IN THE HIGH OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 19664/2022

In the matter between:

ELECTROLUX SOUTH AFRICA (PTY) LTD Applicant

and

RENTEK CONSULTING (PTY) LTD Respondent

The judgment was handed down electronically via email to the parties' representatives on 10 August 2023.

JUDGMENT

FRANCIS, J

1. This is an application for the final liquidation of the respondent on the basis that it is unable to pay its debts.

2. The applicant is in the business of selling solar and electrical geysers and related products to the public.

3. During 2019, the parties entered into an agreement in terms of which the applicant agreed to deliver various products and materials to the respondent. Goods were subsequently provided to the respondent in the amount of R3 384 885.36 during the period 28 March 2019 to 1 October 2020.

4. The applicant failed to make payment for the goods sold and delivered to it, and admitted both its liability and its inability to pay the amount due in e-mail correspondence sent to the applicant on 25 May 2021. Thereafter, the respondent sent an acknowledgement of debt, dated 27 May 2021, to the applicant in which it once again admitted that it was "truly and lawfully" indebted to the applicant in the amount of R3 384 885.36. The respondent proposed making payments of R10 000 per month from 30 June 2021 until the full amount was settled. The acknowledgement of debt was signed by one of the directors of the respondent, Mr Ashaan Pillay.

5. Due to the failure of the respondent to make payment in full, or at all, the applicant delivered a letter of demand in terms of section 345(1)(a)(i) of the old Companies Act, 61 of 1973 ("the Companies Act") [1]. The respondent failed to respond to the statutory letter of demand and, according to the applicant, the respondent was thus deemed commercially insolvent as it

[1] Schedule 5 of the Companies Act 71 of 2008 provides for a transitional arrangement that Chapter 14 of the (old) Companies Act will continue to apply with respect to the winding-up and liquidation of companies as if the latter Act had not been repealed.

could not pay its debts as and when they fell due and payable and thus ought to be liquidated.

6. The respondent opposed the liquidation application on two grounds: firstly, it raised a point *in limine*, arguing that the defence of *lis alibi pendens* was applicable because the appellant had issued summons prior to the institution of liquidation proceedings for the same debt which the applicant now seeks to use as the basis for the liquidation application; and, secondly, the respondent argued that the applicant failed to prove that it (the respondent) is commercially insolvent because there is a *bona fide* dispute whether or not the debt is due and payable. I now consider each of these defences in turn.

LIS ALIBI PENDENS

7. It is common cause that the applicant issued a combined summons in this court under case number 10297/2021 on 18 June 2021 in which it cited the respondent as the second defendant and in which the applicant claimed an amount of R3 384 885.36 ("the action proceedings"). The action was defended, and a plea filed by the respondent. The applicant did not elect to apply for summary judgment and the action proceedings remain unresolved.

8. In essence, the respondent submitted that there is pending litigation between the same parties based on the same cause of action and in respect of the same subject matter in that the amount of R3 384 885.36 claimed in the action proceedings is the same amount in respect of which the applicant issued the statutory demand as a precursor to the liquidation proceedings.

According to the respondent, the liquidation application should be struck off the roll or be stayed pending the finalisation of the action proceedings.

9. The applicant countered by arguing that the defence of *lis alibi pendens* is unsustainable. While the action proceedings and the liquidation application involve the same parties and the same underlying debt, the cause of action and the relief sought are different. The cause of action in the liquidation application relates to the failure of the respondent to comply with a statutory demand for payment and the relief sought is the liquidation of the respondent in terms of the Companies Act. On the other hand, the action proceedings relate solely to the payment of a monetary debt.

10. There are three requirements for a successful reliance on the defence of *lis alibi pendens*: the litigation is between the same parties, the cause of action is the same, and the same relief is sought in both sets of proceedings.

11. A plea of *lis alibi pendens* is based on the proposition that the dispute between the parties is being litigated elsewhere and, therefore, it is inappropriate for the dispute to be litigated in the court in which the plea is raised. Once a suit has been instituted, it should ideally be finalised before that court before another suit can be instituted by the same parties relating to the same cause of action[2]. The policy consideration underpinning the *lis alibi pendens* doctrine is that there should be a limit to the extent to which the same issue is litigated between the parties as it is desirable that there be

[2] See, ***Nestle (South Africa) (Pty) Limited vs Mars Inc* 2001 (4) (SA) 542 (SCA)**.

finality in litigation[3]. Also, a situation should be avoided where different courts pronounce on the same issue with the risk that they may reach different conclusions.

12. In this matter, it is not disputed that the litigation in the action proceedings and the liquidation application relate to the same parties and that the amount claimed in the action proceedings is the same amount which remains unpaid in terms of the statutory demand. The crisp issue before this Court is whether the two legal proceedings instituted can be categorised as being based on the same cause of action.

13. Mr Heunis, who appeared on behalf of the respondent, indicated during the hearing of this matter that there was a judgment in this court that previously upheld a plea of *lis alibi pendens* in circumstances where an action was launched prior to the institution of liquidation proceedings. Despite diligent search, Mr Heunis was unable to produce this judgement. I thus proceed on the basis that there is no binding precedent on this Court on the issue.

14. As noted, the determination of the point *in limine* in this matter rests on the meaning of the term "cause of action". In ***McKenzie v Farmers' Co-operative Meat Industries Ltd***[4], Maasdorp JA approved the definition provided in the English case of ***Cook v Gill*** **L.R 8 CP.107** which defined the phase "cause of action arising in the City" as, "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of*

[3] ***Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others*** **2013 (6) SA 499 (SCA)** at para 2.
[4] **1922 AD 16** at 23.

the court". Later, in the case of ***Abrahmse & Sons v SA Railways and Harbours***[5], the court defined the expression "cause of action" as follows:

> "*The proper legal meaning of this expression 'cause of action' is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration to disclose a cause of action*".

[5] **1933 CPD 626** at 633.

15. From these definitions, it is apparent that the cause of action for the recovery of a liquidated debt from the respondent is different from the set of facts which give rise to an enforceable claim for the liquidation of the respondent[6]. In addition, the nature of the relief sought in the action proceedings are without doubt different from the type of relief sought in the application for the liquidation of the respondent. In the action proceedings, a creditor seeks to enforce a claim against a debtor. On the other hand, liquidation proceedings are designed to set the machinery of the law in motion to declare a debtor insolvent and the estate of the debtor is then taken over for the benefit of third parties and not only the creditor who instituted liquidation proceedings against the debtor. Thus, the liquidation of the company does not only affect the rights of the applicant and the respondent but also that of third parties and involves the distribution of the liquidated estate to various creditors while restricting those creditors' ordinary remedies against the insolvent debtor[7].

16. Mr Heunis cited the following comment of De Villiers CJ in ***Collett v Priest***[8] as authority for the proposition that the defence of *lis alibi pendens* applies in the circumstances of the matter before this court:

> "*The order placing a person's estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the*

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[6] Cf. ***The Standard Bank of South Africa Ltd v Tsheola Dinare Tours and Transport Brokers (Pty) Ltd* (22011/2021) [2022] ZAGPJHC 311 (6 May 2022)**.

[7] See, ***Naidoo v Absa Bank Limited* 2010 (4) SA 597 (SCA)** and ***Investec Bank Ltd and Another v Mutemeri and Another* 2002 (1) SA 265 (GSJ)**.

[8] **1931 AD 290** at 299**.**

creditor. Sequestration proceedings are instituted by a creditor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in investing his estate in the master. No doubt, before an order in so serious consequence to the debtor is given the court satisfies itself as to the correctness of the allegations in the petition. It may, for example, have to determine whether the debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim … against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against it upon any such claim."

17. It seems to me that, contrary to what Mr Heunis argued, ***Collett v Priest*** in fact supports the view that the legal proceedings for sequestrating a person's estate is fundamentally and materially different from proceedings instituted for the payment of a debt due by a debtor to a creditor. It is quite clear from ***Collett v Priest*** that sequestration proceedings are instituted not for the purpose of claiming something from a debtor but for the purpose of setting the machinery of law in motion to have a debtor declared insolvent for the benefit of all the debtor's creditors.

18. In light of the foregoing, it is apparent to me that the respondent cannot rely on the plea of *lis alibi pendens* in this matter because one vital element is missing: the cause of action in the action proceedings and the liquidation application are different. Accordingly, in my view, the institution of action proceedings that have not been concluded cannot serve as a bar to this liquidation application.

INDEBTEDNESS IS DISPUTED

19. The applicant submitted that goods were sold and delivered to the respondent in the sum of R3 384 885.36 and despite the statutory demand, it failed to make payment. According to the applicant, the respondent cannot legitimately dispute its indebtedness due to the fact that the respondent signed an acknowledgement of debt in which the latter admitted its liability to the applicant.

20. The respondent, on the other hand, submitted that after the combined summons was served upon it, the respondent's attorneys dealing with the matter wrote a "without prejudice" letter to the applicant's attorneys setting out why the respondent denied being indebted to the applicant. A schedule listing sales quotes was attached to the letter and the respondent drew the applicant's attention to the fact that several of the items were not delivered, some of the sales quotes were duplicated, and some of the prices were incorrect. The respondent thus denied that it was liable for the amount claimed.

21. In its answering affidavit, the respondent admitted that an acknowledgement of debt was signed by it in favour of the applicant. However, the respondent averred that this document was signed under threat of criminal prosecution. This was denied by the applicant. In its replying affidavit, the applicant admitted that a criminal prosecution was pursued against the respondent but submitted that this was done because the latter had taken goods from the applicant with the connivance of an employee of the applicant. Thus, according to the applicant, the laying of criminal charges had nothing to do with the debt that was due and the acknowledgement of debt provided to it by the respondent.

22. Section 344 of the Companies Act is the source of authority that vests a court with the power to liquidate a company in certain circumstances. Sub-section 344 (1) read with section 345 (1)(a)(i) of the Companies Act provides that a company may be wound-up by a court if it is unable to pay its debts and that the company will be deemed to be unable to pay its debts if a creditor who is owed not less than R100 serves on the company a demand requiring the company to pay the sum due and the company fails to comply.

23. In this matter, the respondent has disputed the debt allegedly due to the applicant. In ***Imobrite (Pty) Ltd v DTL Boerdery CC***[9], the Supreme Court of Appeal summarised the principles to be applied in cases where a debt is disputed, as follows:

[9] **(1007/20) [2022] ZASCA 67 (May 2022)**.

"*It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debt. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.*

A winding-up order will not be granted where the sole or predominanant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights". (footnotes omitted).

24. However, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a company that has not discharged its debts[10]. The court exercises a narrow discretion when deciding on a liquidation application and the following observations in ***Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited***[11] appositely illustrate why a court will not be easily swayed towards exercising its discretion in favour of a debtor that has not discharged its debts:

[10] ***Afgri Operations Limited v Hamba Fleet (Pty) Ltd*** **2022 (1) SA 91 (SCA)** at para [12].
[11] **2014 (2) SA 518 (SCA)**.

> *"[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 who 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.*"

25. It is not necessary to prove actual insolvency for the purposes of section 344 (f) of the Companies Act. In ***Standard Bank of South Africa v R-Bay Logistics CC***[12] it was held that "*if there was evidence that the respondent's company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under section 344 (f) has been proved*". It goes without saying that the exercise of a discretion in favour of not granting a liquidation order in circumstances where a company is commercially insolvent must be based on a solid factual foundation.

[12] **2013 (2) SA 295 (KZD)**.

26. Section 346 (1)(b) of the Companies Act confers *locus standi* on all creditors of a company where the debt due is R100 or more. If a creditor establishes a case for liquidation, where a portion of the amount of the debt is disputed by the debtor or the precise amount of the debt is uncertain, such a dispute will not constitute a defence[13]. In accordance with what is generally known as the ***Badenhorst*** rule[14], *locus standi* will only be deemed to be absent where the existence of the whole of the debt is *bona fide* disputed on reasonable grounds. Where *prima facie* the debt exists, the onus is on the respondent to show that the debt it is *bona fide* disputed on reasonable grounds[15].

27. An issue that arose during this hearing, *albeit* somewhat tangentially, was whether the ***Badenhorst*** rule applies at the final stage of liquidation proceedings. In ***Orestisolve (Pty) Limited t/a Essa Investments v NDFT Investment Holdings (Pty) Limited and Another***[16], Rogers J expressed the view that the ***Badenhorst*** rule only applied at the provisional stage of liquidation proceedings where there was a factual dispute relating to the respondent's liability to the applicant, and the test to be applied for a final liquidation order where material facts are in dispute is the ***Plascon-Evans*** test as expressed in ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***[17]. Thus, when an applicant seeks final relief in liquidation proceedings and there are conflicting versions of fact, the court must accept the version of the respondent together with any facts admitted in the applicant's papers, unless

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[13] See, ***Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W).**

[14] After one of the leading cases on the subject, ***Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T)**.

[15] ***Fresh Investments (Pty) Ltd v Marabeng (Pty) Ltd)* (1030/2015) [2016] ZASCA 168 (24 November 2016)**

[16] **2015 (4) SA 449 (WCC)**. See also, ***Gap Merchant Recycling CC v Gold Reach Trading 55 CC* 2016 (1) SA 261 (WCC)**.

[17] ***1984 (3) SA 623 (A)***.

the respondent's version is far-fetched and clearly untenable. With respect, I am of the view that both the ***Badenhorst*** rule and ***Plascon-Evans*** test must be applied where there is a factual dispute in respect of a respondent's indebtedness in an application for a final liquidation order: quite simply, the ***Badenhorst*** rule and ***Plascon-Evans*** test serve different purposes. As Movshovich AJ commented in ***Voltex (Pty) Limited t/a Atlas Group v Resilient Rock (Pty) Limited***[18], the ***Plascon-Evans*** test is concerned largely with rules of procedure and evidence and not the substantive requirements for an application to succeed whilst the ***Badenhorst*** rule is not a rule of procedure but relates to substantive requirements as to what a party must establish to make out a claim or establish a defence.

28. That the ***Badenhorst*** rule finds application in the final order stage of liquidation proceedings was confirmed by the Supreme Court of Appeal in cases such as ***Afgri Operations v Hamba Fleet (Pty) Ltd***[19] and ***Fresh Investments (Pty) Ltd v Marabeng (Pty) Ltd)***[20] - admittedly, these cases were decided after ***Orestisolve*** and ***Gap***. Thus, in ***Fresh Investments***[21], Fourie AJA in dealing with an application for a final order for the winding up of a company employed the ***Badenhorst*** rule stated as follows:

> "*The guidelines laid down in* ***Kalil***[22] *as to how factual disputes relating to the respondent's indebtedness is in an application such as the*

[18] (case number 2021/29872) [2022] ZAGPJHC 241 (26 April 2022).

[19] Id.fn 10 at para [20].
[20] Id.fn 15.
[21] Id.fn 15 at para [5].
[22] ***Kalil v Decotex (Pty) Ltd and Another*** **1988 (1) SA 943 (A)**.

present should be approached, were stated thus by Brand J in ***Payslip Investment Holdings CC v Y2K Tek Ltd 2001 (4) SA 781 (C)*** *at 783 H-I: 'with reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant had made out a case on the probabilities. The stated exception regarding disputes about a applicant's claim does cut across the approached factual disputes in general'.*"

29. In this matter, the respondent does not dispute the manner in which the alleged debt claimed by the applicant arose. Nor does it dispute being in default of payment of the amount claimed from it by the applicant pursuant to the service of the statutory demand. Whether the debt is due or payable, and the amount thereof, is in dispute.

30. On the facts placed before this court, the applicant has established its claim on a *prima facie* basis. The respondent has signed an acknowledgement of debt in the applicant's favour, the wording of which is quite clear and instructive:

> "***1.*** ***INDEBTED AMOUNT***
>
> *The Debtor acknowledges that it is indebted to the Creditor for the following:*
>
> *1.1.* *they are truly and lawfully indebted to* ***ELECTROLUX SOUTH AFRICA (PTY) LTD*** *in the sum of* ***R3 384 885.36 (Three million***

three hundred eighty four, eighty hundred and eighty five rand & thirty six cents) *(hereinafter referred to as "the outstanding amount") being the full payment from stock supplied, which debt arose from various sales quotes supplied as per attached schedule without payment received;*

1.2. This is the final acknowledgment of debt and Rentek Consulting (Pty) Ltd may not be issued with additional outstanding amounts." (own emphasis).

31. When considering the issue as to whether the respondent has discharged the onus of showing that the indebtedness is genuinely disputed on reasonable grounds, recourse must be had to the respondent's answering affidavit. The respondent's answering affidavit is extremely light on detail in support of its defence. The respondent refers to documents which appeared in the particulars of claim and the plea in the action proceedings, and the letter which was apparently sent to the respondent's attorney querying the amounts claimed by the applicant. None of the documents referred to were annexed to the answering affidavit. All that this court has is the bald assertions as to why the respondent disputes its indebtedness to the applicant. The court is not made privy to the duplicated invoices, or the items that were allegedly not delivered, or what were the incorrect prices. All this information should be within the knowledge of the respondent, but no details were furnished to, or placed before, this Court.

32. Furthermore, the respondent does not seem to suggest that no amount is owing to the applicant. Indeed, at the very least, an amount greater than R100 must be owing because the respondent did not challenge the *locus standi* of the applicant to bring this application. Apart from its bald assertion that the debt is not due and payable because it is disputed, the respondent has offered no supporting evidence to substantiate its position. This must reflect negatively on the *bona fides* of its defence. In the absence of a genuinely disputed debt, the conclusion is ineluctable that the respondent is commercially insolvent. As Malan J (as he then was) stated in ***Body Corporate of Fish Eagle v Group Twelve Investments***[23] **:**

> "*The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts… If the respondent admits a debt over R100 even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts"*.

33. In my view, the respondent, too, has not offered a convincing explanation why it signed the acknowledgment of debt. If the respondent was facing a threat of criminal prosecution, this, on its own, does not amount to a valid reason to have concluded the acknowledgement of debt. Indeed, even prior to signing the acknowledgement of debt, it is common cause that the respondent

[23] **2003 (5) SA 414 (W)** at 428B-C

admitted its indebtedness in an e-mail sent to the applicant. There was no argument by the respondent that this e-mail was also sent under compulsion or threat of criminal prosecution.

34. As noted, the courts have held that the respondent's failure to effect payment of a debt after a statutory demand is presumptive of insolvency. Apart from its bald assertion that the debt is not due and payable because it is disputed, the respondent has not indicated anywhere in its answering affidavit that it has the assets, resources, or sources of income to pay its debts as and when they fall due or to pay the debt owing to the applicant. Accordingly, on a conspectus of the evidence placed before this Court, I am of the view that the applicant has established that the respondent is commercially insolvent. The respondent has not shown that its indebtedness is genuinely disputed on reasonable grounds. In the circumstances of this matter, the applicant was entitled to seek the liquidation of the respondent. All the requirements for a liquidation order have been met, including the formalities prescribed by section 346 of the Companies Act.

ORDER

35. Accordingly, the following order is granted:

35.1 The respondent is placed under final liquidation.

35.2 The applicant's costs are to be costs in the liquidation of the respondent.

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FRANCIS, J