

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) REVISED: **✓**

Date: **15th December 2022** Signature: _____

A handwritten signature in black ink, appearing to be "H. J. Adams", is written over the signature line.

CASE NO: 32779/2020

DATE: 15TH DECEMBER 2022

In the matter between:

MOODLEY, SELVAN

Applicant

and

ADZAM TRADING 48 (PTY) LIMITED

First Respondent

NAICKER, CINDY N O

Second Respondent

SAMONS, THOMAS HENDRIK N O

Third Respondent

**COMPANIES & INTELLECTUAL
PROPERTY COMMISSION**

Fourth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Fifth Respondent

SOUTH AFRICAN REVENUE SERVICES

Sixth Respondent

Coram: Adams J

Heard: 14 October 2022

Delivered: 15 December 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date

and time for hand-down is deemed to be 10:00 on 15 December 2022.

Summary: Costs order – always within the discretion of the court – discretion to be judicially exercised and punitive costs order should be warranted – the general rule is that the successful party should be awarded costs – also means that a party who would have been successful, should be awarded costs – punitive costs order – insufficient reasons furnished for the granting of such order.

ORDER

- (1) The fifth respondent's counter-application for the final winding-up of the first respondent, is declared to be withdrawn.
 - (2) The fifth respondent (Standard Bank) shall pay the applicant's costs of its (the fifth respondent's) opposition to the applicant's application, as well as the applicant's costs relating to its (the applicant's) opposition to the fifth respondent's counter-application, including the costs in relation to the hearing of the costs arguments on 14 October 2022.
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JUDGMENT

Adams J:

[1]. The first respondent (Adzam) is at present and has since 28 February 2020 been in business rescue and the second respondent (Ms Naicker or 'the BRP') is the duly appointed Business Rescue Practitioner. The applicant (Mr Moodley) is a Trustee of the Infinity Trust, which is the sole shareholder of Adzam. Mr Moodley, for all intents and purposes, is the controlling mind behind Adzam and all the other companies in his Group of Companies and he is clearly in control of Adzam or was so in control at least until the said company was placed under business rescue, despite the fact that from 25 February 2020, his daughter, Natasha Naidoo, was appointed as its sole director. Adzam is a property owning

company and owns a commercial property in Brentwood Park, Benoni – worth approximately R30 million. Adzam carries on business mainly in the field of the letting of commercial premises to a number of commercial tenants, which include sister companies in Mr Moodley's group of companies. By all accounts, the fifth respondent (Standard Bank), until recently was Adzam's main creditor, it being owed about R3.6 million at the most relevant time.

[2]. In the main application, Mr Moodley, as an 'affected person' applies – in terms of s 130(2)(a)(i) of the Companies Act¹ – for Adzam to be taken out of business rescue on the basis that it no longer requires rescuing. The business of Adzam, so Mr Moodley contends, is sound and can now stand on its proverbial own two feet. In fact, a more accurate way of putting it is that Mr Moodley's case is that the resolution placing Adzam in business rescue should be set aside on the basis that there is no reasonable basis for believing that the company is financially distressed.

[3]. A consideration of the merits of that application is the subject of a separate judgment by this court, and there is no need to traverse those issues in any detail in this judgment. Suffice to state that Standard Bank opposed the said application on the basis that the business rescue should be converted to final liquidation and winding up proceedings relative to the said company. Standard Bank accordingly issued a counter-application for the liquidation of Adzam on the basis that the company is unable to pay its debts. Subsequently, and after some rather acrimonious exchanges between Mr Moodley and Standard Bank, Adzam's debt to the bank was settled, barring a few thousand rand, which remains in dispute between the parties. Standard Bank therefore indicated in no uncertain terms that it was not pursuing its opposition to Mr Moodley's application nor its own counter-application. The parties could however not agree on the issue of the costs in relation to Standard Bank's opposition to the application and its counter-application.

[4]. I am therefore required to adjudicate only the issue of those costs. In my view, the question to be asked is simply whether, all thing considered, Standard

¹ The Companies Act, Act 71 of 2008;

Bank was entitled to oppose the application and to counter-apply for the liquidation of Adzam. In that regard, the main question to be asked is this: Was Adzam disputing its indebtedness to Standard Bank on *bona fide* and reasonable grounds? Put another way, but for the 'settlement' of its claim on behalf of Adzam, would Standard Bank have been successful in its opposition to Mr Moodley's application and their counter-application?

[5]. These issues are to be decided against the factual backdrop of the matter and the relevant facts as set out in the paragraphs which follows.

[6]. It was the case of Standard Bank that, as and at 25 October 2020, it was a secured creditor of Adzam in the amount of R3 965 877.54, together with interest thereon from 25 October 2020 to date of final payment. In order to recover this debt, which had become due and payable by the aforesaid date, so Standard Bank contended, it was fully within its rights to commence insolvency proceedings for purposes of recovering this debt. Adzam's indebtedness to Standard Bank arose out of a medium-term loan agreement. As security for Adzam's indebtedness to Standard Bank, it holds *inter alia* a covering mortgage bond over the immovable property owned by Adzam. On 19 November 2020, the Standard Bank called up the loan on the basis that Adzam was in arrears with its monthly instalments to the tune of R671 360.94.

[7]. This was denied and disputed by Adzam, or more accurately, by Mr Moodley, who was of the view that payment of the instalments was up to date as they had been given a so-called 'Covid-19 relief' by Standard Bank in respect of six months' instalments. The debt claimed by Standard Bank, so it was alleged by Mr Moodley, was therefore not yet due and payable. Standard Bank was therefore urged not to persist with their opposition to Mr Moodley's application, which he had issued on the 20th October 2020. Standard Bank was not prepared to do this and instead on the 20th November 2020 delivered their answering affidavit and simultaneously proceeded to deliver their counter-application for the final winding-up of Adzam.

[8]. By 23 July 2021, the amount outstanding on the loan had been settled in full by Mr Moodley on behalf of Adzam, save for certain disputed sums relating to

further interests payable and costs, thus extinguishing Adzam's indebtedness to Standard Bank in full. This was in response to Standard Bank's insistence that Adzam was in breach of the loan agreement in that it was in arrears with payment of their monthly instalments, which, as already indicated, was vehemently denied by Mr Moodley. On 4 August 2021, Standard Bank's attorneys advised Mr Moodley's attorneys in writing that, in light of the said payments on account of the loan agreement, Standard Bank would no longer seek the winding-up of Adzam, nor would it continue to oppose Mr Moodley's application. Standard Bank was however insisting on payment of further interests, which, according to them, accrued on the outstanding sums, which had only been debited to the facility account on 26 July 2021, as well as payment of their costs of the application.

[9]. That then brings me back to the question whether Standard Bank was justified in launching its application for the final winding-up of Adzam. The answer to that question is, in my view, no. And I say so for the reasons set out in the paragraphs which follow.

[10]. At first blush, and by all accounts, Adzam is and never was insolvent. It is the owner of immovable property worth approximately R30 million, and its external debts and other liabilities amounted to no more than R4 million. It cannot therefore possibly be suggested that Adzam was factually insolvent. The next question is whether Adzam was able to meet its financial commitments as and when they arose. In that regard, it was the case of Mr Moodley, on behalf of Adzam, that it was. But for the period, during which it had been given a Covid-19 'payment holiday', so Mr Moodley averred, Adzam was up to date with its monthly instalments.

[11]. The alleged arrear instalments formed the basis of Standard Bank's case for the final winding-up of Adzam and their contentions that the company had committed an act of insolvency, was unable to pay its debts, and falls to be wound up. This, as already indicated, is countered by Mr Moodley on the basis that Adzam had applied for and received from Standard Bank Covid-19 relief for the six-month period in question. Accordingly, so Mr Moodley's argument continued, the company was not in arrears in the amount of R671 360.94. The Covid relief

period is the only period during which the company did not pay the full instalment of R111 893.49 per month. It made payment of the debt in the normal course, until such time as the debt was settled early and in full. Accordingly, so it was submitted by Mr Zimmerman, who appeared on behalf of Mr Moodley, there was a *bona fide* dispute as to whether there were arrears at the time of the winding up application.

[12]. Whilst this dispute of fact was still in existence, Mr Moodley, on advice from his legal representatives, elected to put an end to the debate once and for all, by paying up during April 2021 the alleged arrears of R671 360.94, so as to ensure that the winding up application is then withdrawn, and the fight with Standard Bank on this issue is brought to an end. This still did not satisfy Standard Bank, which for some reason, had adopted a rather uncompromising approach to Mr Moodley and to Adzam. Mr Moodley thereupon, and as alluded to above, settled the debt in full on 23 July 2021. If nothing else, this, as submitted by Mr Moodley, put paid once and for all to the allegation that Adzam was unable to pay its debts.

[13]. In sum, Standard Bank contends that they should be awarded the costs as they were successful in that they received payment of the loan amount. This also indicates, so Standard Bank argues, that they would have been successful with their application for the winding-up of Adzam. Not so, argued Mr Moodley, Adzam's debt and whether it was payable at the relevant time, were *bona fide* and reasonably disputed by them and therefore the winding-up application was doomed. He would therefore, so Mr Moodley contends, have been successful in opposing the application for the liquidation of Adzam. On this basis alone, he submits that Standard Bank should pay the costs as between him and them.

[14]. It is trite that liquidation may not be used to enforce payment of disputed debts. It is not suitable to resolve complex factual disputes. See *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd*² and *Badenhorst v*

² *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) at para 154;

*Northern Construction Enterprises (Pty) Ltd*³. Probabilities may not be the basis for factual findings unless the court is satisfied that there is no real and genuine factual dispute. Where the court finds that there is a real and genuine factual dispute incapable of resolution on papers, it can only dismiss the application if it finds that the applicant should have realized when launching the application that there was a factual dispute. See *Adbro Investment Company Ltd v Minister of Interior*⁴.

[15]. *In casu* there was, in my view, a genuine defence which Mr Moodley could and did in fact raise on behalf of Adzam in response to Standard Bank's claim. At the very least, it cannot possibly be suggested that the alleged debt owed to Standard Bank by Adzam and whether same was due, were not *bona fide* disputed on reasonable grounds.

[16]. In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another*⁵, Rogers J said the following:

'[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a *prima facie* basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour (*Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 975J – 979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a *prima facie* case.)

[8] Even if the applicant establishes its claim on a *prima facie* basis, a court will ordinarily refuse the application if the claim is *bona fide* disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. In the context of liquidation proceedings, the rule is generally known as the *Badenhorst* rule, from the leading eponymous case on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C, and is generally now treated

³ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346(T) at 347-348;

⁴ *Adbro Investment Company Ltd v Minister of Interior* 1956 (3) SA 345 (A) at 350A.

⁵ *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC);

as an independent rule, not dependent on proof of actual abuse of process (*Blackman et al Commentary on the Companies Act*, Vol 3 at 14 – 82 to 14 – 83). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is *bona fide* disputed on reasonable grounds. A court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (*Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G – I). However, where the applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds (*Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D – 219C).

[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead apply the *Plascon-Evans* rule (*Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) para 4; *Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd* [2010] ZAWCHC 339 paras 8 – 10; *Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) para 14).'

[17]. The *Plascon-Evans* approach requires the facts deposed to by Mr Moodley to be accepted, unless they constitute bald or uncreditworthy denials or are palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁶. Also see *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd*⁷.)

[18]. Applying this test *in casu*, the facts deposed to by Mr Moodley have to be accepted by me. In my judgment, the claim by Standard Bank against Adzam, although accepted by the latter, is *bona fide* disputed on reasonable grounds on the basis that payment was not yet due and payable and that the monthly

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634D-635D;

⁷ *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) para 36.

instalments were up to date. Moreover, Adzam was not factually or commercially insolvent – it was about R25 million in the green. And it is difficult to understand why Standard Bank was adopting such a harsh stance against it. This is more so, if regard is had to the fact that the medium-term loan which was advanced to Adzam, by all accounts, was going to be paid up well before its expiry period.

[19]. The stance adopted by Standard Bank in these proceedings appears to me to have been wholly unreasonable and such unreasonableness is in no way mitigated by its supposed concern for the interests of other possible creditors of Adzam, such as the South African Revenue Services (SARS). Furthermore, the fact that Adzam had been placed under business rescue in ‘suspicious’ circumstances also does not detract from the foregoing facts, notably that Adzam was not factually or commercially insolvent.

[20]. The point is that Standard Bank, when faced with a plausible explanation by Mr Moodley in relation to Adzam’s indebtedness to the Bank and the risk that that version may very well be true, truly jumped the gun by the institution of the counter-application. In rejecting out of hand that explanation and the version of Mr Moodley, Standard Bank acted unreasonably. There was no reason for the bank not to accept the perfectly plausible explanation proffered by the Mr Moodley.

[21]. I am therefore satisfied that Standard Bank should, in terms of the general rule that a successful party should be awarded costs, pay Mr Moodley’s costs of their opposition to his application as well as his costs relating to the counter-application.

[22]. The next question is whether a punitive costs order should be granted against Standard Bank. It is trite that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging*⁸:

‘[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the

⁸ *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 (1) AD 597 at 607;

circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.’

[23]. And see further: *Swartbooi v Brink*⁹. The issue of costs is a matter for the discretion of a trial court. Smalberger JA elaborated on the nature of this discretion as follows (in the context of an agreement between parties that attorney client costs be paid) in *Intercontinental Exports (Pty) Ltd v Fowles*¹⁰ at para 25: ‘The court’s discretion is a wide, unfettered and equitable one. It is a facet of the court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party’s conduct in relation to the litigation.’

[24]. SCA judgements have indicated that a court should be disinclined to grant costs orders on the scale as between attorney and client until salient argument and sufficient forensic debate have helped to establish the appropriate judicial basis on which to make them: *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*¹¹ and *Thoroughbred Breeders Association v Price Waterhouse*¹².

[25]. Bearing these principles in mind, I am not persuaded in this matter that a punitive costs order would be appropriate. In the premises, I am of the view that – as regards the proceedings between Mr Moodley and Standard Bank – costs should be awarded in favour of Mr Moodley against Standard Bank only on the party and party scale.

⁹ *Swartbooi v Brink* 2006 (1) SA 203 (CC) par 27;

¹⁰ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA).

¹¹ *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 648 E-I;

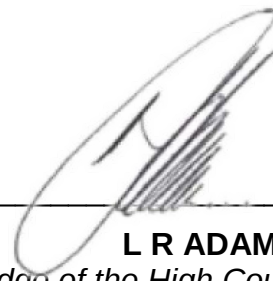
¹² *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 596 D-I.

[26]. Finally, I think that it would also be appropriate for me, in addition to the costs order, to grant an order to the effect that the counter-application is declared withdrawn, so as not to leave same hanging in limbo.

Order

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

- (1) The fifth respondent's counter-application for the final winding-up of the first respondent, is declared to be withdrawn.
- (2) The fifth respondent (Standard Bank) shall pay the applicant's costs of its (the fifth respondent's) opposition to the applicant's application as well as the applicant's costs relating to its (the applicant's) opposition to the fifth respondent's counter-application, including the costs in relation to the hearing of the costs arguments on 14 October 2022.



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

HEARD ON:	14 th October 2022
JUDGMENT DATE:	15 th December 2022 – judgment handed down electronically
FOR THE APPLICANT:	Attorney Rael Zimmerman
INSTRUCTED BY:	Taitz & Skikne Attorneys, Johannesburg
FOR THE FIFTH RESPONDENT (STANDARD BANK):	Advocate M De Oliveira
INSTRUCTED BY:	Jason Michael Smith Incorporated, Rosebank, Johannesburg