

SOUTH AFRICA / JUDGMENT

True North Holdings (Pty) Limited and Another v M D Individually Designed Handcrafted Jewellery (Propietary) Limited (41251/2019) [2020] ZAGPJHC 373 (25 November 2020)

[2020] ZAGPJHC 373**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

41251/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: 41251/2019****DATE:**25th
November 2020
In**the matter between:**TRUE
NORTH HOLDINGS (PTY) LIMITED First
Applicant
RAMICULAS
PROPERTY CC
Second
Applicant
and
M D INDIVIDUALLY DESIGNED
HANDCRAFTED
JEWELLERY (PROPIETARY) LIMITED Respondent**Coram:**

Adams J

Heard:27 May 2020 – The ‘virtual hearing’ of the
application was conducted as a videoconference on the Microsoft
Teams digital platform.

Delivered:	25 November 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 25 November 2020.
Summary:	Liquidation – Company – Application for final winding-up order on the grounds that the respondent company is unable to pay its debts within the meaning of s 344(f), read with s 345(1)(c) and s 344(h) of the Companies Act 61 of 1973 – whether applicants are creditors of the company and whether their claims are bona fide disputed on reasonable grounds (the Badenhorst rule) – factual disputes to be decided on the basis of the Plascon Evans principle – application dismissed – ORDER (1) The first and second applicants' application for the final liquidation of the respondent is dismissed with costs. (2) The provisional winding-up order issued on the 3rd of February 2020 be and is hereby discharged. (3) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of this opposed winding-up application.

JUDGMENT

Adams J:

[1]. This is the extended return date of the rule nisi issued on the 3rd of February 2020 in terms of which the respondent and all other interested parties were called upon to show cause and put forward

their reasons on or before the 30th of April 2020 why a final order for the winding-up of the respondent should not be granted. On the said date, viz the 3rd of February 2020, a provisional winding-up order was also granted against the respondent company.

[2]. The first and second applicants seek a final winding-up order against the respondent. The first applicant is the Holding Company of the Cash Converters Group of Companies, which carries on business in the pawn industry and also in the purchase and resale of second hand goods business, and the second applicant is a related property owning company. The respondent carries on business as a specialised jeweller, which business includes the valuation, assessment and refurbishment of jewellery as well as the purchase and resale of second hand jewellery.

[3]. The applicants seek the winding up of the respondent company on the grounds that it is unable to pay its debts within the meaning of s 344(f) read with s 345(1)(c) of the Companies Act, Act 61 of 1973 ('the 1973 Companies Act'). The applicants also allege that it is just and equitable that the respondent be wound up in terms of s 344(h) of the 1973 Companies Act. The case of the applicants is that the respondent is deemed to be and is factually unable to pay its debts.

[4]. The first applicant claims that the respondent is indebted to it (the first applicant) in an amount of R1 039 035.11 being in respect of monies lent and advanced by the first applicant at the special instance and request of the respondent. This total amount, so the first applicant contends, consists of individual amounts of expenses incurred by the respondent and which amounts were paid by the first applicant on behalf of the respondent. These expenditures were incurred by the respondent and paid on its behalf in circumstances to which I shall revert to later on in the judgment. Suffice to state at this stage that, according to the first applicant, these itemised expenses should have been credited in the books of account of the respondent to the first applicant's loan account with the respondent. As regards the second applicant, it claims from the respondent an amount of R170 719.01, allegedly being in respect of arrear rental and ancillary charges due and payable by the respondent to the second applicant in terms of a commercial lease agreement between the respondent and the second applicant in relation to the former's business premises.

[5]. The respondent disputes liability to the applicants for these amounts. In essence the respondent avers that its alleged indebtedness to the first and second applicants is premised on assumptions that a 'joint venture' between the first applicant and the respondent and its structure had been finalised and the exact details of such a collaboration agreed upon. Far from it, so the respondent contends – no agreement was reached on the structure of the business relationship and therefore the basis for the debt falls flat.

[6]. The applicants contend that there is no real and genuine factual dispute. The respondent's admitted indebtedness to them, so the applicants submit, is borne out by the books of account of the respondent, which confirm additionally that the respondent is factually insolvent.

[7]. It is trite that liquidation may not be used to enforce payment of disputed debts. It is not suitable to resolve complex factual disputes. See *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017

(12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) at para 154 and *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956

- (2) SA 346(T) at 347-348. Probabilities may not be the basis for factual findings unless the court is satisfied that there is no real and genuine factual dispute. Where the court finds that there is a real and genuine factual dispute incapable of resolution on papers, it can only dismiss the application if it finds that the applicant should have realized when launching the application that there was a

factual dispute. See *Adbro Investment Company Ltd v Minister of Interior* 1956

- (3) SA 345 (A) at 350A.

[8]. During 2018 the first applicant identified the opportunity of increasing the value of the jewellery its franchisees deal with by means of the services rendered by the respondent. It was then contemplated by the first applicant that the respondent, and its owners, Mr and Mrs Maack, would enable the franchisees to better assess the jewellery they deal with and to have an entity such as the respondent refurbish the jewellery so as to increase its value. Therefore, what the first applicant had in mind was the establishment of a 'jewellery processing centre', which would add value to the business of the first applicant, its group of companies and its franchisees. So, it should be borne in mind that the relevant transactions and related business arrangements were conceived by this idea with its primary purpose being the addition of value to the first applicant's business.

[9]. This is where the respondent and its owners entered the picture, and during October 2018 the first applicant met with them and agreed to work together towards the establishment of the 'jewellery processing centre', which, as already indicated, had as its main purpose the increase in value of that portion of the second applicant's business in the second hand jewellery field.

[10]. In the months following the initial approach by the first applicant to the respondent, more particularly Mr and Mrs Maack, the parties discussed and considered the manner in which their business relationship would be structured. There was general agreement between the parties that a separate company, with Mr Maack, Ms Maack and the first applicant as shareholders, would be formed and which would house the 'jewellery processing centre'. In this context, Mr Maack indicated that his company, the respondent, was available and proposed that it be used for that purpose. Towards the end of 2018 and the beginning of 2019 steps were put in place to give effect to this general consensus on the collaboration – also referred to a 'joint venture' by the respondent.

[11]. All the same, the respondent, as the entity and the vehicle through which the business of the new entity was being conducted, then conducted itself as such. By then though agreement on the exact details of the contractual and legal arrangements had not yet been finalised. In the end no agreement could be reached on the details relating to the relationship. Mr Maack was not prepared to sign the legal documents which would have regularised the legal relationship between Mr and Mrs Maack and the first applicant, whether that be in a new company or in the respondent company. That then meant that the whole arrangement fell flat – as did the basis on which the respondent had been used as the vehicle for the 'joint venture' and any and all liability to the first applicant.

[12]. So, for example, Mr Maack travelled extensively throughout South Africa to meet with the franchisees. All of Mr Maack's travel and accommodation expenses were paid by the first applicant and the total of those travel and accommodation expenses were charged to the respondent. The total of those expenses amounted R14 912.58. This amount forms part of the total claim by the first applicant on which the winding-up application is based. The same principle applies to the rest of the itemised amounts charged by the first applicant to the respondent – such as the salaries of the employees of the respondent, which were paid by the first applicant and which it now claims from the respondent.

[13]. The first applicant's case is therefore that it lent various amounts of money to the respondent, by way of it paying the respondent's debts. The respondent denies this. The payments were made by the first applicant, so the respondent contends, not as respondent, but as the entity which was the vehicle used to implement the proposed business relationship in relation to the 'jewellery processing centre'.

[14]. The intention of the parties, so the respondent alleges, was that the jewellery processing centre would be set up for the benefit of the first applicant's Cash Converters Group of Companies to grow its business. This much is conceded by the first applicant, who in fact approached Mr and Mrs Maack with a suggestion that they collaborate in a venture, which had as its aim the optimisation of that portion of the business dealing in second hand jewellery – the idea being, according to the first applicant, to increase that portion of the business to 30%. It therefore stands to reason that the first applicant would, as contended by the respondent, be funding the project until such time as a joint venture vehicle had been established and created, which would then take over the debts and responsibilities arising from the project. However, until such time as the vehicle had been created the first applicant would be footing the bill.

[15]. The respondent therefore avers that there was never any intention – and certainly no agreement – that the respondent would borrow any amounts from the first applicant or any of the companies in its group. The respondent submits that on the evidence before me there is no loan agreement in terms of which the first applicant lent and advanced sums of money to the respondent. There was also no lease agreement between the second applicant and the respondent. I agree with these submissions – the probabilities favour such a finding on the facts, which also fits in with the conclusion that, all things considered, the intention of the parties was that the costs incurred in the project and leading up to the commencement thereof would have been for the account of the new company, which was mooted at that stage to be the respondent, with its ownership, shareholding, executive and management restructured as per agreement to be reached between the interested parties.

[16]. The point about this matter is that it was the first applicant's Group of Companies which required a workshop and a jewellery processing centre to be set up, with the assistance of Mr Maack, being the expert gemmologist and specialist jeweller, at which facilities jewellery would be valued, cleaned and restored. This was the first applicant's idea. So then, why would they not be liable for the costs and other expenses relating to the piloting of the project? I therefore find myself in agreement with the submission made by the respondent that it was always within the

contemplation of the parties that the first applicant would be funding the business. Mr Maack, in these circumstances, would not have agreed to the respondent renting the workshop, which was set up for the future business venture for the benefit of the first applicant and its Group of Companies. This conclusion is bolstered by the fact that no written lease or loan agreement was ever concluded. There is merit in the argument that the reason that there was never any written lease or loan agreement in existence bears testimony to the fact that no such lease or loan agreement ever came into existence.

[17]. The first applicant makes much of the fact that their version of events is corroborated by the books of account of the respondent for the relevant period from February 2019 to September 2019. It is so that from about March 2019 the first applicant's accountants started doing the respondent's books of accounting. However, as rightly pointed out by Mr Woodrow, Counsel for the respondent, this was done in expectation and on the assumption that Mr and Mrs Maack and the first applicant would conclude and finalize the agreement or agreements in terms of which the respondent would become the vehicle used to drive the first applicant's jewellery processing centre project. In the end, that was not to be and as things turned out, the respondent was not the possible 'joint venture vehicle' contemplated by the parties in their discussions and deliberations. I am therefore of the view that no significance can and should be attached to those documents.

[18]. The first applicant also relies on these books of account to demonstrate that the respondent is factually insolvent. These accounts include the debts in favour of the first and second applicants and on which this application for the winding-up of the respondent is based. As indicated, those books of account were in fact prepared on the assumption that the respondent was at that stage the entity which would house the jewellery processing centre. Those assumptions failed and therefor so does the factual conclusions on which they are based.

[19]. In sum, the first and the second applicants contend that the respondent's disputing of the amounts due to the first and second applicants is hollow and contrived. The respondent, on the other hand, argues that the applicants have failed to prove that they are owed the amounts claimed by the respondent. In any event, so the respondent contends, it has shown that the alleged debts owed to the applicants by the respondent are bona fide disputed on reasonable grounds.

[20]. The applicants seek a final winding-up order and the issues in summary are whether the applicants are owed the sums they claim by the respondent and whether their claims are disputed on reasonable grounds. In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC), Rogers J said the following:

'[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.)

- [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 – 83). 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 (*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).
- [9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the Plascon-Evans rule (*Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) para 4; *Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd* [2010] ZAWCHC 339 paras 8 – 10; *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) para 14).
- [10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the Badenhorst rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the applicant. At the final

stage, therefore, the Badenhorst rule is likely to find its main field of operation where the applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is bona fide disputed on reasonable grounds and should thus not be determined in liquidation proceedings. (In the present case neither side requested a referral to oral evidence.)

[11] If, on the other hand, and with due regard to the application of the Plascon-Evans rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's

claim, there seems to be limited scope for finding that the debt is nevertheless bona fide disputed on reasonable grounds. It is thus unsurprising to find that the reported judgments where the Badenhorst rule has been relevant to the outcome have been cases of applications for provisional liquidation rather than final liquidation.'

[21]. The Plascon-Evans approach requires the facts deposed to by the respondent to be accepted, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. (Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634D-635D. Also see Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017 (2) SA 1 (SCA) para 36.)

[22]. Applying this test in casu the facts deposed to by the respondent have to be accepted by me. In my judgment, the claims by the applicants against the respondent have not been established on the papers. Moreover, and for the reasons mentioned supra, even if the applicants have proven their claims, I am of the view that those claims are bona fide disputed on reasonable grounds.

[23]. On the basis of the facts in this matter it has to be accepted that the intention of the parties all along would have been that the first applicant would pay for all costs and expenses pending the conclusion of an agreement between the parties regarding the structure and the form of the business relationship which would have regulated the 'jewellery processing centre'. Until such time as the joint venture vehicle had been created and was up and running, the costs incurred on the project would have been for the account of the first applicant. The project was the first applicant's brainchild and its initiative – it was set up for the benefit of its Group of Companies. It follows that the first applicant would then have been required to provide the necessary funding until such time as the project could run on its own with its own vehicle. One such vehicle possibly was the respondent and it was in the contemplation of the parties as a possible vehicle. It bears emphasising however that the respondent, as constituted at the relevant time was not that vehicle. The respondent would have needed to be restructured and its ownership and shareholding realigned. The restructured respondent, and not the present respondent, is the entity which would have been liable to the applicants for the amounts claimed in these proceedings.

[24]. The facts of this matter demonstrate that there was no lease and no loan agreement concluded between the applicants and the respondent.

[25]. Therefore, I find that the first applicant has not demonstrated that the respondent per se is liable to it for the so-called loan account with respondent in favour of the first applicant. The intention viz-a-viz this loan account and the debits passed in respect of the expenses incurred by the respondent was always that liability would be that of the entity which would be the vehicle through which the 'joint venture' would be channelled. I reach the same conclusion in regard to the alleged lease agreement between the second applicant and the respondent.

[26]. The applicants have failed to prove that they are owed the amounts claimed by the respondent. The application for the final winding-up of the respondent falls to be dismissed.

Costs

[27]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[28]. I can think of no reason why I should deviate from this general rule. I can also not think of any reason why I should grant punitive costs against the applicants, as I was urged to do by Mr Woodrow, who appeared on behalf of the respondent.

[29]. I therefore intend awarding costs against the first and second applicants in favour of the respondent on the ordinary party and party scale.

Order

Accordingly, I make the following order: -

- (1) The first and second applicants' application for the final liquidation of the respondent is dismissed with costs.
- (2) The provisional winding-up order issued on the 3rd of February 2020 be and is hereby discharged.
- (3) The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the respondent's costs of this opposed winding-up application.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 27th May 2020 – in a ‘virtual hearing’ during a videoconference on the Microsoft Teams digital platform JUDGMENT DATE: 25th November 2020 – judgment handed down electronically FOR THE FIRST AND SECOND APPLICANTS: Advocate B D Hitchings INSTRUCTED BY: Martins Weir-Smith Attorneys FOR THE RESPONDENT: Advocate C Woodrow INSTRUCTED BY: Wynand Du Plessis Incorporated

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