The Applicant contends that the Respondent made payments on the account statement in respect of invoices 1 to 10, and a partial payment on statement 11 in the total amount of R1 494 563.31. The Applicant further contends that an amount remains outstanding of R576 227.80 which is a claim comprised of invoices 11 to 17 which, the Applicant claims, was never settled by the Respondent.

The service of the section 345 demand:

8. The Applicant further complains that the Respondent ignored pertinent correspondence directed to it in respect of the outstanding amount and also failed to respond to the Section 345 (1973 Companies Act) notice which was duly served at the Respondent's registered address. The facts that such correspondence was sent, not replied to and further that the Section 345 notice was duly served and not replied to, was not denied. The Respondent indicated that the reason for failure to respond to the Section 345 notice was that it did not receive it. The Respondent did not elaborate much further than that on this issue.
9. In argument Ms Louis correctly conceded on behalf of the Respondent that the service of the Section 345 notice was proper.
10. In respect of the further affidavits filed by the respective parties, both of the respective parties indicated that they had no objection in respect of the admission of those affidavits and consequently leave was granted for the admission of such evidence.

The crux of the opposition to the application:

11. The main thrust of the opposition to the application can be summarised as follows:

- 11.1. non-compliance with the provisions of the 1973 Companies Act;
- 11.2. that the Respondent has presented a bona fide defence against the Applicant's claim; and
- 11.3. that the application is an abuse of process, worthy of a punitive cost order.

The certificate of security:

12. In the answering affidavit the Respondent contended that the

Applicant failed to comply with Section 346(3) of the 1973 Companies Act by failing “to issue its certificate of tendered security and security bond 10 days prior to the date of the application as required in terms of Section 346(3) of the “1973 Companies Act”.

13. A proper certificate of security was uploaded before the matter was heard by this court. Ms Louis on behalf of the Respondent correctly abandoned the point. Such a concession was rightly made, taking note of the authority in *Court v Standard Bank of SA Limited; Court v Bester* N.O. [1995] ZASCA 39; 1995 (3) SA 123 (AD) where the then apex court held at 131B that “all that is thus required by the sub-section is that security must have been given before the matter is heard and that the certificate shall then accompany the application”.

See also: *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) at par 9.

Non-compliance with the Companies Act:

14. During argument two further issues were raised in respect of

non-compliance with the requisites of the 1973 Companies Act. The first being that there was no proof of service on the Respondent

uploaded to Caselines. The Applicant’s counsel produced a return of service which confirmed that such service did in fact occur and consequently that point was abandoned. In any event, the Respondent could not be heard to suffer any prejudice insofar as it fully opposed the application, was quite clearly aware of the matter and presented full argument on the merits of the matter.

15. Secondly, that in respect of service on SARS by way of e-mail,[2] that the Practice Directives of this court require that the compliance affidavit should also attach a copy of the read received

report. No such copy of the read receipt report was attached to the compliance/service affidavit. There is however a proper affidavit dealing with service from the Applicant’s attorney which states under oath that he was personal knowledge of the content of that affidavit and, in paragraph 3.2 thereof, confirms that service of the application together with all of the annexures occurred on the office of the South African Revenue Service on 22 April 2022 as is evident from annexure “JD2” thereto. The affidavit attaches a copy of an e-mail sent to SARS.

16. Mr Louw, on behalf of the Applicant submitted that there is therefore clear evidence before the court of compliance, that such evidence should be accepted (implying that the non-compliance with the practice directive can and should be condoned in the present circumstances)

and further, that any risk that SARS did not obtain knowledge of the application could be remedied by way of a provisional order also dealing with service.[3] Be that as it may I am satisfied that the Applicant has complied and that the non-compliance with the practice directive, in this case, should be condoned.

The onus and test whether the dispute of the claim is bona fide:

17. In *Gap Merchant Recycling CC v Goal Reach Trading* 55 CC 2016

(1) SA 261 (WCC) Rogers J comprehensively summarised the legal test to be applied to establish if a claim is bona fide disputed on reasonable grounds at 267 to 271 as follows:

“The legal test — disputed claims

[20] 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. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the 'Badenhorst rule', after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C. A distinction is thus 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 respondent's liability, on the other hand, the question is whether the applicant's claim is disputed on reasonable and bona fide 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 (*Payslip Investment Holdings CC v Y2K Tec Ltd* 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 (*Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D – 219C).

[21] There was some debate before me as to how far a respondent need go in order to discharge the burden of proving that a debt which is prima facie due and payable is bona fide disputed on reasonable grounds. Both parties referred me to statements made by Thring J in *Hülse-Reutter supra*. It is desirable that I quote fully what the learned judge said at 219F – 220C:

'I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claims, and do so bona fide, which is now common cause, what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, in this matter, have to prove the company's defence in any such

proceedings. All they have to satisfy me of is that the grounds which they advance for their and their company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such a trial. This is not an application for summary judgment in which, in terms of Supreme Court Rule 32(3), a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits the material facts relied upon therefor... It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide, and I must emphasise again that their bona fides are not here disputed, to allege facts which, if approved at a trial, would constitute a good defence to the claims made against the company. Where such facts are not within their personal knowledge, it is enough, in my view, for them to set out in the affidavit the basis on which they make such allegations of fact, provided that they do so not baldly, but with adequate particularity. This being the case, they may, in my judgment, refer to documents and to statements made by other persons without annexing to their affidavits such documents or affidavits deposed to by such persons, subject of course to the qualifications which I have mentioned and, in particular, to the Court being satisfied, as it is in this case, of their bona fides.'

[22] As Mr Randall for the applicant emphasised, Thring J made it clear in this passage that bona fides was not in issue and that what he was discussing was the test for determining whether a respondent who has bona fide disputed the applicant's claim is doing so on reasonable grounds. Even in regard to reasonable grounds, the learned judge warned that it would not suffice to make bald allegations lacking in adequate particularity. His reference to hearsay evidence is not germane to the present case, because such facts as are relevant to the respondent's defence are within the personal knowledge of its deponent Muller.

[26] I see no reason for adopting a different approach when considering, in liquidation proceedings, whether the applicant's claim is bona fide disputed on reasonable grounds. Bona fides relates to the respondent's subjective state of mind, while reasonableness has to do with whether, objectively speaking, the facts alleged by the respondent constitute in law a defence. The two elements are nevertheless interrelated because inadequacies in the statement of the facts underlying the alleged defence may indicate that the respondent is not bona fide in asserting those facts. As Hülse-Reutter makes clear, the objective requirement of reasonable grounds for a defence is not met by bald allegations lacking in particularity; and, as appears from Breitenbach and El-Naddaf, bald allegations lacking in particularity are unlikely to be sufficient to persuade a court that the respondent is bona fide.

[27] The foregoing discussion treats the Badenhorst rule as laying down a rigid legal test: if the application is bona fide disputed on reasonable grounds, the application must as a rule of law be dismissed. That is far from being settled in our law. In *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) Corbett JA, after listing a number of decisions in which the rule in slightly varying formulations had been adopted, said the following (at 980F – I):

'This rule would tend to cut across the general approach to applications for a provisional order for winding-up which I have outlined above as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while at the same time the respondent established that its indebtedness to the applicant was disputed on bona fide and reasonable grounds. Whether the Badenhorst rule should be accepted then as an exception to the general approach relating specifically to the locus standi of the applicant as a creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the winding-up procedure by using it as a means of putting pressure on the company to pay a debt which is bona fide disputed (see the English case of *Mann and Another v Goldstein and Another* [1968] 2 All ER 769 at 775C – D) need not, however, be decided in this case. The point was not argued before us and, as I shall show, it seems to me that for various reasons the Badenhorst rule should not be applied here.'

[28] In *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd* [2012] ZAWCHC 43, which concerned the return day of a provisional liquidation, Binns-Ward J said the following in para 14 (footnote omitted):

'I am hesitant to accept the notion that the Badenhorst rule goes to standing. After all, as Corbett JA observed in *Kalil v Decotex supra*, at 980, it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent company in winding-up proceedings, while the respondent at the same time was able to establish that the claim was disputed on bona fide and reasonable grounds. The applicant in such a case would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The Badenhorst rule would thus seem to constitute a self-standing (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is bona fide disputed. Availment of the procedure in circumstances in which the Badenhorst rule applies can be an abuse of process. It is so, however, only when the creditor knew, or should reasonably have foreseen, that the debt was disputed on bona fide and reasonable grounds at the time of the institution of the proceedings.'

The expression of opinion in this passage, to the effect that the Badenhorst rule may not go to standing and that it is rather a self-standing and possibly flexible principle, received support by the full bench in *Nedbank Ltd v Zonnekus Mansions (Pty) Ltd*

[2013] ZAWCHC 6 para 43. A flexible approach, particularly at the provisional stage, also seems to have found favour with a full bench in Gauteng in *Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC* [2012] ZAGPJHC 211 paras 13 – 15."

The defence to the claim:

18. Ms Louis provided a spirited argument, the main thrust of which can be summarised as follows:

The Cap Argument:

19. The letter of appointment places a cap on the amount which would be paid to the Applicant of R1.5 million. (referred to herein as “the Cap Argument”) The Respondent contended in its supplementary affidavit that “in terms of the company records, there has not been any variation of the contract price and, accordingly, the Applicant has been paid the full R1.5 million they were contracted to execute the works for”.
20. The Respondent further states that it effected payment to the Applicant of the outstanding portion of the contract price in the amount of R5 463.93 and attaches a proof of payment for the latter amount on 30 January 2023.

21. The Argument is in fraught with certain challenges. The

Respondent’s initial version set out in the answering affidavit stated that it disputes the outstanding amount based upon the provisions of the letter of appointment. The Respondent explained this defence by pertinently stating in paragraphs 15 and 16 of the Founding Affidavit that:

“15. In light of the above, and as per the Letter of Appointment, the outstanding amount will become due and owing two (2) days after the Respondent is paid by the Employer, Randfontein Local Municipality.

22. It is submitted that the Employer has not effected payment of the outstanding amount and accordingly the outstanding amount is not due, owing and payable by the Respondent.”
16. The allegation in paragraph 9 of the Founding Affidavit that the Respondent is indebted to the Applicant in the claimed amount was not denied in the answering affidavit. The Respondent elected to respond to that allegation with the following:

“The contents of this paragraph are admitted insofar as the Applicant rendered services for the Respondent.”

17. The allegation in paragraph 13 of the Founding Affidavit that there is still an amount outstanding which was never settled by the Respondent is also not disputed. The Respondent curiously responds as follows thereto:

“The contents of this paragraph are admitted insofar as the fact that an amount is still due to the Applicant in terms of the project.”

18. Where the allegations made in the Founding Affidavit have not been denied, those allegations are for the purposes of the application accepted as correct. See: *Moosa v Knox* 1949 (3) SA 327 (N); *United Methodist Church of South Africa v Sokufundumala* 1989

- (4) SA 1055 (O) at 1059A; Ebrahim v Georgoulas 1992 (2) SA 151 (B) at 153D. Ms Louis sought to contend that the Answering Affidavit should be read as a whole and if this is done the admission should be disregarded. She was however constrained to concede that it would be hard to marry the admission to the later denial.

19. In Wightman t/a JW Construction v Headfour (Pty) Ltd [2008] ZASCA 6; 2008 (3) SA 371 (SCA) at 375F–376B held:

“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 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.”

20. The admissions made by the Respondent initially, is at variance with the later denial by the Respondent that it is indebted at all to the Applicant. It is rather difficult for the Respondent to contend first that the claimed amount has not become both due and payable, then that the amount is not due at all and to later to in the supplementary affidavit that all that was owed, the so-called Cap Argument, has been paid. There are also a several allegations which fall within the Respondent’s knowledge which is met with a curt denial or not directly answered to.
21. There is some merit in the submissions by Mr Louw that there appears to have been a metamorphosis of the Respondent’s version from the initial answering affidavit to the version contained in the supplementary affidavit. The initial version was that the amount would not be due and payable until the Respondent was paid by its employer. The concession was made that the Municipality had now fully paid and that no further payments were to be expected by the Respondent from its employer. The Respondent states in the supplementary answering affidavit, at paragraph 8, that:

“The Respondent is indebted to the Court and, following the reconciliation, it has come to our attention that we have received payment from the Municipality. I (sic) respect of the Droogheuwel Project.”

22. Mr Louw in his argument progressed to embracing the position that his client would only be entitled to payment two days after payment having been received by the Respondent from the Municipality. Mr Louw argued that it was now common cause that the Respondent had been paid which would effectively mean that the dilatory defence that the amount was not due and payable, fell away.
23. The Cap Argument holds an inherent flaw insofar as the argument in the answering and supplementary affidavits ignored that the so-called Cap was not R1.5 million, but R1.5 million plus VAT. It was conceded on behalf of the Respondent that the Respondent would therefore have to pay a total of the R1.5 million as well as the VAT thereon, respectively at 14% and 15% consequent upon the effective increase in the VAT rate on 1 April 2018. Even if calculated at 14% it would leave a difference of R210 000.00 which was not paid. The so-called Cap Argument presents no defence for this part of the Applicant’s claim. When asked about this, the Respondent’s counsel indicated that the Respondent clearly, with reference to the supplementary answering affidavit, presented its contentions under the “misapprehension” that the cap amount would be R1.5 million and disregarded the VAT which must also be paid.
24. The consequence is that the Cap Argument, insofar as it relates to the balance of the amount in respect of the full R1.5 million plus VAT can at best only present a defence (if any) in respect of a part of the so-called outstanding amount claimed by the Applicant. It still leaves and amount of at least R210 000.00. It was conceded that the balance was not paid.

The prescription issue:

25. The Respondent’s fallback position was that if the amounts were immediately due upon invoice, then the Applicant’s claims would have prescribed. There is some merit in the contention that insolvency proceedings do not have the intention of enforcing a debt as its primary object and therefore the launching of an application would not stay prescription.
26. On the facts of the matter the last invoice issued by the Applicant was issued on the 28th of February 2020 for an amount of R156 403.45. Mr Louw astutely pointed out that the answering affidavit, containing the admissions of the indebtedness, is dated 26 July 2022 which admission would amount to an acknowledgement sufficient to interrupt

prescription. It is correct that section 14 of the Prescription Act, 68 of 1969 provides for either an express or tacit acknowledgement of liability by a debtor as grounds for interruption of prescription.[4]

27. This being so, the claim that the Applicant's full claim has prescribed cannot succeed. This leaves the Respondent's purported defence in tatters, and it can be accepted that the Respondent is in fact indebted at least for R156 403.45 of the last invoice. As such the true gap is the one in the Respondent's

own version.

The inability to pay:

28. In terms of section 344(f) of the 1973 Companies Act, a company may be wound up if the company is unable to pay its debts as described in section 345 of the act.

29. Section 345(1) of the 1973 Companies Act provides that:

"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

- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) in the case of any body 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
 - (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
 - (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts." (Own underlining.)
30. A company's inability to pay its debts may be proved in any manner. Evidence that a company has failed on demand to pay a debt payment of which is due is cogent prima facie proof of inability to pay its debts:

"for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources"

See: Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd 1962 (4) SA 593 (D) at 597 per Caney J.

31. The mere fact that the value of a company's assets may exceed the amount of its liabilities does not preclude a finding that the company is unable to pay its debts: such a finding may be made if these assets are not readily realisable and the company has no funds with which to meet current demands if, in other words, the company is "commercially insolvent"; in the Rosenbach case supra at 597 Caney J stated:

"The proper approach in deciding the question whether a company should be wound up on this ground appears to me...to be that, if it is established that a company is unable to pay its debts, in the sense of being unable to meet current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency."

See also: Absa Bank Ltd v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C); Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 (WCC).

32. The Respondent also does not comprehensively deal with its own financial position with the candour which would be expected from a party against whom a winding-up order is being sought. The failure to make a full disclosure justifies a negative inference.
33. In Absa Bank Limited v Rhebokskloof (Pty) Ltd 1993 (4) SA 436 (C) the Court held at 440F - 441A thus:

"Turning to the merits of the matter, Mr Gauntlett contended that ABSA was entitled to a final winding-up order on the basis that Rhebokskloof was 'commercially insolvent'. The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up. As Caney J said in Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd 1962 (4) SA 593 (D) at 597E-F:

'If the company is in fact solvent, in the sense of its assets exceeding its liabilities, this may or may not, depending upon the circumstances, lead to a refusal of a winding-up order; the circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts.'

Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor as a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae*, to a winding-up order (see Henochsberg on the Companies Act 4th ed vol 2 at 586; *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662F).

34. A company is deemed to be unable to pay its debts if it meets the conditions set down in section 345(1)(a). As stated by Bosielo JA in the full bench decision of the Supreme Court of Appeal in *Lamprecht v Klipeiland (Pty) Limited* All SA 279 (SCA) (19 September 2014) at par 15:

"To meet the threshold laid down in section 345(1)(a) it is essential that an applicant prove three essential requirements. These are, first, that he or she is a creditor of the respondent for an amount not less than R100, secondly, which must be due and payable. In other words, the debt must be liquid. Third, there must be proof that, notwithstanding service of the section 345(1)(a) notice, the debtor has neither paid the amount claimed nor secured or compounded it to the reasonable satisfaction of the creditor."

35. The Applicant has proven the three essential requirements. In terms of section 345(1)(a), it is apparent that a creditor is entitled to apply for winding up of a company even if it appears to be solvent, the creditor as such is entitled to apply for winding-up and the company who has its own remedy that is, to pay the debt and if it persists in the non-payment, it may suggest inability to pay. (See: *Werksmans Incorporated v Praxley Corporate Solutions (Pty) Ltd* [2015] 4 All SA 525 (GJ) para 82.)

Conclusion:

36. The court is not satisfied that the Applicant has a bona fide defence against the claim. The way in which the Respondent has set out its version creates the distinct impression that the opposition to the application is contrived and disingenuous. The Respondent's versions are both fraught with contradictions

and discrepancies. In light of the above findings, and after consideration of all the relevant facts, the Court finds that the Applicant has made out a case for the granting of a provisional order.

37. Insofar as there has been non-compliance with the practice directive relating to the attachment of the read receipt in respect of the e-mail to SARS, such non-compliance is not material, and such the non-compliance is condoned.
38. The interest of justice in the present matter militates in favour of the granting of a provisional winding-up order.

The order:

39. Consequently, the following order is made:

1. The Respondent's supplementary affidavit is admitted.
2. The late delivery of the Respondent's Answering Affidavit is condoned.
3. The Respondent is hereby placed under provisional winding-up in the hands of the Master of the High Court, Pretoria.
4. That a rule nisi be issued, with return date 22 May 2024 at 10:00 or as soon thereafter as the matter may be heard, calling upon all interested parties, to show cause, if any, why the following final order should not be made:-

39.4.1. a final winding-up order is granted in respect of the Respondent; and

39.4.2. the costs of this application are costs in the winding-up of the Respondent.

5. That service of this order is to be effected as follows:-

5.1 by the Sheriff:

5.1.1 on the Respondent at its registered office;

5.1.2 on the employees of the Respondent; and

5.1.3 on every registered trade union that may be found to represent any of the employees of the respondent.

5.2 on the South African Revenue Service, Pretoria; and

5.3 by publication in The Citizen newspaper and in the Government Gazette.

6 The costs of this application will be costs in the liquidation of the Respondent.

RJ GROENEWALD (AJ)

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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For the Applicant: Adv NG Louw Instructed by: Dawie Beyers Attorneys For the Respondents: Adv C Louis Instructed by: C de Villiers Attorneys Matter heard on: 12 March 2024 - Court 8F

Judgment

date: 19 March 2024

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- [1] Which should be read with Item 9 of Schedule 5 to the Companies Act, 71 of 2008.
- [2] It was conceded in argument that at this stage SARS only accepts service by way of e-mail and no physical service is received by SARS.
- [3] There is some merit in this submission when considering *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* 2015 (2) SA 526 (SCA) albeit that that case primarily dealt with notice to employees.
- [4] *Pentz v Government of the RSA* 1983 (3) SA 584 (A); *Aussenkehr Farms (Pty) Ltd v Trio Transports CC* 2002 (4) SA 483 (SCA).
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