

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 04586/2022

**BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ
10 July 2023**

In the matter between:

SB GUARANTEE COMPANY (RF) LTD

Applicant

and

TS THANTSHA ATTORNEYS (PTY) LTD

Respondent

(Registration Number: 2013/13463/07)

JUDGEMENT

INTRODUCTION

[1] The applicant makes application for the liquidation of the respondent. The application is founded on three grounds (a) the respondent, factually is insolvent, (b) the respondent, in terms of section 344(f) read with section 345(1) of the Companies Act 61 of 1973 is deemed to be insolvent and (c) it would be just and equitable in terms of section 344(h) of the said Act.

[2] The application came before me in the unopposed motion court in the following

circumstances:

- 2.1 the application was issued during or about October / November 2022; the exact date is not known to me but the notice of motion is dated 26 October 2023³ and served on the respondent on 27 January 2023;
- 2.2 the notice of motion inter alia provides that in the event of the respondent failing to enter an appearance to oppose the application that the matter would be dealt with in the unopposed motion roll of 27 February 2023;
- 2.3 the respondent delivered its notice of appearance to oppose the application on 2 February 2023, a mere 5 days before the hearing on the unopposed motion roll and as a consequence of the application having “become” opposed, the matter did not proceed on the 7th of February 2023 but instead was removed from the roll to allow the respondent to deliver its opposing affidavit and allow for the matter to be dealt with on the opposed roll;
- 2.4 the respondent’s opposing affidavit was due for delivery on 23 February 2023;
- 2.5 having failed to deliver its opposing affidavit, the applicant proceeded to enrol and set the application down, in the unopposed roll for 31 May 2023, as is required in terms of the Practice Directive of this Division; and
- 2.6 on the eve of the unopposed hearing, the respondent delivered its opposing affidavit.

[3] The matter accordingly “became” opposed “again” and, as previously stated, in terms of the Practice Directive of this Division, the matter was to be removed and placed on the

opposed roll. The rule, however is not an absolute rule and the court retains its discretion to determine its own processes. A court has full powers to determine its own procedure having regard to the nature of the case before it and the interest of justice in general, so as to ensure that the proceedings are dealt with as efficiently and expeditiously as possible. See: *Western Assurance v Caldwell's* 1918 AD 262. This has been a long established principle.

- [4] The applicant, notwithstanding the delivery of the opposing affidavit, insisted that until the late filing of the opposing affidavit was condoned, the opposing affidavit is not before court and the matter remained unopposed.
- [5] The opposing affidavit contains an application for condonation for the late filing of the said affidavit and as a consequence, I directed that I would hear the application to condone the late filing of the opposing affidavit. If condonation was to be granted, the application would be adjourned to the opposed roll. If condonation however, was refused, the application instead would be dealt with on an unopposed basis. The proposed way of dealing with the matter was agreed to by counsel for both parties and as a consequence the application stood down for argument to Thursday 1 June 2023 for the intended purpose.

THE NOTICE OF MOTION

- [6] Having heard argument on the application for condonation and in considering the matter I noted from the notice of motion that it may not have complied with Rule 6(5)(b)(iii) and / or Form 2(a) of the Uniform Rules of Court ("the Rules"). More specifically, the portion of the notice of motion of concern provides as follows:

"TAKE NOTICE FURTHER that if you intend opposing this application you are required to: -

- a To notify the applicant's attorneys in writing on or before the
- b And within 15 (fifteen) days after you have so given notice of your intention to oppose the application, to file your answering affidavits, if any."

[7] The notice of motion does not state a date by when the notice of appearance was to have been filed.

[8] Rule 6(5)(b)(iii) provides that:

"5(a) Every application other than one brought ex parte must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given."

(b) In a notice of motion the applicant must –

(i) ...

(ii) ...

(iii) set forth a day, not less than five days after service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the application will set be set down for hearing on a stated day, not being less than 10 days after service on the said respondent of the said notice."

[9] Flemming DJP in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) at 502E held:

"Rule 6(5)(a) of the Uniform Rules of Court is peremptory. An application must be in the form 'as near as may be in accordance with Form 2(a)'. Rule 6(5)(b) also compels. An application is bound to nominate a day, at least five days after service on the respondent, on or before which the respondent must notify the

applicant of intended opposition. Within 15 days after service on the respondent, on or before which the respondent must notify the applicant of intended opposition. Within 15 days after the notification, respondent who does oppose must deliver opposing affidavits “

- [10] In *Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen* 1978 (1) SA 779 (T) at 782B held that:

“... in an application which does not fall under Rule 6(12), and is not brought ex parte, a ‘notice of motion’ which is not substantially in material respects as near as may be in accordance with Form (2)(a) is a nullity,..”

- [11] The question then arises, whether the notice of motion, failing to nominate a date by when the notice of intention to oppose the application by the respondent to be filed, constitutes a nullity, incapable of condonation, alternatively whether it constitutes an irregularity, capable of condonation. Further, if it is the latter, whether condonation, absent a request for condonation by the applicant, is possible in these circumstances.
- [12] An important feature in the present application, is the fact that the respondent, notwithstanding the purported defect in the notice of motion, delivered its notice of appearance to oppose the application as well as its opposing affidavit prior to the hearing of the application on the unopposed motion court roll. The respondent did not avail itself of the remedies under Rule 30.
- [13] In *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) Van Zyl R having to consider the use of the short form of Form 2(a) instead of the long form, and whether the use of the short form constituted a nullity alternatively an irregularity. For present purposes the dicta expressed in *Mynhardt supra* is more appropriate than the dicta expressed in *Gallagher supra* and *Simross Vintners supra* respectively. Both *Gallagher supra* and *Simross*

Vintners *supra* are matters which commenced in the urgent court and subsequently continued in the normal course without the notice of motion having provided for alternative time periods for the filing of further affidavits. Mynhardt *supra*, instead, concerned the use of the short form of Form 2(a) which would also have resulted in the respondent not having been directed by when the notice of opposition and the subsequent opposing affidavit was required to have been filed.

[14] Van Zyl R in Mynhardt *supra* held:

“Die vraag wat tans oorweeg moet word, in die lig van die aangehaalde dicta, is of die aansoek in die onderhawige geval 'n nietigheid is vanweë die gebruikmaking van die verkeerde vorm van kennisgewing van aansoek en dus moontlik nie kondoneerbaar is nie.

Soos in die Simross -saak, is dit duidelik dat die verkeerde vorm van kennisgewing deur die applikante gebruik is en dat sodanige kennisgewing van aansoek op die respondent beteken is. Anders as in die gemelde saak het die respondent, na betekening van die foutiewe kennisgewing, dit egter goed gedink om volledig daarop te antwoord en dit het veroorsaak dat die aangeleentheid as 'n bestrede aansoek voor die Hof geplaas is. In die lig van die kennis wat die respondent van die aansoek gekry het en van sy reaksie daarop, is daar by my geen twyfel dat hy hoegenaamd nie deur die gebruikmaking van die verkeerde vorm van kennisgewing benadeel is nie. Dit kom my dus anomalies voor dat die respondent in hierdie stadium hom op die beweerde nietigheid van die kennisgewing van aansoek kan beroep. Die vraag ontstaan dan of die gebruikmaking van die verkeerde vorm van kennisgewing dit inderdaad nietig maak.

Na oorweging van die beslissing in die Simross -saak en sonder inagneming van die feit dat die onderhawige geval onderskeibaar is vir sover die aansoek bestrede is, is ek dit met eerbied nie met COETZEE R eens dat die betekening van 'n ex parte aansoek dit onder die vaandel van Reël 6 (5) bring, in welke geval dit 'n nietigheid is wat nie kondoneerbaar is nie. Daar is 'n aansienlike verskil tussen 'n dagvaarding wat nie deur die Griffier uitgereik is nie en 'n aansoek wat in die verkeerde vorm gegiet is, soos inderdaad duidelik uitgewys is in Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) op 780C-D en G-H (per RUMPF AR, soos hy toe was):

"Uit die bewoording van die omskrywing van 'siviele dagvaardings' in art 1 van die Wet op die Hooggeregshof blyk dit dat die Wetgewer aandui dat 'n siviele geding begin word deur 'n dagvaarding of 'n kennisgewing van mosie of petisie wat ten doel het om die verskyning van 'n persoon voor die Hof te vereis. Hoewel 'n dagvaarding eers deur die Griffier uitgereik word voordat dit beteken word (Reël 17 (1), (3)), word dit nie in die Reëls vereis dat 'n kennisgewing van mosie deur die Griffier uitgereik moet word nie of by hom ingelewer moet word voordat dit aan die respondent beteken kan word nie.

'n Dagvaarding wat nie deur die Griffier uitgereik is nie, sou 'n nulliteit wees en deur betekening van so 'n dagvaarding sou geen geding ingestel word nie. Die voorskrifte aangaande 'n kennisgewing van mosie, wat nie deur die Griffier uitgereik word nie, is anders. Word 'n kennisgewing van mosie aan 'n respondent behoorlik beteken deur 'n Balju, sou dit miskien betoog kon word dat wat hom betref deur die applikant 'n geding ingestel is waarby hy betrek is. Na betekening aan hom is die respondent verplig en geregtig om luidens die bepalings van die kennisgewing op te tree, afgesien daarvan of die applikant kennis van die aansoek aan die Griffier gegee het of nie."

Dit is so dat die kort vorm van kennisgewing, vir ex parte aansoeke bedoel, nie volledige bepalings uiteensit van wat 'n respondent te doen staan nadat dit tot sy kennis gekom het nie. Myns insiens maak dit egter nie die kennisgewing 'n nietigheid nie. Anders as in die geval van 'n dagvaarding wat nie deur die Griffier uitgereik is, en dus, skynbaar, nie 'n "stap" of "verrigting" is wat ooreenkomstig Reël 30 as onreëlmstig tersyde gestel kan word nie, is 'n kennisgewing van mosie wat behoorlik op die respondent beteken is, ongeag in welke vorm, wel 'n "stap" of "verrigting" soos in Reël 30 bedoel. Indien die verkeerde vorm van kennisgewing gebruik is, sou dit die respondent dan vrystaan om 'n aansoek vir die tersydestelling daarvan te bring. So nie sou hy dit kon ignoreer en daarop antwoord asof dit in die korrekte vorm gebring was, in welke geval hy klaarblyklik afstand sou gedoen het van sy reg om in terme van Reël 30 die kennisgewing tersyde te laat stel. Dit is inderdaad die uitwerking van Reël 30 (1), wat aldus lui: "

'n Party tot 'n geding waarin 'n stap op onreëlmstige wyse gedoen is deur 'n ander party, kan binne 14 dae daarna by die Hof tersydestelling daarvan aanvra: met dien verstande dat geen party wat 'n verdere stap in die geding gedoen het terwyl hy geweet het van die onreëlmstigheid, geregtig is om so 'n aansoek te doen nie."

Die blote betekening van 'n ex parte aansoek omskep dit, na my mening, nie in 'n Reël 6 (5) aansoek soos in die Simross - saak supra op 783G bevind is nie. Betekening mag foutiewelik, of ex E abundanti cautela, geskied het, in welke geval die betekening nie die aard van die aansoek verander nie. As dit as ex parte aansoek bedoel was, maar verkeerdelik of onnodig beteken was, bly dit steeds 'n ex parte aansoek. Indien dit nie as ex parte aansoek bedoel was nie, maar in die vorm van 'n ex parte aansoek gegiet was, sou dit as onreëlmstige verrigting in terme F van Reël 30 tersyde gestel kon word. Nóg foutiewe betekening, nóg die gebruikmaking van die verkeerde vorm sou die aansoek, myns insiens, egter 'n nietigheid of nulliteit maak nie.

- [15] In relation to the question as to whether the non-compliance of Rule 6(5)(b)(iii) is capable of condonation, Van Zyl R continued to hold:

"Dat die nie-nakoming van die Reëls met betrekking tot die bring van 'n aansoek in 'n verkeerde vorm gekondoneer kan word, mits daar geen benadeling is nie, is dan ook uitdruklik beslis in Barclays Nasionale Bank Bpk v Badenhorst 1973 (1) SA 333 (N) op 341C-G en by implikasie goedgekeur in Mame Enterprises (Pty) Ltd v Publications Control Board 1974 (4) SA 217 (W) op 220B-C. In hierdie verband is dit belangrik om daarop te let dat die Hof 'n besonder omvangryke bevoegdheid het om kondonasie te verleen waar prosedure-reëls nie nagekom word nie. Dit spruit voort uit die uitdruklike bewoording van Reël 27 (3), wat aldus lui: "Die Hof kan, as goeie redes aangevoer is, die

nie-nakoming van hierdie Reëls kondoneer." Hierdie bevoegdheid word ook ontleen aan die Hof se inherente jurisdiksie om kondonاسie onder omstandighede soos die onderhawige te verleen (sien *Marais v Aldridge and Others* 1976 J (1) SA 746(T) op 752C; 1986 (1) SA p462 Van Zyl R A vgl *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W) op 1036C-1037F; *Western Bank Ltd v Packery* 1977 (3) SA 137 (T) op 140D-H; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) op 462H-463B). In hierdie verband het die Appèlhof dit reeds duidelik gestel dat die Hof nie vir die Reëls bestaan nie, maar die Reëls vir die Hof. Sien Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) op 783A-D per RUMPF AR (soos hy toe was): "In verband met die vraag wat appellant presies moes gedoen het nadat respondent sy aansoek gestaak het, is dit wenslik om te herhaal wat in die algemeen van toepassing is, nl dat die Hof nie vir die Reëls bestaan nie maar die Reëls vir die Hof. 'n Uitspraak wat hieraan uitdrukking gee, is dié in *Ncoweni v Bezuidenhout* 1927 CPD 130, waar onder andere gesê word: 'The Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it and where the Rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice. Of course, if one is absolutely prohibited by the Rule, one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.' Met verwysing na hierdie uitspraak het WILLIAMSON R hom soos volg uitgedruk in *Brown Bros Ltd v Doise* 1955 (1) SA 75 (W) op 77: 'In my view this is a case where the Rules of Court as framed do not provide for one particular set of circumstances which can arise and I think the Court has inherent power to read the Rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines.'

[16] The final question to consider as far as the non-compliance with Rule 6 is concerned is whether such non-compliance can be condoned absent a request for condonation from the applicant. The answer in the present instance must be in the affirmative and I say this for the following reasons:

16.1 Wepener J in *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 held that in respect of a scenario where both the answering affidavit and replying affidavits were filed of time and neither party having brought a substantive application for condonation, that the court was entitled to disregard the said non-compliance and entertain the application. The main reasons for such an approach related to the issues of prejudice or the lack thereof.

16.2 Van Zyl R in *Mynhardt supra* approached the non-compliance in a similar

basis, i.e the lack of any prejudice as far as the respondent is concerned together with the fact that the respondent having been placed in possession of the irregular notice of motion, had the procedural entitlement to have initiated steps in terms of Rule 30 of the Rules. Instead, the respondent elected to file, not only an opposing affidavit dealing with the allegations contained in the founding papers, but seeks condonation for the late filing of the opposing affidavit.

CONDONATION

[17] The application for condonation is contained in the following paragraphs in the opposing affidavit and provide:

"35. *Soon after I became aware of the of the application upon receipt of the email from the applicant via email I gave instructions to my attorneys of record. I was at the time in Polokwane, Turfloop which is my second home. I had some challenges wherein the property was vandalized, the ceiling caved in and other internal structures were damages. I had also to complete the construction. As a result of my predicament. As a single woman I was also faced with the challenges of the builders who were taking advantage at building material and costs. I was in fact having few challenges which prevented me from coming back timeously for consultation to defend the matter. It was not a deliberate attempt to [dis]respect the court in failing to comply with the rules of the Honourable court. I had I was not in a position to come back to Gauteng to consult with my attorneys of record. the difficulties.*"

and

"44. *It is clear from the above that there was a delay on my side in serving and filing of this affidavit. However, I submit to this Court that the delay has not been mala fide but occasioned by overwhelming circumstances beyond my control. I respectfully submit that the delay should not be construed by the Court as a deliberate move on my side not to honour the time frames put in place by the Court.*

45. *It may please this Honourable Court to find that on the chronology listed above that my conduct in serving and filing the Answering affidavit late may have been occasioned by circumstances beyond my control. As aforesaid the applicant the Applicant will not suffer substantial prejudice in serving and filing this Answering affidavit late. However, I stand to suffer enormous prejudice, by reasons of the fact the Court would not have had regard to this affidavit in order to come to a proper finding."*

[18] In opposition to the application the respondent alleges that:

- 18.1 the application is defective as a result of the purported non-joinder of a surety, Thotogelo Sharon Setati to the present application;
- 18.2 the applicant failed to advise to what extent, if any, it had collected from the said surety;
- 18.3 the failure by the applicant to have demonstrated that the respondent is factually insolvent;
- 18.4 the respondent, purportedly, have assets, which if liquidated, would settle the arrears;
- 18.5 a denial that the respondent's arrears are R190,000.00 in that payments were made to repay the arrears;
- 18.6 a denial that demand for payment was made prior to the present application was launched, and that it was served on the respondent, less than 7 days prior to the hearing.

[20] The court, in the exercise of its discretion, may condone any non-compliance with

the Rules. See: - Minister of Prisons v Jongilanga 1985 (3) SA 117 (A) at 123 The discretion must be exercised judicially on consideration of the facts of each case and subject to the requirement that the applicant shows good cause for the default. See:- Federated Employers Fire and General Insurance Co Ltd v McKenzie 1969 (3) SA 360 (A) at 362 – 363 “*Good cause*” entails (a) a satisfactory explanation for the delay; the explanation must contain sufficient particularity for the default, (b) the application must be made *bona fide* and not intended to delay the proceedings, (c) the applicant must establish a *bona fide* defence that is not potentially unfounded and is based upon facts, that if proved, would constitute a defence; (d) the applicant must establish that the granting of the order will not prejudice the other party in any way that cannot be compensated for by a suitable costs order, and if applicable, a postponement See: - Smith NO v Brummer NO 1954 (3) SA 352 (O) at 357H - 358C and (e) the convenience of the court and the avoidance of unnecessary delay in the administration of justice. See: - Chairperson of the Immigration Selection Board v Frank and Another 2001 NR 107 (SC) at 165G – I; Ferris v FirstRand Bank Ltd 2014 (3) SA 39 (CC) at 43G – 44A.

- [21] I am not persuaded by the explanation advanced by the respondent. The explanation lacks particularity. Equally, I am not satisfied that the application for condonation is *bona fide* and not made for the sole purpose to delay. The unopposed hearing on 7 February 2023 was avoided by the filing of the respondent's notice to oppose on the eleventh hour. The opposing affidavit, coupled with the application for condonation was delivered on the eve of the hearing on the unopposed roll, undoubtedly to cause another postponement of the hearing of the matter.

- [22] It is trite that a weak explanation can be rescued by good prospects of success.
- [23] In considering the grounds of opposition, one must have regard to the test applicable relating to applications for the winding-up of companies. In this regard Rogers J in *Orestisolve (Pty) Ltd t/a Essa Investments v Ndtf Investment Holdings (Pty) Ltd* and *Another* 2015 (4) SA 449 (WCC) at par [13] to [17] reaffirmed the applicable legal principles when faced with an application for the winding-up of a company as follows:

“The relevant legal principles

[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 1988 (1) SA 932 (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 – 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 & Another v HEG Consulting Enterprises (Pty) Ltd 1988 (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 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 Solution CC v Amagen Development (Pty) Ltd [2010] ZAWCHC 339 paras 8-10; Badge & Others NNO v Midnight Storm Investments 265 Pty Ltd & Another 2012 (2) SA 28 (GSJ) para 14).

[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the Badenhorst rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the applicant. At the final stage, therefore, the Badenhorst rule is likely to find its main field of operation where the applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is bona fide disputed on reasonable grounds and should thus not be determined in liquidation proceedings. (In the present case neither side requested a referral to oral evidence.)

[11] If, on the other hand, and with due regard to the application of the Plascon-Evans rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's claim, there seems to be limited scope for finding that the debt is nevertheless bona fide disputed on reasonable grounds. It is thus unsurprising to find that the reported judgments where the Badenhorst rule has been relevant to the outcome have been cases of applications for provisional liquidation rather than final liquidation.

[12] Even where the facts are undisputed, there may be a genuine and reasonable argument whether in law those facts give rise to a claim. I have not found any case in which the Badenhorst rule has been applied, either at the provisional or final stage, to purely legal disputes. If the Badenhorst rule's foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute. But if the Badenhorst rule extends to purely legal

disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. I have not conducted an exhaustive analysis of the English authorities but the position stated by the Court of Appeal in HMRC v Rochdale Drinks Distributors Ltd [2011] EWCA Civ 1116 paras 79-80 indicates that the equivalent rule in England finds application where the dispute is shown to be one 'whose resolution will require the sort of investigation that is normally within the province of a conventional trial'. A purely legal question would not have that character.

[13] I have used the expression 'bona fide disputed on reasonable grounds' in describing the Badenhorst rule. The South African cases, including Badenhorst itself, are formulated in such a way as to indicate two requirements, namely bona fides and reasonable grounds. The view that the rule comprises two distinct components was expressly articulated in Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd 1998 (2) SA 208 (C) at 218F-220C, quoted with approval in Porterstraat 69 Eiendom (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 at 606B-607E. In the more recent of the two English authorities cited in Badenhorst, namely Re Welsh Brick Industries Ltd [1949] 2 All ER 197 (CA), Lord Greene MR said he did not think there was any difference between 'bona fide disputed' and 'disputed on some substantial ground' and that the one was just another way of saying the other (at 198E-F). This was repeated more forcefully by Harman J in Re a Company (No 001946 of 1991); Ex parte Fin Soft Holdings SA [1991] BCLC 737 at 738f-740c who said that bona fides in the (true) sense of good faith has nothing to do with the matter. However English cases usually express the test in the same way as our courts (see, for example, Tallington Lakes Ltd & Another v Ancaster International Boat Sales Ltd [2012] EWCA Civ 1712 paras 39-41; Salford Estates (No 2) Ltd v Altomart Ltd [2014] EWCA Civ 1573 para 33). Including or excluding bona fides as a distinct requirement is unlikely in practice to lead to different results because bona fides (genuineness) is on any reckoning not on its own sufficient and because a finding that the claim is disputed on substantial (ie reasonable) grounds could rarely co-exist with a finding that the company is not bona fide in disputing the claim."

- [24] The first two grounds relate to the purported failure of the applicant to have joined a surety to these proceedings and the failure by the applicant to have provided any insight in relation to its attempts to have executed against the referred to surety. Both grounds have no prospects of success. The first ground fails to recognise the fact that these are liquidation proceedings. Secondly, even if the joinder of the surety

was permissible, the opposing affidavit contains absolutely no allegations as to why the surety has a direct and substantial interest in these proceedings. Furthermore, the applicant alleges that as at 22 August 2022 the respondent was indebted to the applicant in the amount of R1,510,910.74 together with interest at the rate of 10.4% per annum calculated and compounded monthly in arrears from 19 August 2022. The suretyship appears to be a limited surety for an amount of R1,400,000.00.

[25] The third ground seeks to raise a dispute in respect of the respondent's insolvent status. The respondent fails to appreciate the fact that the applicant *inter alia* approaches this court on the deeming provisions provided for in terms of section 344(f) read with section 345(1) of the Companies Act 61 of 1973. The respondent is deemed to be trading under insolvent circumstances unless the deeming provisions are disturbed by facts placed before this court by the respondent. Save for a bald and unsubstantiated allegation that the respondent has sufficient assets to liquidate the arrears, no details are provided whatsoever as what these assets consist of and the whereabouts thereof. Furthermore, and by virtue of the breach of the respondent in maintaining the repayment instalments, the entire capital amount has become due and payable by virtue of the acceleration provisions in the underlying agreement. Accordingly, in order to prevent the applicant from proceeding in this application, the respondent is required to settle the entire indebtedness and not only the arrears; bearing in mind that in order for the applicant to establish its locus standi, it only requires an amount of R100 to be owing.

[26] The respondent, fourthly, denies the arrears to be R190,000.00 and alleges that it has made payments in reduction of the arrears. Again, no detail is provided in

support of these alleged payments, save to state that on the respondent's own version, an amount remains outstanding. Equally, the respondent disregards the evidentiary burden placed on it by virtue of the certificate of balance placed before this court.

[27] Lastly, the respondent denies that demand for payment was made until 7 days before the hearing of the applicant. I assumed that the respondent is referring to the hearing of 7 February 2023. This defence must fail. The underlying agreement contains no provision requiring the applicant to demand payment prior to initiating these proceedings. To the extent that the denial is directed at the section 345 demand, the defence equally, has no merit. It is not suggested that the demand was not served at the respondent's registered address. Service of the demand is confirmed by the sheriff of this court.

[28] Consequently, the opposing affidavit fails to establish any bona fide defences that are not potentially unfounded and are based upon facts, that if proved, would constitute a defence.

[29] Lastly, in respect of the application for condonation, I consider the aspect of prejudice. The respondent alleges that the applicant will not suffer substantial prejudice however, the respondent stands to suffer enormous prejudice, by reasons of the fact the court will not have had regard to the opposing affidavit in order to come to a proper finding. On this argument it nears mentioning that it is not sufficient for the applicant for condonation, the respondent in the present instance, to show that condonation will not prejudice the applicant. The respondent as applicant for

condonation, must show good cause; the question of prejudice does not arise if it is unable to establish that good cause exists. See: - Standard General Insurance Co Ltd v Eversafe (Pty) Ltd 2000 (3) SA 87 (W) at 95E-F

[30] In the result, the application for condonation is refused.

THE ORDER

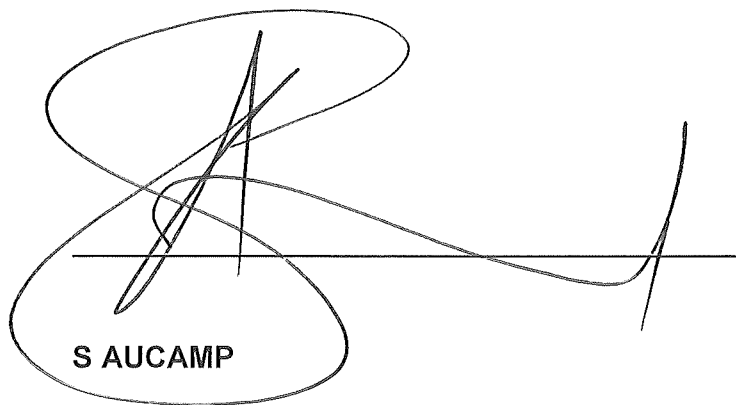
[31] Having considered the papers and having heard counsel for the respective parties, the following order is granted:

31.1 the respondent is placed under provisional winding-up and placed in the hands of the Master of this Honourable Court;

31.2 All persons who have a legitimate interest in and to these proceedings are called upon to put forward their reasons why the court should not order the final winding-up of the respondent at 10:00 on 16 August 2023.

31.3 A copy of this order is to be served on the respondent at its registered office and be published in the Government Gazette and a newspapers circulated in the area of the respondent.

31.4 A copy of this order is to be forwarded to each known creditor of the respondent by registered post.



S AUCAMP

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANESBURG

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Caselines. The date and time for hand-down is deemed to be 10 July 2023.