IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER 2021/10910

1) REPORTABLE: NO
2) OF INTEREST TO OTHER JUDGES: NO
3) REVISED: NO
4) Date: 19 November 2021

In the matter between:-

COSTANN INVESTMENTS (PTY) LIMITED Applicant

and

ALPHA DYNAMICS (PTY) LIMITED t/a LAUNDRY DYNAMICS

(Registration Number: 2015/018159/07) Respondent

Coram: Booysen: Acting Judge of the High Court of South Africa

Heard on: Tuesday 16 November 2021 @ 14:00

Delivered: Friday 19 November 2021 @10:00

Summary: **Liquidation -** Respondent unable to honour its indebtedness and commercially insolvent. There is no valid reason why the Court should withhold the liquidation order.

JUDGMENT

BOOYSEN AJ

INTRODUCTION

[1] This is an application for the liquidation of the respondent, in terms of section 345(1)(a) and (c) of the Companies Act 61 of 1973 ("the1973 Act").

[2] The respondent's indebtedness arises from arrear rentals and utility charges from July 2020 to November 2020, payable in terms of a written lease agreement concluded on/or about 27 June 2018 for the premises situated at Shop Number 23, Meyersdal Mall, Corner Hennie Alberts, and Michelle Avenue, Meyersdal, Gauteng.

[3] According to the applicant, the respondent's debt was R219 216.00 at the application launch and increased to R560 890.87 by the time the applicant prepared its replying affidavit.

[4] The applicant instituted action proceedings in the Palm Ridge Regional Court to recover arrear rentals owed to it by the respondent for the period April 2020 to June 2020, before the applicant's demand in terms of section 345(1)(a) of the 1973 Act and before this application.

[5] The respondent relies on a verbal agreement in terms of which the respondent undertook to make payment of R15 000.00 (fifteen thousand

Rands) every 10 (ten) days in reduction of its rental obligation, i.e., R45 000.00 per month or every 30 (thirty) days. The respondent disputed the amount of the indebtedness on the strength of the verbal agreement and raised the defence of *lis alibi pendens*, relying on the action instituted in the Palm Ridge Regional Court.

[6] The respondent argued that the COVID-19 pandemic, National Lockdown Regulations and the lockdown period constitute a *force majeure,* which made it impossible to comply with - and released it from - its rental obligation when its business was closed, from 27 March 2020 to 25 May 2020.

[7] The respondent stated further that load shedding contributed to its commercial difficulties. Unfortunate, as this is, the respondent's counsel did not pursue the *force majeure* in argument, correctly so, as I am not aware of any authority that supports the contention that these circumstances would release the respondent from its obligation under the lease agreement

THE VERBAL AGREEMENT

[8] I must accept in the respondent's favour that there was such an arrangement. A court does not easily conclude that one or other party to a dispute of fact evident from application proceedings lacks *bona fides*. See **Reynolds NO v Mecklenberg (Pty) Ltd** 1996 (1) SA 75 (W) at 81G/H-J:-

"*A Court does not easily reach the conclusion that one or other party to a dispute of fact has no honest belief in his own allegations and accordingly lacks bona fides. … Therefore it is only when the absence of bona fides of one of the parties in relation*

to every relevant dispute of fact is abundantly clear, together manifest, and substantially beyond question, that a Court is justified in disbelieving the affidavit evidence of one of the parties in granting or refusing relief accordingly."

[9] This matter should be decided on the facts, as alleged by the respondent and the common cause facts alleged by the applicant. One of the clearest expositions of the Plascon-Evans Rule (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E - 635C.) is by the Supreme Court of Appeal, per Harms DP in **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at [26]:-

"*Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's . . . affidavits, which have been admitted by the respondent . . . together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the Court is justified in rejecting them merely on the papers*."

[10] The respondent's made payments according to the verbal agreement from 28 February 2020 up to 10 May 2021. However, it is evident from the

summary that the respondent could not honour its undertaking to pay R45 000.00 per month. Therefore, it is indebted to the applicant and has failed to keep the verbal agreement on its version.

LIS ALIBI PENDENS

[11] The defence of *lis alibi pendens* depends on the existence of a pending earlier action. The overriding principle is that it is *prima facie* vexatious to bring two actions regarding the same subject matter. Therefore, the place where judicial proceedings started is where it should end.

[12] The requisites for a valid plea of *lis pendens* are that the actions must (1) be between the same parties, (2) contain the same thing, and (3) arise from the exact cause of action. The principle has been summarised by **Voet 44.2.7** as follows:-

"*Exception of lis pendens also requires same persons, thing and cause – the exception that a suit is already pending is quite akin to the exception of res judicata, inasmuch as, when a suit is pending before another judge, the exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of res judicata in terms of what has already been said. Thus the suit must already have been started to be mooted before another judge between the same persons, about the same matter, and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending*."

See **Richtersveld Community v Alexkor Ltd and Another** 2000 (1) SA 337 (LCC) at paragraphs [18] to [12]; **Nestlé (South Africa) (Pty) Ltd**

v Mars Inc 2001 (4) SA 542 (SCA) at paragraph [16] and **Cook and Others v Muller** 1973 (2) SA 240 (N) at 244-245.

[13] Where *lis pendens* is present, a court has the discretion to allow the action instituted to proceed and stay the other action, which discretion has been stated as follows:-

"*It is clear on the authorities that a plea of lis alibi pendens does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings because it is prima facie vexatious to bring two actions in respect of the same subject matter*."

See **Cook and Others v Muller** (*supra*) at 244 **and Richtersveld Community** (*supra*) at paragraph [16].

[14] The verbal agreement brings an end to the *lis alibi pendens* defence. The action is based on the lease agreement and not the verbal agreement, and the latter established the respondent's indebtedness to the applicant in this application. The Magistrate court is yet to hear the action. If the liquidation is successful, it will potentially end the action as the liquidator will deal with the respondent's claim in the insolvent estate.

THE BADENHORST RULE

[15] The Appellate Division in **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (A) formulated the Badenhorst rule in terms of which an application for liquidation should not be resorted to enforcing a claim which is *bona fide* disputed by the company. Accordingly, the Court will refuse a winding-up

order where the respondent on *bona fide*, reasonable grounds and a balance of probability denies its indebtedness. The *onus* on the respondent to dispute the debts on *bona fide* and reasonable grounds.

[16] Rogers J in **Orestisolve (Pty) Ltd t/a Essa Investments V Ndft Investment Holdings (Pty) Ltd and Another** 2015 (4) SA 449 (WCC) explained the Badenhorst rule. A court will refuse an application for the company's liquidation if it *bona fide* disputes the applicant's claim on reasonable grounds. The Badenhorst rule prevents the abuse of the liquidation process for the enforcement of debts and is an independent rule not requiring proof of actual abuse of process. The Court must distinguish liability disputes from disputes the other requirements for liquidation in terms of which the Court will refuse the application even where the applicant proves its claim. The Badenhorst rule is more appropriate in provisional applications when an *onus* may be cast on the company to explain the basis of the claimed dispute (i.e. its *bona fides* and reasonability).

[17] At the final stage, however, **Plascon-Evans** (*supra*) will apply, and proof of the claim will leave little scope for a finding that the debt is nevertheless genuinely disputed. The requirement of *bona fides* is satisfied if the company genuinely wishes to contest the claim and believes it has reasonable prospects of success. Lack of *bona fides* will usually go together with delay, which would, in turn, indicate that the company is unable to pay its debts and militate against the exercise of discretion in its favour. In contrast, a company's deemed inability to pay its debts in terms of section 345(1) does not give rise to a rebuttable presumption. The Court has a residual discretion

to deny the application for liquidation. The reason the company provides for its refusal to pay (e.g. *bona fides* and reasonability) might result in the Court exercising it in its favour. The ambit of the discretion is debatable, but whatever it's limits, there must be a valid reason to withhold the liquidation order once the applicant complies with the statutory requirements. Such reasons would include:-

(a) that there are competing applications for liquidation and business rescue;

(b) opposition by a significant creditor; or

(c) the company is commercially solvent, and a presumption of commercial insolvency arose merely because it misguidedly but genuinely disputed the claim and therefore refused to pay it.

[18] Section 344(f) of the 1973 Act provides that the Court may wind up a company if it cannot pay its debts as described in section 345. The Supreme Court of Appeal, per Wallis JA, in **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd** 2014 (2) SA 518 (SCA) dealt with commercial insolvency in the context of the Companies Act 71 of 2008 ("the 2008 Act") at par [16] to [18] as follows:-

"[16] For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities).

See, for example, Johnson v Hirotec (Pty) Ltd; Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in liquidation); Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd.

[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money — and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets. Where the test for solvency in liquidation proceedings to be whether assets exceed liabilities, this would undermine there being a predictable and therefore effective legal environment for the adjudication of the liquidation of companies: one of the purposes of the new Act, set out in s 7(l) hereof.

[18] In view of the long-established and well-settled practice in our courts that commercial insolvency justifies the liquidation of a company, it must be presumed that the legislature was aware of this fact. The principle that Parliament is presumed to be acquainted with the interpretation of earlier legislation by the Court, applies where there has been a settled and well-recognised judicial interpretation before the relevant legislation was passed."

[19] The test is commercial insolvency, i.e. the inability of a company to pay its debts as they fall due, a situation which may prevail even though the value of

the company's assets exceeds its liabilities. However, the fact that a commercially insolvent company has assets that in value exceed its liabilities may be a relevant circumstance in exercising the Court's residual discretion to refuse a winding-up order. However, there are no such fact/s before me, so I cannot exercise that discretion in the respondent's favour.

[20] I find that the respondent is indebted to the applicant, unable to honour such indebtedness, and commercially insolvent. Therefore, there is no valid reason to withhold the liquidation order.

[21] Accordingly, I make the following order:-

(1) The respondent, **ALPHA DYNAMICS (PTY) LIMITED t/a LAUNDRY DYNAMICS** with registration number 2015/018159/07, is placed under final liquidation in the hands of the Master of this Court.

(2) The costs of this application are costs in the administration of the respondent's estate.

AJR Booysen
Acting Judge
19 November 2021

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