REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

3/6/2021

DATE

SIGNATURE

Case No.: 39696/2019

In the matter between:

GUARDRISK PREMIUM FINANCE (PTY) LIMITED — Applicant

and

BUPHE MANAGEMENT (PTY) LIMITED — Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email.

Gilbert AJ:

1. The applicant seeks the winding-up of the respondent in terms of section 344(f) as read with section 345(1)(a) and (c) of the Companies Act, 1973.[1]

2. The applicant contends that it is a creditor of the respondent and that the respondent is deemed to be unable to pay its debts.

3. It is unnecessary to detail the nature of the indebtedness due by the respondent to the applicant as the respondent has on its own version, on at least two occasions, admitted an indebtedness to the applicant in a sum of R706 198.11. Suffice it to state that the indebtedness arose from the applicant providing a financing solution to the respondent in respect of short-term insurance premiums which the respondent collects from its clients on a monthly basis.

4. The applicant contends that the respondent is deemed to be unable to pay its debts because the respondent has for three weeks after service upon it in June 2019 of a demand in terms of section 345(1)(a) neglected to pay the sum reflected in the demand, or to secure or compound for it to the reasonable satisfaction of the creditor[2] and that in any event it has been proven to the satisfaction of the court that the respondent is unable to pay its debts.[3] The respondent disputes this, contending that it *bona fide* disputed the indebtedness on reasonable grounds (more particularly that the amount claimed in the demand of R933, 483.90 is incorrect) and,

[1] As read with item 5 of schedule 9 of the Companies Act, 2008.
[2] Section 345(1)(a) of the Companies Act, 1973.
[3] Section 345(1)(c) of the Companies Act, 1973.

as developed in argument before me, the respondent's failure to pay its admitted indebtedness is reflective of an unwillingness rather than an inability to pay its debts.

5. It is appropriate to describe certain developments that took place in court before argument commenced on the merits of the application.

6. The applicant previously in June 2020 launched an interlocutory application to compel the respondent to deliver its heads of argument and practice note so that the matter could proceed on an opposed basis. This is because the respondent had not done what is required of its procedurally to enable the matter to be enrolled for hearing. The respondent did then belatedly deliver heads of argument.

7. The applicant proceeded to enrol the matter and it came before Meyer J on 26 November 2020 on an opposed basis. The matter was again postponed that day, with the respondent to pay the costs occasioned by the postponement on the opposed attorney and client scale. The court order expressly provides in paragraph 3 that "*it is recorded that this is the second time that the Respondent's attorneys of record withdrew at the eleventh hour before the hearing of the application*".

8. The respondent's previous attorneys of record were Strydom M & Associates.

9. When the matter was called before me on 31 May 2021, Ms Matlala appeared for the respondent, having been instructed that morning by

whom I told are new attorneys, Thompson Attorneys.[4] As Thompson Attorneys had not formally filed notice of appointment as attorneys of record for the respondent, I stood the matter down to enable the respondent's counsel to seek her instructing attorney's presence in court on the virtual platform and to be in a position to furnish her with instructions. Ms Thompson then joined the court proceedings.

10. Respondent's counsel, after confirming her instructions, informed the court that her primary instructions were to make a settlement proposal in open court. Respondent's counsel proceeded to propose in open court, i.e. on a with prejudice basis, that the respondent undertook to pay R300 000.00 by Friday, 4 June 2021, followed by instalments of R67 699.35 over the next months, together with a tender of costs in relation to the hearing of 31 May 2021. The total of the tendered amounts, other than costs, was R706 198.11, corresponding with what the respondent contends on its version is owing by it to the applicant.

11. Mr Pocock, who appeared for the applicant, upon instructions rejected the offer.

12. Respondent's counsel then sought for a postponement of the application on behalf of the respondent. I refused the application, for the reasons set out in my *ex tempore* judgment.

[4] It appears from the electronic file that a firm called Thompson Attorneys have been on record as correspondent attorneys.

13. Respondent's counsel indicated that her instructions were to argue the main application on its merits.

14. The matter then proceeded on in its merits.

15. By reason of the respondent's with prejudice proposal made in court, the respondent had admitted its indebtedness to the applicant in the amount of R706 198.11. When I enquired of respondent's counsel what to make of the proposal that this admitted amount be paid over a period and so may be indicative of an inability on the part of the respondent to pay its debts, the submission was that the tender to pay the admitted amount over a period stemmed from an unwillingness rather than an inability to pay the full amount. I deal with this later in my judgment.

16. Although the applicant initially sought a final winding-up order, during the course of argument and after dealing with various deficiencies in relation to the furnishing of the application to employees as required in terms of section 346(4A)(a)(ii) of the Companies Act, 1973, the applicant instead sought, at this stage, a provisional winding-up order. This is because in the absence of substantial compliance with the requirements of section 346(4A), a final order cannot be granted.

17. I refer to my judgment in *Bravura Capital (Pty) Limited v Drive Path Trade & Invest (Pty) Limited t/a Southern Energy* [2021] ZAGPJHC 3 (1 February 2021) in which I detailed what is required of an applicant when furnishing a copy of the application to employees as envisaged in

section 346(4A)(a)(ii). I refer in particular to paragraphs 6 to 25 of that judgment.

18. Although an affidavit was filed on behalf of the applicant in terms of section 346(4A)(b) which sought to prove that a copy of the application had been furnished to employees, that affidavit does no more than refer to returns of service that the applicant contends constitutes compliance with the requirement.

19. The first return of service relied upon by the applicant reflects that a copy of the application was "*served by affixing it to the main gate in view of all the employees to see*" at the "*employment address of the employees*" at 17 Wolhuter Street, Parkrand, Boksburg. But the preceding return of service attached to the compliance affidavit reflects that when the same deputy sheriff attended at the same address one minute earlier in order to serve a copy of the application on the respondent itself at that address, she was informed by the occupier of that address, a Mr Snyman, that he is renting at the given address and that the respondent is unknown to him. The difficulty is evident – how can a copy of the application left at this address constitute substantial compliance with the requirement that a copy of the application be furnished to employees where the deputy sheriff had just been informed by the occupant of that address that the defendant is unknown at that address. It therefore follows that there can be no employees at that address.

20. The second return of service relied upon by the applicant reflects that a copy of the application was served on the employees at a "*residence*" in Highway Gardens, Germiston North by affixing a copy to the principal door as the deputy sheriff found the premises locked and unattended. The sheriff describes in his return that this is "*the given address on behalf of the employees of the respondent"*. But nowhere is it explained why this address is of any relevance to the employees. But what does appear as an annexe to the compliance affidavit is another return of service reflecting that the same deputy sheriff was able at exactly the same time to serve a copy of the application on the respondent by way of service on a Mr Kikomba, a manager at that address, and which address is stated to be the respondent's registered address. Again, how can the same premises be simultaneously locked and unattended when Mr Kikomba is present. In any event, the address is not the registered address of the respondent, which is stated in the founding affidavit to be at 213 Rondebult Road, Farrarpark, Boksburg.

21. The returns of service do not reflect substantial compliance, if any compliance at all, with the statutory requirement that a copy of the application be furnished to employees. The distinct impression is that little more than lip service was paid to this requirement, and serious questions arise as to the credibility of what is stated in these returns of service, which remarkably are signed by different deputy sheriffs but with the same deficiencies.

22. The question that arises is the consequence of non-compliance with section 346(4A). Wallis JA in *EB Steam Company (Pty) Limited v Eskom Holdings SOC Limited* 2015 (2) SA 526 furnished the answer - in those circumstances the court may still grant a provisional order. In *EB Steam* a final liquidation order was sought and granted by the court *a quo*. On appeal, Wallis JA found in paragraph 26 that the court *a quo* should instead have granted a provisional winding-up order, giving directions if necessary, on how the employees are to be served with the papers.

23. In the circumstances, it is not open to me to grant a final winding-up order and therefore it is unnecessary for me to consider whether the applicant has achieved the threshold for the granting of a final winding-up order.

24. Has the applicant crossed the threshold for a provisional winding-up order?

25. It is not altogether a simple exercise in delineating precisely what threshold needs to be satisfied to enable a provisional liquidation order to be granted. The various decisions, such as the oft-cited *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[5] and *Kalil v Decotex (Pty) Limited,*[6] and the more recent pronouncements, are not entirely reconcilable. Nonetheless, particularly useful is the judgment of Rogers J in *Gap Merchant Recycling CC v Goal Reach Trading 55 CC*,[7] from which the following can be extracted:

[5] 1956 (2) SA 346 (T) at 347H – 348C, and from which comes the often referred to 'Badenhorst rule'.
[6] 1988 (1) SA 943 (A).
[7] 2016 (1) SA 261 (WCC).

25.1. If there are factual disputes relating to the requirements for a winding-up other than respondent's liability to the applicant, has the applicant established those requirements on a *prima facie* basis, i.e. on a balance of probabilities with reference to all the affidavits (without employing the well-known *Plascon-Evans* test)?[8]

25.2. If there are factual disputes concerning the respondent's liability to the applicant and the applicant shows *prima facie* its claim on a balance of probabilities with reference to all the affidavits,[9] then the onus is on the respondent to show that the debt is *bona fide* disputed on reasonable grounds, i.e. the *Badenhorst* rule comes into play. If the respondent demonstrates this, then the application should (rather than necessarily must)[10] be dismissed.[11] This means that even if the applicant can demonstrate its claim on a balance of probabilities, a provisional winding-up order can be

[8] Para 20.See also para 7 and 8 of *Orestisolve p/l t/a Essa Investments v NDFT Investment Holdings p/l* 2015 (4) SA 449 (WCC)*;* para 9 of *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24 (24 March 2017)

[9] The Full Bench of this Division in *Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC* [2012] ZAGPJHC 211 (30 October 2012), para 13 describes this as an exception to the general reluctance of the court in motion proceedings to decide disputes of fact purely on the basis of the probabilities, citing *Kalil v Decotex* at 979G-H. See also *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 80G to 81A.

[10] See the discussion in *Kalil v Decotex* at 980G-I as to whether the Badenhorst rule (namely that where the respondent disputes liability for a debt *"bona fide en op redelike ground"… "dan moet die aansoek afgewys word*") is inflexible, or is applicable only where it appears that the applicant is abusing the winding-up procedure as a means of putting pressure on a company to pay a debt that is *bona fide* disputed. This discussion features in *Hannover Group Reinsurance (Pty) Ltd and another v Gungudoo and another* [2011] 1 All SA 549 (GSJ) para 11 to 16, where the court expresses, in effect, doubt whether the Badenhorst rule is immutable, as contrasted to the court, at the provisional stage, doing *"its best to decide the probabilities by taking into account the full conspectus of allegations and denials as they appear in the affidavits, read as a while, placed before it."*

[11] Para 20, citing *Hulse-Reutter and another v HEG Consulting Enterprises* 1998 (2) SA 208 (C) at 218D – 219C. See also *Orestisolve* paras 7 and 8; *Afgri Operations* paras 6, 14, 17.

refused if the respondent nevertheless demonstrates that the debt is *bona fide* disputed on reasonable grounds.[12]

25.3. *Bona fides* and reasonableness are two distinct requirements.[13]

25.4. As to whether the indebtedness is *bona fide* disputed, the court must look to the respondent's subjective state of mind. Bald allegations lacking particularity are unlikely to persuade a court that the respondent is *bona fide*.[14]

25.5. As to whether indebtedness is disputed on <u>reasonable grounds</u>, the court looks to whether there are facts, if proven at trial, that would constitute a defence. This requires more than bald allegations lacking in particularity.[15]

26. Generally, a referral to oral evidence has more of a role to play at the final stage than at the provisional stage.[16]

27. If at the provisional stage a *prima facie* case is not made out on a balance of probabilities with reference to all the affidavits, the application should be dismissed, unless the applicant seeks a referral to oral evidence. In that event, the more the balance on the probabilities is tipped in favour of the applicant, the more likely the referral and vice versa. It would only be

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[12] *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783I.
[13] Para 23, *Standard Bank of SA Ltd v El-Naddaf and another* 1999 (4) SA 779 (W), at 748G-895B, which in turn cites *Badenhorst*.
[14] Para 24 to 26, citing *Badenhorst* and *El-Naddaf.*
[15] Para 26; citing *Hulse-Reutter*.
[16] In *Provincial Building Society of South Africa v Du Bois* 1966 (3) SA 76 (W), the court at 79H to 80E expressed a somewhat firm view that save in exceptional circumstances, a referral to oral evidence should not be resorted to at the provisional stage, and that a provisional order should be granted. Subsequent support for this approach by our Full Bench is found in *Total Auctioneering* above, para 14.

in rare cases that a court would order oral evidence where the preponderance of probabilities on the affidavits favours the respondent.[17]

28. At the provisional stage, the court is unlikely to refer the matter to oral evidence where the probabilities favour the applicant, and a *prima facie* case is made out (as it is only necessary at the provisional stage to make out a *prima facie* case with reference to all the affidavits). The court may grant a provisional order as the matter can be referred to oral evidence at the final stage if so requested then by the respondent.[18]

29. There can be no *bona fide* dispute on reasonable grounds in the present instance that the respondent is indebted to the applicant, at least in the admitted amount of R706 198.11. This amount was tendered in open court, and in any event is admitted by the respondent in its answering affidavit after compiling its own reconciliation.

30. What remains is to consider whether the applicant has established on a *prima facie* basis, i.e. on a balance of probabilities with reference to all the affidavits that the respondent is unable to pay its debts.

31. Malan J (as he then was) in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Limited* 2003 (5) SA 415 (W) at 428B stated:

> "*The deeming provision of section 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts (Ter Beek's case supra at 311F). If the*

[17] *Kalil* ay 979E-I.
[18] *Kalil* at 979B-E.

respondent admits a debt over R100, <u>even though the respondent's indebtedness is less than the amount demanded in terms of section 345(1)(a) of the Companies Act</u>, 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" (my emphasis).

32. This dictum was affirmed and applied by the Supreme Court of Appeal in *Lamprecht v Klipeiland (Pty) Limited* [2014] 4 All SA 279 (SCA) in paragraph 16.

33. In *Lamprecht* the Supreme Court of Appeal was satisfied that the deemed inability to pay debts was triggered even where the full extent of the indebtedness was not known but where the respondent had admitted a debt of at least over R100.00.[19] *A fortiori* in the present instance the respondent has admitted an indebtedness in a specific amount, namely R706 198.11. That the applicant's demand in terms of section 345(1)(a) was for a larger amount (R933, 483.90) and that the respondent disputes its indebtedness for such larger amount does not in and of itself destroy the rebuttable presumption of the respondent's deemed inability to pay its debts as brought about by section 345(1)(a).

34. It is therefore necessary to consider whether on a balance of probabilities with reference to all the affidavits the respondent has rebutted the presumption that it is deemed to be unable to pay its debts arising from it

[19] In *Lamprecht*, the respondent had expressly admitted that the applicant had *locus standi* in terms of section 345(1)(a) and had further in earlier court proceedings consented to a court order that specifically recorded that the applicant had *locus standi*. But this does not affect the affirmation by the court of the operation of the deeming provision in section 345(1)(a).

having neither paid the amount claimed in the section 345 demand nor secured or compounded it to the reasonable satisfaction of the applicant.

35. The respondent in open court tendered to pay its admitted indebtedness but over a period. The respondent does not state under oath that it was unwilling to pay the indebtedness, as contrasted to an inability to pay the admitted indebtedness. It was rather the respondent's counsel during argument that proffered the submission that the respondent was unwilling, rather than unable, to pay the admitted indebtedness.

36. In any event absent an explanation under oath why the respondent is unwilling rather than unable to pay an admitted amount, this is a factor indicative of the respondent's inability to pay its debts.

37. At all material times the respondent has accepted that it is indebted to the applicant in at least a significant sum. The respondent in its answering affidavit deposed to as long ago as March 2020 admits that on its version its owes the applicant R706 198.11. But no payment is made towards this amount, although it is over a year later and where it would have been expected of the respondent to have settled the admitted indebtedness by now. Instead, as described above, the respondent went about in a dilatory fashion in its opposition to the liquidation application, including changing attorneys at the last minute and seeking various indulgences of the court in relation to postponements of the application. This too is not indicative of a respondent who is able to pay its debts.

38. The reaction of the respondent to the applicant's demand in terms of section 345 when served in June 2019 is also telling. Having received the demand, the respondent sent an email to the applicant in which the receipt of the demand is acknowledged and records that "*as discussed during the meeting, we shall engage GPF [the applicant] and arrange a payment accordingly*". It is unclear as to whether this is to arrange payment of the full amount or only a portion thereof, but in either event no payment is subsequently made.

39. On 8 August 2019 in a further email the respondent seeks confirmation of the status of its account in a particular amount but again does not make any payment.

40. The respondent attaches to its answering affidavit a bank statement which reflects that as at 31 December 2018 it only had R55.76 in its bank account. The respondent's counsel proffered as an explanation as to why this must not be taken into account as indicative of an inability to pay was that the bank statement was years old. But this is hardly a satisfactory answer where the respondent could have sought to file a supplementary affidavit placing fresh evidence before the court that its position had changed and that it was now sufficiently cash flush to make payment of the admitted indebtedness.

41. This is particularly so where the respondent in its answering affidavit in paragraph 15 expressly admitted that during 2019 it had experienced cash-flow restraints. But, it contends, it was still able to meet its

obligations to its creditors. But if this was so, why then has the respondent not paid the admitted amount owing by it to the applicant . Even now, in its tender in court, the respondent seeks to pay its admitted indebtedness over a period.

42. The respondent in its answering affidavit refers to been a significant increase in its cash-flow in the first two months of 2020 and that it was expected to receive a surplus of R6 million by the end of July 2020. But supporting detail in relation thereto is negligible as is its explanation as to why it expected such a change in its financial fortunes. The respondent does not take the court into its confidence by filing a supplementary affidavit explaining what had become of its financial position since the answering affidavit was deposed to during March 2020, particularly in the wake of the hard lockdown brought about by the COVID-19 pandemic and whether the anticipated R6 million surplus expected by the end of July 2020 materialised.

43. The respondent states that it is owner of an unencumbered immovable property situated in Edenvale with a value of approximately R1.4 million and that this is indicative of its solvency. That the respondent may have an unencumbered property, and that it may be factually solvent in that its assets exceeds its liabilities (which the applicant in any event disputes) does not assist when what is relevant is its ability to pay its debts that are due (i.e. its commercial insolvency).

44. I am satisfied that such evidence as is before the court does not rebut the presumption of the respondent's inability to pay its debts but to the contrary demonstrates that the respondent is unable to pay its debts Accordingly, upon a consideration of all the affidavits I am satisfied that the applicant has *prima facie* established on a balance of probabilities its entitlement to a provisional winding-up order.

45. In doing so, I did not consider the respondent's replying affidavit, which was not commissioned and therefore did not serve as evidence. The applicant's counsel confirmed that no reliance can be placed upon the replying affidavit.

46. Section 346A of the Companies Act, 1973 regulates the service of the provisional order, including on employees and trade unions, if any. Presumably the applicant will take heed of what is stated in this judgment to ensure effective and compliant service of the provisional order, including upon employees and any registered trade unions. During the course of argument, the respondent's counsel took instructions and informed the court that there were four employees situated at in Edenvale, providing an address where they could be found.

47. The following order is made:

    47.1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court, Johannesburg.

47.2. All persons who have a legitimate interest are called upon to put forward on a date to be obtained from the Registrar at 10h00 or so soon thereafter as counsel may be heard such reasons as they wish, if any, why this court should not order the final winding-up of the respondent and that the costs of this application be costs in the winding-up of the respondent.

47.3. A copy of this order is to be served on the various persons as provided for in section 346A of the Companies Act, 1973 and is to be published once in the Government Gazette and once in a newspaper circulating in Gauteng.

47.4. A copy of this order is to be furnished to each creditor and shareholder known to the applicant, either per email, per telefax or per registered post.

Gilbert AJ

Date of hearing:	31 May 2021
Date of judgment:	3 June 2021
Counsel for the Applicant:	Mr W Pocock
Instructed by:	Fluxmans Inc
Counsel for the Respondent:	Ms K Matlala

Instructed by: Thompson Attorneys