IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***12th August 2022*** Signature: _____

CASE NO: 994/2021

DATE: 12TH AUGUST 2022

In the matter between:

ALL PLANT (PTY) LIMITED Applicant

and

GEBANE INVESTMENTS CC Respondent

Coram: Adams J

Heard: 19 April 2022 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 12 August 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 12 August 2022.

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 345(1)(c) of the Companies Act 61 of 1973 – whether applicant's

claim is *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

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(1) The applicant's application for the final liquidation of the respondent is dismissed with costs.

JUDGMENT

Adams J:

[1]. In this opposed application, the applicant ('All Plant') seeks a final winding-up order against the respondent ('Gebane'), which, according to All Plant, is unable to pay its debts. All Plant therefore applies for the winding up of Gebane on the grounds that it is unable to pay its debts within the meaning of s 345(1)(c) of the Companies Act, Act 61 of 1973 ('the 1973 Companies Act'). The case of All Plant in the main is that Gebane is deemed to be and is factually unable to pay its debts.

[2]. All Plant claims that Gebane is indebted to it (All Pay) in an amount of R263 423, being in respect of the letting by and the hiring from All Pay of heavy machinery and equipment at the special instance and request of Gebane during July to September 2020. The aforesaid amount of R263 423 is the balance due and payable by Gebane of the agreed hiring charges, which takes into account an amount of R100 000, which was paid on the 18 September 2020 by Gebane on account of their admitted indebtedness to All Plant.

[3]. It is the case of All Plant that Gebane does not have a valid and a *bona fide* defence to the claim, which, so All Plant contends, is aptly demonstrated by the fact that, in response to the statement of account sent to Gebane on 2 September 2020 and an initial demand for payment on 15 September 2022, it

(Gebane) unreservedly accepted liability to pay the amount due as per the statement. This Gebane did in a written communiqué on 15 September 2020, in which they requested to pay the said sum in three instalments as follows: R120 873 on 18 September 2020; R100 000 on 25 September 2020; and R100 000 on 2 October 2020. Moreover, on 18 September 2020, Gebane in fact paid to All Plant an amount of R100 000 on account of their indebtedness to All Pay, leaving the outstanding balance of R263 423.

[4]. On 15 October 2020 All Plant caused to be delivered to Gebane a demand in terms of Section 345 of the Companies Act, Act 71 of 2008, affording them three weeks within which to settle the account, failing which, so the notice read, an application for the winding-up of Gebane would be launched. Gebane failed to respond to this statutory notice within the prescribed period, which means, so All Plant contends, that it is deemed to be unable to pay its debts as and when they fall due and is therefore commercially insolvent.

[5]. Whilst Gebane accepts that it is liable to All Plant for the amount claimed as being their agreed hiring charges for the letting and hiring of heavy equipment, it alleges that it is entitled to withhold payment of the said sum on the basis that they have a counterclaim for delictual damages against All Plant for an amount in excess of R500 000. These damages arise from an incident on 27 June 2020, when an employee of All Plant, apparently in a fit of rage, caused damage to property belonging to or under the control of Gebane. There appears to be very little dispute about this incident and All Pay's possible liability to Gebane to compensate it for such damages.

[6]. All Plant is sceptical about the *bona fides* of Gebane and the genuineness of the defence raised by it in relation to the claim for payment of the outstanding account. In his written additional submissions, Mr Hartman, Counsel for All Plant, contended that the 'so-called- defence', raised for the first time on 13 November 2020 in response to the demand addressed to Gebane on 15 October 2020, is not a valid and a *bona fide* defence, which can assist Gebane in resisting the winding-up application. It is an afterthought, so I understand the contention on

behalf of All Plant, aimed at camouflaging Gebane's commercial and factual insolvency.

[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*[1] and *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[2]. 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*[3].

[8]. As already indicated, *in casu* there is no real factual dispute relating to the incident which may or may not implicate All Plant in a damages claim in favour of Gebane. The only question is whether this is a genuine defence which Gebane could and did in fact raise in response to All Plant's claim, if regards is had to the initial exchanges between the parties during September 2020, when Gebane appeared to accept unequivocally and unconditionally that it owed All Plant the amount claimed.

[9]. In sum, All Plant contends that Gebane's disputing of the amount due to it is hollow and contrived. Gebane, on the other hand, argues that All Plant has failed to prove that they are owed the amount claimed. In any event, so Gebane contends, it has shown that the alleged debt owed to All Plant by it, is *bona fide* disputed on reasonable grounds.

[10]. All Plant seeks a final winding-up order, alternatively a provisional one, and the issues in summary are whether All Plant is owed the money they claim and whether their claim is disputed on reasonable grounds. In *Orestisolve (Pty)*

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[1] *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) at para 154;

[2] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T) at 347-348;

[3] *Adbro Investment Company Ltd v Minister of Interior* 1956 (3) SA 345 (A) at 350A.

Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another[4], 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

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[4] *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC);

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).'

[11]. The *Plascon-Evans* approach requires the facts deposed to Gebane 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*[5]. Also see *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd*[6].)

[12]. Applying this test *in casu* the facts deposed to by Gebane have to be accepted by me. In my judgment, the claim by All Plant against Gebane, although accepted by the latter, is *bona fide* disputed on reasonable grounds on the basis that payment is not yet due and payable – Gebane is entitled to withhold payment of the amount owing on the basis of a counterclaim it has against All Plant for damages.

[13]. Therefore, I find that All Plant has not demonstrated that Gebane is at this stage liable to it for the amount claimed. The application for the winding-up of the respondent stands to be dismissed.

Costs

[14]. 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.

[15]. 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 Mvubu, Counsel for Gebane.

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[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634D-635D;

[6] *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) para 36.

[16]. I therefore intend awarding costs against All Pay in favour of Gebane on the ordinary party and party scale.

Order

[17]. Accordingly, I make the following order: -

(1) The applicant's application for the final liquidation of the respondent is dismissed with costs.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

HEARD ON:	19 April 2022 – the matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013
JUDGMENT DATE:	12th August 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate J Hartman
INSTRUCTED BY:	Pachel Schulenburg Attorneys, Bryanston
FOR THE RESPONDENT:	Advocate Karabo Mvubu
INSTRUCTED BY:	Ningiza Horner Attorneys, Sandton