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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

CASE NO.: 1184/2018

**Date heard: 02-11-2018
Date delivered: 07-06-2019**

In the matter between:

Muhammad Raziek Rajah

Applicant

and

Graven Motorsport (PTY) LTD

Respondent

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The Applicant, Mr Muhammed Raziek Rajah, instituted proceedings for the liquidation of the respondent, Graven Motorsport (Pty) Ltd, on the basis that the respondent was unable to pay its debts as described in sec 345 of the Companies Act 61 of 1973, (the Act).

2. The applicant alleged in his founding papers four claims which the respondent refused and/or failed to pay.
 - 2.1 The first claim was one of R75 000, 00 which related to the double payment to the respondent for the purchase of a V10 Dodge Challenger engine in the amount of R75 000, 00 on 23 and 29 June 2017.
 - 2.2 The second claim is one for R90 000,00, being the amount allegedly paid by the applicant on behalf of the respondent as its contribution to a drift racing event/s and which the respondent has not repaid as undertaken.
 - 2.3 The third claim relates to the failure by the respondent to pay the applicant the purchase price of a Razor GTR custom car kit in the amount of R65 000 00.
 - 2.4 The fourth claim relates to the respondent's failure to pay its share of R5 000, 00 for the branded caps made for the drift events.
3. The respondent opposed the liquidation application and in its opposing affidavit admitted undertakings made between the parties in relation to the second to fourth claims, however it denied the amounts claimed to be due and owing under the second and fourth claims *inter alia* since no proof of payment by the applicant with regard to the second claim is attached to the founding affidavit and with regard to claim four no VAT

invoice was supplied to the respondent as proof of the actual expenses incurred by the applicant.

4. With regard to the third claim, the respondent stated that the custom car kit supplied by the applicant was unusable and that the applicant was informed thereof and the return of the car kit was tendered.
5. With regard to the first claim, the respondent took two points in limine – that of lack of *locus standi* and non-joinder. The *locus standi* point was raised on the basis that not the applicant but Good Hope Plasterers CC t/a as Good Hope Construction/ Good Hope Construction Racing, had paid the R75 000, 00 claimed to be due and owing. The non-joinder issue relates to the fact that the R75 000, 00 claimed was not paid into the account of the respondent but into the account of an entity named LC and RP Transport CC. The contention is thus that LC and RP Transport is the entity which should pay back the amount claimed and should therefore have been cited as a party to the proceedings.
6. In addition the respondent contends that the applicant owes it R251 142. 00 for repairs effected to the Dodge vehicle and intended to issue summons against applicant or counterclaim for payment of the amount.
7. Despite the defences raised, specifically to the first claim, the respondent, after delivering the opposing papers, in fact paid

the applicant on 21 September 2018 the amount of R75 000,00 in settlement of this claim.

8. The applicant thereafter in its replying affidavit conveyed its intention not to proceed with the liquidation application since payment relating to the first claim had been made to him in the meantime and the remaining claims have resulted in a dispute of fact, which although spurious would best be resolved in action proceedings against the respondent.
9. The only issue thus remaining between the parties in this application is that of costs.
10. The applicant is of the view that the respondent should pay the costs of the application since; (i) it is the respondent's non-response to the sec 345 demand which resulted in the application being brought; and (ii) the respondent thereafter opposed the application just to turn around and pay a substantial portion of the claim. The contention is therefore that the application would not have been brought had the respondent paid the R75 000,00 which was due to the applicant, within the three week period provided for in sec 345 of the Act.
11. The respondent on the other hand, holds the view that the application would in any event have failed due to the applicant's lack of locus standi and the material dispute of facts which the applicant was aware of before launching the

application. It therefore contends that the applicant should bear the costs of the application, on the attorney and client scale.

12. As far as the *locus standi* defence is concerned I do not intend to deal with it in any great detail, since I am of the view that this is an opportunistic defence, just as the *in limine* point of non-joinder, which quite noticeably has not been pursued during argument. The respondent in its opposing affidavit is quite clearly ambivalent and contradictory in its own view on who the entity is it had transacted with in connection with the upgrade of the Dodge Challenger, the subject matter of the applicant's first claim. In one instance the deponent to the opposing affidavit, Mr Otto Graven, the shareholder and director of the respondent, remarks generally that his dealings with regard to repairs of drifting motor vehicles were with the applicant and/or GHCR. He thereafter states that, regarding the specific Dodge Challenger transaction, he was under the impression that the applicant acted on behalf of Good Hope Plasterers CC t/a GHCR. He later mentions that the applicant and/or Good Hope Plasterers CC paid an additional amount of R30 000, 00 towards the upgrade of the Dodge Challenger. The only basis for the challenge to the *locus standi* of the applicant regarding this claim is that the double payment of R75 000, 00 emanated from the bank account of Good Hope Plasterers CC. This issue was in any event put to rest when Mr Graven made payment of the R75 000, 00 to the applicant.

13. The more cogent argument is that concerning the dispute of facts. On 11 April 2018, almost one and a half months before the application for liquidation was launched, the respondent presented an invoice relating to the “*Dodge Build and Storage*” and which forms the basis for its intended counterclaim against the applicant. The applicant in his founding affidavit refers to this invoice as being “*contrived*” as a direct result of the sec 345 demand. He furthermore denies that he is responsible for payment of the services and repairs since the invoice is addressed to Good Hope Construction, seemingly forgetting that he claims to have entered into the agreement for the upgrade of the Dodge in his personal capacity. The applicant should have foreseen that a material dispute of facts would arise from this issue.
14. Likewise, as appears from an e-mail dated 21 May 2018 emanating from the applicant himself, he knew before instituting the application that the respondent wanted to return the Razor GTR kit which forms the basis of the third claim referred to herein-above. The dispute relating to this issue was thus also known to the applicant beforehand.
15. An applicant who brings an application for liquidation after it has become clear that a debt is disputed, and such a dispute cannot be resolved merely on the papers, as the applicant apparently does appreciate, having withdrawn the application, is said to abuse the process of the Court. In *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956(2) SA 346 (T)

at 347-348, what has become known as the “*Badenhorst rule*,” was formulated and which loosely paraphrased is that, liquidation proceedings ought not to be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed since the procedure for liquidation is not designed for the resolution of disputes as to the existence or non-existence of a debt.

16. Ms Snyders who appeared for the respondent is correct in her contention that the application would have been dismissed on this basis had it been pursued and that the respondent should not have to bear the costs of an abortive application.
17. I am however not of the view that the respondent should be rewarded for its lackadaisical approach towards paying its debts and the attitude it has taken on the issue of *locus standi*, by ordering the applicant to pay attorney client costs. A fair costs order in my view is one where the applicant has to pay for the costs of the application on a party and party scale.

The following order is made:

The applicant is ordered to pay the respondent’s costs relating to the withdrawn application on the party and party scale.

CC WILLIAMS
JUDGE

For Applicant: Adv DC Jankowitz
 Van de Wall Inc

For Respondents: Ms J Snyders
 Engelsman, Magabane Inc