IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 6105/2022P

In the matter between:

JOHN DOUGLAS MICHAU N.O.	**FIRST APPLICANT**
NEIL DAVID BUTTON N.O.	**SECOND APPLICANT**
YASIN ALLI N.O.	**THIRD APPLICANT**

and

KENNETH HANSEN MOURITZEN	**RESPONDENT**

JUDGMENT

Nicholson AJ:

Introduction

[1] The applicants seek an order for the provisional sequestration of the respondent in terms of s 10 of the Insolvency Act 24 of 1936 ('the Act').

[2] Sections 2, 8, 9 and 10 of the Act are relevant to this matter and read as follows:

'**2. Definitions.**—In this Act unless inconsistent with the context—

. . .

"debtor", in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the law relating to Companies;

. . .

Factual background

[5] On 31 August 2012, judgment was granted in favour of Greystones Enterprises (Proprietary) Limited ('Greystones') in the following terms:

'(a) Payment of the sum of R2 280 000,00.

(b) Payment of the further sum of R60 000,00 per month from March 2007 to date of judgment.

(c) Interest on the sum referred to in sub-paragraphs (a) and (b) hereof according to law at the rate of 15,5% per annum a tempore morae to date payment.

(d) Cost of suit on the scale as between attorney and client, such costs to include where applicable, the costs consequent upon employment of two counsel.'[1]

[6] On 10 May 2021, the applicants were appointed as the liquidators of Greystones.[2] On 11 February 2021, some eight years after the judgment was granted, the bill of costs was taxed, which determined an amount of R2 842 822.94 owing to Greystones by the respondent.[3]

[7] A *nulla bona* return in terms of s 8*(b)* of the Act was obtained by the sheriff on 29 September 2021.[4]

[8] On that basis, the applicants seek an order for the provisional sequestration of respondent.

Applicants' case

[9] The applicants aver that while the debt and interest were paid in full, the taxed costs remain unpaid. In the circumstances, the liquidated debt in terms of s 9(2) of the Act is for legal costs. As proof of the debt in the form of the taxed costs, the applicants annexed to the founding affidavit the warrant of execution which bears the registrar's stamp dated 26 August 2021. It is axiomatic that the warrant of execution is based on the taxing master's allocator. However, while it is settled that an allocatur has the effect of a court order, the applicants have neither put up the bill of costs nor the allocatur.

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[1] Founding Affidavit, Vol 1, para 8 at page 6; and annexure FA1 at page 13.
[2] Founding Affidavit, Vol 1, para 13 at page 7; and annexure FA3 at page 17.
[3] Founding Affidavit, Vol 1, paras 11-12 at page 7; and annexure FA2 at pages 15-16.
[4] Founding Affidavit, Vol 1, paras 15-18 at page 8; and annexures FA4 and FA5 at pages 18-19.

against Ken Mouritzen under Case No. 1399/2007',[10] and does not mention the settlement of a loan account or any other stated debt.

[14] The respondent further avers that the said amount was made available in terms of a resolution by the directors of Greystones to distribute a dividend of R30 000 000 among its shareholders. Part of the dividend, being an amount of R11 021 212.12 that accrued to the respondent, would be used to settle the debt, and the respondent would receive an amount of R1 600 000 being paid to the Mouritzen Family Trust[11].

[15] The applicants do not dispute the said resolution and quote paragraph A of the resolution as follows:

'To settle in full, the capital sum and interest thereon of the judgment of the KwaZulu-Natal High Court granted against Ken Mouritzen under Case No. 1399/2007.'[12]

[16] It bears mentioning that the exact same wording is used again in paragraph C of the resolution. However, paragraph C.2 reads:

'The Company shall immediately pay the dividend, on receipt of the Mouritzen Family Trust authorisation to retain and allocate to the Company, the sum of R11 021 212,12 of the share of the dividend, to settle in full Ken Mouritzen's indebtedness to the company in terms of C.1.'

[17] The wording in paragraphs A and C.1 of the resolution, while purporting to settle the debt in full on the one hand, but on the other hand, also purporting to settle the capital sum and interest only, is ambiguous. However, the wording in paragraph C.2 – in less ambiguous terms - suggests that the full debt of the respondent, as it relates to Greystones, would be settled.

[18] In argument, Ms Palmer, who appeared for the respondent, stated that the resolution must be read with the email dated 21 October 2013,[13] where in referring to

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[10] Replying Affidavit, Vol 3, para 46 at pages 238-239; and annexure AA4, Vol 2, para A at page 128.
[11] Answering Affidavit, Vol 2, paras 16.6-16.10 at pages 103-104; and annexures AA3 and AA4 at pages 127-129.
[12] Replying Affidavit, Vol 3, para 46 at pages 238-239; and annexure AA4, Vol 2, para A at page 128.
[13] See annexure AA3, Vol 2, at page 127, which email reads as follows:
'Please find attached signed resolution. The dividend payment will be loaded for authorisation by 0800 Monday 21st October 2013. Please authorise same in order that the judgement can be settled today. I would like to place on record that the interest on the settlement has been overstated by approximately R300,000.00.'

[22] I am of the view that should I find cause to sequestrate the respondent, there would be an advantage to creditors because it is apparent from the papers that the respondent does have a considerable estate, although the extent of the estate is unclear, given that the respondent has the means to travel, has interests in going concerns, namely MFT Distributors (Pty) Ltd and Greystones Cargo Systems, is a beneficiary of the Mouritzen Family Trust and has sold a property for an amount R2.9 million.

[23] In the premises, the sole issue before me for determination is whether the applicants have established a claim against the respondent.

Discussion

[24] A liquidation application should not be resorted to to enforce the payment of a debt which is bona fide disputed because a liquidation affects the interests of all creditors and shareholders; accordingly, an order for its liquidation should not lightly be granted on the application of a single creditor[19]. This has become known as the Badenhorst rule.

[25] Having resolved that the debt is disputed, the next part of the enquiry is whether the debt is disputed on bona fide grounds, and if so how should the dispute be resolved on the papers, this being motion proceedings.

[26] Expanding on the Badenhorst Rule, in Kalil v Decotex (Pty) Ltd and another, the court stated:

'. . . an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. 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.'[20]

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[19] *Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)*

[20] 1988 (1) SA 943 (A) at 980B-C, referring to *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).

[32] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*, Wallis JA observed that:

'Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[25] (Footnotes omitted.)

[33] To determine if Greystones and the respondent intended to settled the legal costs, the judgment quantum and interest, the email and the resolution must be read together. The actual wording in the resolution refers 'to settle in full Ken Mouritzen's indebtedness to the company', while in another part of the resolution it states, 'to settle the capital sum and interest thereon of the judgement'; and if that is not ambiguous enough, the email reads: 'Please authorise same in order that judgement can be settled today'.[26] It is evident that both the interpretations of the applicants and the respondent have merit.

[34] I have already mentioned the *Badenhorst* rule above. In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and another,* Rogers J observed that:

'[67] I must emphasise, though, that the *Badenhorst* rule is conventionally formulated as requiring the company to satisfy the court of two things: its bona fides and the reasonableness of its grounds for disputing the claim. If the respondents were to fail in their reliance on

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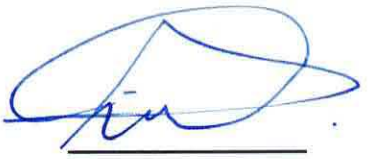
[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[26] Annexure AA3, Vol 2, at page 127.

Order

[38] In the result, I make the following order:

1. The application is dismissed with costs.



NICHOLSON AJ

Date of hearing: 19 July 2023
Date handed down: 4 August 2023

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