

SOUTH AFRICA / JUDGMENT

Payapp (Pty) Ltd and Another v Polanocol (Pty) Ltd and Others (Hulett and Others Intervening) (6482/2022) [2023] ZAWCHC 141 (8 June 2023)

[2023] ZAWCHC 141

COURT

Western Cape High Court, Cape Town

BEFORE

Meer

CASE / FILE NUMBER

6482/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Before the Hon. Ms Justice Meer

Hearing: 1 June 2023

Delivered: 8 June 2023

Case No: 6482/2022

In the matter between:

PAYAPP (PTY) LTD First Applicant BRIAN FRANCIS DALTON Second Applicant And POLANOCOL (PTY) LTD First Respondent RODNEY KENNETH BARTMAN Second Respondent CARLO JOHANN VILJOEN Third Respondent and TREVOR HULETT 1st Intervening Party ALAN MOORE 2nd Intervening Party KAREN MOORE 3rd Intervening Party ANTON NORTJE 4th Intervening Party HERDRIKUS JACOBUS VAN DIJK 5th Intervening Party CORNELIA JOHANNA ELIZABETH VAN DIJK 6th Intervening Party HERMAN WAAGMEESTER 7th Intervening Party ROBERT MACFARLANE 8th Intervening Party JOHANNES PETRUS VAN DER WALT 9th Intervening Party WILLEM JACOBUS FILMALTER 10th Intervening Party LYNDIA BOSHOF 11th Intervening Party FRIK DU PLESSIS 12th Intervening Party DOUWE BIJKER 13th Intervening Party RONEL KOK 14th Intervening Party PIETER VAN DEN BERG 15th Intervening Party NICOLETTE VAN DEN BERG 16th Intervening Party THOMAS HAWKINS 17th Intervening Party

JUDGMENT DELIVERED THIS 8 DAY OF JUNE 2023

MEER J

- [1] The Applicants seek a final order for the liquidation of the First Respondent, a provisional order having been granted on 23 September
2021. The Applicants bring the application as creditors of the First Respondent (“Polanocol”) as contemplated in Section 346(1)(b) of the Companies Act 61 of 1973. In addition, the Second Applicant (“Dalton”) brings the application as a member and shareholder of Polanocol under Section 346(1)(c) thereof. The claim of the First Applicant (“Payapp”) is for payment of the sum of R2 547 708.56 plus interest alleged to be the balance due pursuant to Payapp’s cancellation of a loan agreement. The claim of the Second Applicant (“Dalton”) is for payment of the amount of R2 600 000.00 plus interest, also alleged to be the balance due in terms of a loan agreement.
- [2] The Applicants contend that Polanocol is unable to pay its debts as envisaged by section 344(f) read with section 345(1)(c) of the 1973 Companies Act and that it would be just and equitable for Polanocol to be wound up as contemplated by sections 344(h) thereof and section 163(2)(b) of the Companies Act 71 of 2008.
- [3] Polanocol, the Second Respondent (“Bartman”) and the Intervening Parties oppose the final order on the following grounds:
- 2.1 They deny the Applicants’ claims against Polanocol;
- 2.2 The deeming provisions in section 345(1)(a) of the 1973 Companies Act (inability to pay one’s debt) are not activated; and
- 2.3 It would not be just and equitable for Polanocol to be wound up. The Third Respondent has not participated in these proceedings. Any reference to the Respondents in this judgment will thus be to the First and Second Respondents.
- [4] After the provisional winding up order was granted the Intervening Parties applied successfully to intervene and filed an answering affidavit to the Applicants’ founding affidavit. In Applicants’ replying affidavit thereto Dalton raised for the first time a further ground for the just and equitable winding up of Polanocol. This was to the effect that the entire business model of Polanocol contravenes the Share Block Control Act 59 of 1980 (“Share Block Act”) read with the definition of Agricultural Land in the Sub-division of Agricultural Land Act 70 of 1970 (“SAL Act”) and that its

continued functioning will be in contravention of the law. The Intervening Parties applied to strike out these further grounds. That application is conveniently dealt with in context after the background facts are set out below.

Background facts

- [5] The Applicants’ claims have their genesis in a project embarked upon in 2017 by Dalton, the sole director and shareholder of Payapp, and Bartman, to establish a self-sustaining residential community. For this purpose, they purchased Polanocol as a shelf company. Bartman and Dalton were appointed as directors of Polanocol and were equal shareholders.

Polanocol purchased a 1172ha farm named Dalbarton on the Cape West Coast for a purchase price of R10 million, for the purpose of selling portions thereof to persons who would form part of their envisaged self-sustaining residential community. According to the Applicants, R3,300 000.00 (three million three hundred thousand) of the purchase price was paid by Payapp on behalf of Polanocol, as a loan to the latter. This is refuted by the Respondents and Intervening Parties.

- [6] The Intervening Parties are investors who purchased portions of the farm and who reside thereon. They have also entered into contracts for the purchase of shares in Polanocol. Their shares in Polanocol enabled them to occupy designated stands on the farm Dalbarton at one share per 1000m².
- [7] Once investors had paid their purchase prices in full they were presented with shareholder's agreements which each shareholder as well as a representative of Polanocol signed. Bartman's answering affidavit states:

"There appeared to be some 70 investors who had paid in full for their shares in Polanocol. These investors have contributed (some have used their entire lifesavings) to the purchase price of the farm, the installation of services and the day-to-day running costs of the Dalbarton Community. Many of them already reside on the farm and take part in subsistence farming activities to maintain themselves. To the best of my knowledge they all wish to continue with the Dalbarton concept, to become shareholders in Polanocol, and to reside on the farm."

- [8] It is common cause that by 2021, the working relationship and mutual trust between Dalton and Bartman had deteriorated to such an extent that Dalton resigned from his position as director of Polanocol. Dalton however continues to reside on the farm. The Applicants' characterisation of their relationship as one of litigation and confrontation appears to be apposite. This, as the Applicants contend is evidenced by the interim protection orders they issued against each other and the spoliation order and interim interdict Dalton obtained against inter alia, Bartman in this court under case no: 6482/2022, which interdict was subsequently made final.
- [9] According to the Intervening Parties the breakdown in the relationship between Dalton and Bartman has however not deterred the Intervening Parties from continuing with the Polanocol project and continuing to reside in the self-sustaining community that has been established on the farm. Their view is that it was never the intention to conduct Polanocol as a partnership between Bartman and Dalton. It was at all material times intended that further shares would be issued to investors and they would have input in future decisions pertaining to Polanocol. Unlike Bartman and Dalton, the community on the farm is not so divided that it cannot function, they say.

Application to strike out in terms of Rule 6(15):

- [10] The intervening parties seek the striking out of the following portion of the Applicant's replying affidavit to the Intervening Parties' opposing affidavit of Brian Francis Dalton dated 15 May 2023, on the basis that the paragraphs and documents contained therein constitute a new case that is sought to be made out in reply, and allegations that ought to have been made in the founding affidavit. They aver that the Intervening Parties are prejudiced by their inclusion: Paragraphs 9-26 thereof and Annexure RA1 to RA6.
- [11] The impugned sections in the replying affidavit introduced a further basis for the just and equitable winding-up of Polanocol. This, as aforementioned is that the entire business model of Polanocol contravenes the Share Block Control Act read with the definition of agricultural land in the SAL Act and that its continued functioning will be in contravention of the law. This, the Applicants categorised as an anterior issue to be addressed, contending moreover that this Court could not ignore the alleged illegality and was constitutionally bound to uphold the law.
- [12] In *Mostert and Others v Firststrand Bank t/a RMB Private Bank and another*[1] 2018(4) SA 443 (SCA) at paragraph 13 Van der Merwe, JA stated the following:

"It is trite that in motion proceedings the affidavits constitute both the pleadings and the evidence. As a respondent has a right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional cases allow new matter in a replying affidavit. . . In the exercise of this discretion a court should in particular have regard to: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter would result in unnecessary waste of costs."

- [13] Mr Jonker for the Applicant submitted that the replying affidavit did not introduce a new ground or cause of action for the liquidation of Polanacol. The Applicants had always relied upon the just and equitable ground of liquidation. The impugned paragraphs in the replying affidavit, he stated were in answer to the Intervening Parties' just and equitable defence. Their answering affidavit alleged that they had bought shares, share certificates as attached had been issued, that they had valid shareholder agreements and as shareholders they could break the deadlock. This, he submitted caused the Applicants'

focus to shift to the question of legality.

- [14] The Applicants' reliance upon the illegality of the shareholders' agreements and Polanacol's business model only became apparent, he contended, after the delivery of the Intervening Parties' intervention application and answering affidavit in which they asserted their right as shareholders based on the shareholders' agreements. Dalton, he said, was aware that the shares could be sold but he was not aware of the issue pertaining to the illegality of the shares. In reply

Dalton refuted the Intervening Parties' reliance upon the shareholders' agreements by demonstrating that they are void. The replying affidavit, he submitted, enlarged upon what was revealed in the answering affidavit.

[15] I note that this application was launched on 2 March 2022. The founding affidavit indicates that at that stage, Dalton was aware of the subject of unlawful issuing of shares. Although he raised this pertinently in relation to a special resolution approving the issue of shares to a director, he was nonetheless alive to the issue of unlawfulness pertaining to shares. The founding affidavit also notes that the shareholders' register records 84 shares had been issued to some 40 purchasers. It also refers to the unlawful issuing of shares to Bartman and Viljoen.

[16] It is also so that as of March 2022 shareholders' agreements had already been signed. Bartman's answering affidavit states that Dalton himself executed shareholders' agreements with several investors and accepted payment of their funds. One such agreement is alleged by Bartman to have been executed by Dalton and concluded with Trevor Bruce Hulett. I pause to mention that whilst this is not refuted or responded to in the replying affidavit of Dalton to Bartman's answering affidavit, it is later on refuted by Dalton in reply to the Intervening Parties' affidavit.

[17] Paragraph 15.5 of Hulett's share agreement which is a standard clause in all the sale of shares agreements states as follows:

"the purchaser recognises that the current legislation in South Africa severely restricts the ability to form a small scale farming

community on agricultural zoned land and accepts that the seller is not liable for any restriction by the government placed on the seller."

This is a further indication of Dalton's being alive to some of the questions pertinent to illegality which he claims not to have been aware of prior to the Intervening Parties' answering affidavit being filed. Sale of shares agreements were executed at a time when he was a director and his mere say so of ignorance as to the contents thereof is so improbable as not to be countenanced.

[18] Then too there is a circular by Dalton dated 25 May 2020, Annexure AA2.1 to the answering affidavit of Bartman which states:

"So we had to then work within the constraints that agricultural zoning allows so after many discussions with many CA's and legal people (it's amazing how few are willing to get involved with a movement like ours going for self-determination, so finding the right one takes time) we thought the best way is shares and . . ."

This too suggests that at the commencement of these proceedings Dalton was engaged with issues related to the new matter raised in reply to the Intervening Parties' answering affidavit and would have been alive to it.

- [19] Dalton would have one believe that in establishing the Polanacol business model which was based on the sale of shares to investors like the Intervening Parties, and resulted in a slew of shareholders' agreements being signed, no heed was paid to the validity of the shareholder agreements or the legality of the Polanacol business model. It is common cause that these agreements were signed when he was a director and that he was engaging "legal people". His claim not to have been aware of the illegality issue at the commencement of these proceedings, thus wears thin.
- [20] His attempts to distance himself from the sale of shares agreements by claiming he did not draft them, suggesting his signature may have been forged, alternatively that he did not remember signing, as he did in reply to the Intervening Parties' answering affidavit, is aptly categorised by the intervening parties as astounding. There is no evidence apart from his say so to back up his averment of ignorance as to the legality of the Polanacol business model or the shareholders' agreements until he was alerted thereto by the Intervening Parties' claiming that the shareholders' agreements were valid. On the contrary, the pleadings suggest otherwise. It is no answer, as submitted by Mr Jonker, that Dalton was aware that the shares could be sold but he was not aware of the legality of the shareholders' agreement.
- [21] The issue of illegality is clearly a new matter that was introduced, notwithstanding it being brought under the just and equitable heading. The illegality of the Polanacol business model and the validity of the shares with reference to the Share Block Act and the SAL Act was not a case that the Respondents were required to meet in the founding affidavit.
- [22] I accordingly am of the view that the new matter pertaining to illegality would in all probability have been known to Dalton, the co-architect of the Polanacol business model, when the application was launched. The new matter, if allowed, will certainly prejudice the Respondents in a manner which could not be put right by orders in respect of postponements and costs. The disallowance of the new matter will not result in unnecessary waste of costs. – I note also that Mr Crookes for the Intervening Parties did not concede that all the facts necessary to determine the new matter were placed before Court.
- [23] Insofar as the Applicants motivate for the inclusion of the new matter as a just and equitable basis for winding up on the basis of the illegality of a business model that Dalton himself engineered, justice and equity in my view militates against this. For this would permit Dalton, who, on his version engineered an illegal scheme, to take advantage of its illegality for his sole benefit and to the disadvantage of the Respondents and Intervening Parties. There would be nothing just and equitable in obtaining a winding up by the inclusion of the new material. It ill behoves Dalton in the circumstances, having created the alleged illegality to now to seek to include it as a new basis for the winding-up.

- [24] It is trite that an Applicant who relies on justice and equity as a ground for winding-up must come to court with clean hands, in the sense that he or she must not have been wrongfully responsible for, or have connived at bringing about the state of affairs which is asserted results in it being just and equitable to wind up the company. See *Emphy and another v Pacer Properties (Pty) Ltd*[2], *Wackrill v Sandton International Removals (Pty) Ltd*. [3] Dalton does not fit this mould.
- [25] The application to strike out is accordingly granted.
- [26] Given that the application to strike out has been granted, the introduction of the further basis for the just and equitable winding up of Polanocol based on the illegality of the business model for contravention of the Share Block Control Act and the SAL Act 1, cannot be entertained.
- [27] Motivating for the inclusion of the new matter, Mr Jonker correctly submitted that this Court is constitutionally bound to uphold the law and cannot ignore an illegality. To this end I intend drawing the alleged illegality to the attention of the DPP for investigation on the basis of criminal offences in terms of section 11 of SAL Act and section 21 of the hare Block Act. A copy of this judgment shall be sent to the relevant office of the DPP. It shall also be sent to the Company and Intellectual Property Commission. Section 81(f) of the Companies Act 71 of 2008 enables the Commission to apply to wind-up a company if it is acting in an illegal manner.

Payapp's claim:

- [28] Payapp's claim arises from an alleged oral loan agreement for the sum of R3,300 000.00 (three million three hundred thousand) which Dalton claims was lent to Polanocol to finance the balance of the purchase price of the farm. In this regard it is alleged that Polanocol is indebted to Payapp in the total sum of R2 547 708.56 together with interest calculated from 4 February 2022. Dalton's founding affidavit states that on 19 May 2020, Polanocol, represented by Bartman and Dalton entered into an oral loan agreement with Payapp for a loan of this amount. It was agreed that Polacocol would repay the capital sum as and when it was able to raise funds. The parties discussed formalising the loan agreement in writing but this did not happen.
- [29] Dalton states that voice recording transcripts of a meeting between Dalton and Bartman on 25 January 2021 and WhatsApp exchanges between Dalton and Bartman of 23 and 24 February 2021, quoted verbatim in the founding affidavit evidence the loan by Payapp. As the full voice recordings and a transcript thereof were not produced for inspection pursuant to a Rule 35 (12) notice by the Intervening parties, these cannot be relied upon. See *Democratic Alliance and Others v Mkhwebane and Another*. [4]
- [30] Bartman's answering affidavit denies the loan by Payapp, and avers that the balance of the purchase price was financed by way of verbally agreed personal loans by him and Dalton each in the sum of R1,5million. In his supplementary answering affidavit, he states that he

appointed chartered accountantso investigate Polanocol's financial affairs. They considered the statement of the attorneys who transferred the farm, Polanocol's FNB account and EG Elliott Trust Account and concluded that they were unable to locate any proof that Payapp actually paid the amount of R3,300 000.00 to Polanocol on its behalf. Based on their findings the Respondents deny Payapp's claim.

- [31] Balance sheets of Payapp dated between June to October 2020. contends Bartman, do not reflect any loan to Polanocol. Dalton counters in reply that these are a "snapshot" of Payapp's cash and gold investments on a specific date and time and do not reflect its total assets and liabilities.
- [32] Further in reply, Dalton relies on various proofs of payments and extracts from bank statements to substantiate the allegation that Payapp paid R3 300 000 towards the purchase price of the farm. The Respondents contend that this merely shows that the various bank accounts that were utilised by Payapp to administer its online payment platform were also utilised to make payment of the purchase of the farm. They aver that despite what is suggested in reply, the supporting documents on which the Applicants rely do not prove that Payapp's funds were used to pay for the farm. Instead the documents support the Respondents' version that Polanocol's funds held in the Payapp account were used to pay the balance of the purchase price.
- [33] A further dispute pertaining to this loan is raised by the Intervening Parties. The dispute they raise is whether the sum of R3,3 million was a withdrawal from Polanocol of investors' funds that had been paid into its Payapp account from the EG Elliott Trust during October 2019 to April 2020, or whether it was a loan by Payapp as contended by the Applicants.
- [34] In this regard the founding affidavit in the Intervention application of Mr Nortje states that before July 2020, all the Intervening Parties' payments to Polanocol were paid to the EG Elliot Trust account and after the first half of the purchase price for the farm was paid, the sum of R6 092 million of investor funds had been transferred from the EG Elliott Trust to Polanocol's Payapp account. They were held by Payapp but were Polanocol's funds. Each of the payments identified by Dalton in his supplementary replying affidavit, being the advance of R3,3 million to the Payapp loan account, was for amounts credited to the Polanocol Payapp account. The R3,3 million he contends therefore is not a loan from Payapp but a withdrawal by Polanocol of investors' funds that had been paid into the Payapp account.
- [35] This is denied in reply by Dalton who contends that Polanocol did not have funds to pay the entire purchase price and that Nortje did not factor in all the farm expenses. He further states with reference to a reconciliation, that after payment of R5 million to the transferring attorneys, Polanocol had a positive balance in the Elliot Trust Account of R12million and a negative balance of - R3 268 697.41 in its Payapp account. This reflected the R3,3 million loan.

- [36] The Respondents contend that the reconciliation is not supported by any vouchers and is contradicted by the Respondent's independently verified reconciliation which reflects that immediately after the purchase price was paid, Polanoncol's Payapp account had a credit balance of US\$14,143.25.
- [37] Then there is a further dispute concerning the reconciliation of Polanocol's account with Payapp. The founding affidavit of the intervening party states that after reconciling payments against deposits, Polanocol's account with Payapp had a balance of US\$36 843.69 in favour of Polanocol. In the light of this reconciliation it cannot be said Payapp has established itself as a creditor.
- [38] In reply, Dalton states that the total credit deposits in Polanocol's Payapp account equals US\$927985.50 (\$10 88020.71 minus Payapp's loan of US\$160 036.21). Considering that the total payments from Polanocol's Payapp account was US\$1051177.02, the balance of the account as at 22 June 2021, would have been minus US\$123 192.52. This shortfall was financed with the Payapp loan to Polanocol.

Dalton's claim

- [39] Dalton's claim as aforementioned is for payment of the amount of R2 600 000.00 plus interest, alleged to be the balance due for a loan to Polanocol as agreed.
- [40] Bartman's supplementary answering affidavit admits the conclusion of the agreement between him and Dalton but denies Dalton's contention that he only received payment of R400 000.00. He states Dalton received payment in the net amount of R794491.40 and annexes how this is calculated in annexure "AA8". In reply Bartman's calculation is rejected. Dalton points out that it is an error to apply the full R50 000.00 monthly payment in the reduction of the outstanding capital. This is because the R50 000-00 monthly payment, he alleges comprises R25 000-00 interest and R25 000-00 capital. A deduction of only R25 000-00, on each payment reflects that only R400 000-00 had been paid leaving a balance of R2.6million. Dalton points out in reply moreover that annexure AA8 reflects three journal entries which are not payments and of which he has no knowledge.
- [41] Bartman moreover alleges in his supplementary replying affidavit that the following amounts must be deducted from Dalton's loan account:

41.1 R2 440 169.00 and R54801.00, alleging that on 19 and 20 May 2020 respectively Dalton paid himself these amounts respectively. These transactions are reflected on the transaction schedule on Polanocol's Payapp account being annexures AA6.

41.2 Dalton denies this in reply stating these amounts represent payments that he made on behalf of Polanocol. The dates and amounts of these expenses are set out in documents annexed to the supplementary replying affidavit being annexures RA9 and RA10. In respect of the refund of R54801.00, Annexure RA9, he contends is a summary of Polanocol expenses that were paid from Mezogen's Nedbank account being one of Payapp's accounts as alluded to above. Annexure RA9 he contends reflects that there is still a shortfall owing to him in the sum of R2600.51. In

respect of the refund of R244 169.00, Dalton attaches a reconciliation setting out the calculation of this amount marked RA10.

[42] Bartman moreover avers that the amount of R810 0002.59 must be deducted from Dalton's loan account by applying set-off. Dalton denies in reply that this amount may simply be set-off against his loan account. At best for Bartman, Polanocol may have a counterclaim against him which is denied.

[43] Dalton contends that even accepting Bartman's new allegations in his supplementary answering affidavit, Polanocol would remain indebted to Dalton in the sum of at least R1210538.60, calculated as follows:

41.1 Dalton's loan account R3000000.00;

41.2 Dalton's personal loan account to Polanocol to finance the shortfall in the purchase price of the farm R1500000.00.

41.3 Less the total amount to be deducted from the loan account on Bartman's version being payments received from Polanocol towards his loan account, being R3289461.40.

41.4 Total R1210538.60

[44] The Intervening Parties dispute both loans to Bartman and Dalton, they dispute whether these are valid loans and take issue with the fact that the interest rate is not explained. They contend that in February 2020 when the agreement between Bartman and Dalton was struck, Polanocol had already taken significant amounts of investors' money. It was not a two-member company in respect of which the two of them could simply assign themselves loan claims. Before any amounts are acknowledged, they contend these agreements will have to be proved and it will have to be shown that the company got value commensurate to the loans. They dispute and deny that the company has received such value and further contend that Dalton's claim is not real. The financial statements they contend make no mention of these loans. These averments are not responded to by Dalton in reply.

Polanocol's commercial insolvency

[45] The Respondents submit that the Applicants have attempted to supplement their case in reply by referring to Polanocol's alleged commercial insolvency and relying on section 344(1) (c) of the 1973 Companies Act as a further ground for liquidation. They point out that Dalton makes no allegations in his founding affidavit concerning Polanocol's commercial insolvency or even its financial affairs generally.

[46] The Intervening Parties addressed the financial state of Polanocol in their founding affidavit pointing out that Polanocol's 2022 financial statements show that:

Polanocol has equity of R17,659,129.

It has sufficient cash of R26 4696 to meet its liabilities of R101, 094.

Assets to the value of R18 373 057.

This is not replied to. The Respondents additionally point out that Polanocol has assets to the value of R18 373 057 and cannot be deemed to be unable to pay its debts.

Discussion: disputes about the existence of the debts.

[47] The above clearly indicates that the pleadings are replete with disputes of fact in abundance. These being application proceedings, the Plascon Evans test applies.[5] It would be well to remind ourselves that the relief sought can only be granted if I am satisfied that the facts alleged by the Respondents together with the facts alleged by the Applicants which the Respondents admit, justify the relief. A denial by the Respondents may only be disregarded if I am satisfied that it does not raise a real, genuine or bona fide dispute of fact and I am satisfied as to the inherent credibility of the Applicant's factual averments.[6]

[48] In *Wightman t/a JW Construction v Headfore (Pty) Ltd and another*[7] at paragraph 13 it was said:

"A real, genuine and bona fide dispute of fact can exist only when 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."

I am of the view that the Respondents and Intervening parties have done just so in respect of the facts they are disputing. They have indeed seriously and unambiguously addressed the disputed facts pertaining to Payapp's and Dalton's claims against Polanocol as well as the latter's commercial insolvency.

[49] In *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[8], the well-known Badenhorst rule was articulated namely, that the procedure for winding-up is not designed for the resolution of

disputes over the existence or non-existence of a debt, and therefore winding-up proceedings are not appropriate, and ought not to be resorted to, in order to enforce the payment of a debt, the existence of which is bona fide disputed by the company on reasonable or substantial grounds.

[50] *Hiemstra, AJ* stated at 347 H -348C:

"A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order."

[51] In *Kalil v Decotex (Pty) Ltd and another*[9], *Corbett, JA* stated:

*“Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds. Though not always formulated in exactly the same terms this rule appears from decisions such as *Badenhorst v Northern Construction*For convenience I shall refer to this as the *Badenhorst* rule. This rule would tend to cut across the general approach to applications for a provisional order of 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.”*

- [52] The Respondents and Intervening Parties have shown on a balance of probabilities that their indebtedness to the Applicants is disputed on bona fide and reasonable grounds. This in my view is a classic instance where winding-up proceedings ought not to have been resorted to, in order to enforce the payment of the debts in question, the existence of which are bona fide disputed on substantial grounds. Given the breakdown in the relationship between Dalton and Bartman, and the denial of the debts, the myriad disputes should have been foreseen and the application should not have been proceeded with.

Just and Equitable Considerations

- [53] The Applicants contend that a deadlock and a complete breakdown of the relationship between Dalton and Bartman is sufficient evidence to conclude that it is just and equitable that Polanocol be wound up. They aver that it would be an impossible task to apportion blame for the breakdown of Bartman and Dalton's relationship. No one party they say is solely at fault, and both contributed to some extent to the breakdown of the relationship. They characterise the relationship between these two as one of litigation and confrontation as is evidenced by interim protection orders issued against each other and the spoliation order and interim interdict Dalton obtained against inter alia Bartman.
- [54] As aforementioned, an Applicant who relies on justice and equity as a ground for winding-up must come to court with clean hands. In *Emphy and another v Pacer Properties (Pty) Ltd*[10]) it was said at 368G-369A:

“A petitioner who relies on the just and equitable clause must come to court with clean hands: if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish to continue...the impossibility must not be caused by the person seeking to take advantage of it.

. . . an applicant that relies on the just and equitable provision must not have been wrongfully responsible for the situation which has arisen... I am satisfied that the mere existence of a deadlock does not per se entitle an applicant to a winding-up order under the just and equitable provision. What requires to be emphasised is that the court is concerned with what is just and equitable and not whether there is a deadlock or not.”

[55] The Respondents contend that Dalton was the cause of the breakdown and therefore is not approaching the court with clean hands. In this regard they contend that Dalton purported to remove Bartman as vice president after declaring himself president of the self-sustaining community, Dalton formed a faction with several Dalton investors and residents and they did everything in their power to make life on Bartman as difficult as possible, Dalton backdated and executed a loan agreement on behalf of Polanocol when he had no authority to do so. This is disputed by Dalton who however concedes that it is impossible to apportion blame between him and Bartman, some blame does attach to him.

[56] As stated in *Emphy supra*, the mere existence of a deadlock is not sufficient for a winding up order. What I am required to be concerned with, is what is just and equitable and not only whether there is a deadlock between Dalton and Bartman, the mere existence of which, per se does not entitle the Applicants to a winding up order. In this regard, the pleadings illustrate that Polanocol is not a small company akin to a partnership between Dalton and Bartman. It is a company with several investors to whom shares have been sold, with whom shareholder agreements have been concluded and share certificates issued, in return for a place to live as part

of a community on the farm Dalbarton. The founding affidavit of Nortje in the Intervening Application aptly states that their lives

should not be held hostage to the disagreements between Dalton and Bartman. As is contended by the Intervening parties, no case is made out that the community is divided and cannot survive. It is only the relationship between Bartman and Dalton that is identified as problematic. I agree that to simply ignore these facts and conclude that because of the disagreements and disputes between Dalton and Bartman, the company should be wound up, would be an act of injustice and inequality.

[57] In view of all of the above the Applicants have not made out a proper case for the winding up of Polanocol. I grant the following order:

1. The Application is dismissed
2. The Provisional Order of Liquidation is discharged;
3. The Applicants shall pay the costs of the First and Second Respondents and the costs of the Intervening Parties on the scale as between party and party.

MEER, J

Adv for Applicant: W Jonker Instructed by Van der Spuy per CH van Breda Adv for Respondents: L van Dyk Instructed by Geldenhuys Jonker Inc. Adv for Intervening Parties: T Crookes Instructed by Ebersöhns Attorneys

[1] 2018(4) SA 443 (SCA) para 13.

[2] 1979(3) SA 363 (D) at 368.

[3] 1984(1) SA 282 (W) at 292.

[4] 2021

(3) SA 403 (SCA) para 41.

[5] See Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634I-635B.

[6] Above at 634I-635B

[7] 2008(3) SA 371 (SCA).

[8] 1956(2) SA 346 (T) at 347.

[9] 1988(1) SA 943 (A) at 980 A-H.

[10] Above at 2.

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