

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 57639/2007

INYANGA TRADING 444 (PTY) LTD

APPLICANT

And

3/7/2009

R&T ONTWIKKELAARS (PTY) LTD

RESPONDENT

JUDGEMENT

MAVUNDLA J.:

- [1] The applicant seeks an order in terms whereby the respondent's company is placed under final winding up and that the costs of the application be costs in the liquidation. The application is opposed.
- [2] The applicant alleges in its papers *inter alia* that the respondent is unable to pay its debts and that a notice in terms of section 345 of the Companies' Act, 61 of 1973 was delivered by hand and sent by registered post to the registered office of the respondent. Annexure "JPN2" is the relevant letter of demand in terms of the aforesaid section.

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
2009/07/03 DATE	 SIGNATURE

- [3] The applicant alleges that the respondent is indebted to it in the amount of R1 081 460.43 being amounts in respects the earth moving machinery let to the respondent by the applicant. The applicant alleges further that the aforesaid amount relates to the various to various invoices numbered 001, 002, 003, 005 and 006 dated respectively 8 December 2006, 24 January 2007, 5 February 2007, 15 February 2007 and 28 February 2000.
- [4] The cause of the respondent's indebtedness to the plaintiff is alleged to be as the result of the applicant letting to the respondent a Komatsu TLB 4X4, a Komatsu bulldozer and a Komatsu excavator. The TLB and Excavator were let to the respondent for a minimum of twelve month. A Bulldozer was let to the respondent for a minimum for a period of three months. It is averred that the respondent needed the aforesaid machinery for purposed of executing civil engineering services and infrastructure services at a development at Louis Trichard now Makhado.
- [5] The appellant further alleges that the transport costs for the TLB and the Bulldozer from Bela-Bela to Louis Trichard became payable on 7 January 2007. On 16 January 2007 a letter of demand was allegedly written to the respondent in terms of which payment was demanded in the amount of R16 245.00. The applicant further alleges that it then cancelled the rental agreement on 24 January 2007.

- [6] The respondent denies that it is indebted to the applicant in the aforesaid amount or at all and that it had to pay any transport costs to the applicant. The respondent contends on the contrary that it is the applicant that is indebted to it in the amount of R17 125 000.00. The respondent's claim is set out in summons that was issued under case number 57639/07 in this Court against the present applicant. A copy of this summons is attached to the respondent's answering affidavit. It is not in dispute that such summons were issued and served on the applicant.
- [7] The plaintiff has also attached to its papers copies of summons issued by the respondent against it under case number 52131 (annexure JPN17) in which the respondent claims from the applicant the amount of R17125 000.00. In the summons in paragraph 6 thereof it is stated as follows: "On 24 January 2007 the defendant addressed the letter of cancellation to the plaintiff, a copy of which is not in the possession of the plaintiff, in terms of which the rental agreement was cancelled as a result of the alleged repudiation by the plaintiff of the rental agreement of 5 December 2006. As a result of the plaintiff's refusal to accept responsibility for the transport costs and plaintiff's rejection of invoice 001 rendered by the defendant to the plaintiff." In paragraph 8 thereof it is stated "the plaintiff disputed a liability for the transport costs, as reflected in Annexure "G" above and has also disputed the correctness of

tax invoice 001 dated 8 December 2006 rendered by defendant to plaintiff. In paragraph 9 it is stated that the plaintiff had repudiated the rental agreement, and disputed the alleged cancellation of the agreement by defendant as appears from a letter dated 26 January 2007 of plaintiff, which is annexed hereto as Annexure "H". It needs be understood that the plaintiff herein above is the respondent in casu and the defendant is the applicant in casu. I find it not necessary to state much about the progress of the civil proceedings referred to herein above. It suffices to state that these proceedings are pending.

- [8] The respondent in its answering affidavit states that the application is based upon claims which form the subject of an action which is currently pending between the parties under case number 52131/2007 in the jurisdiction of this court. In this regard he has attached copies of the relevant summons, which I have already referred to here earlier above. The respondent further states that the application of the applicant is an attempt to enforce and allege that which is currently *bona fide* dispute between all the relevant parties.
- [9] From the papers filed it is clear that each party alleges that the other is indebted to it. They differ as to the amounts owed by the other.
- [10] The circumstances upon which a liquidation order are set out in section 344 of the Companies Act, one of which is in terms of

subsection “ (h) it appears to the Court that it is just and equitable that the company should be wound up.”

[11] The Court has discretion to grant a winding up order irrespective of the ground upon which the winding up order is sought. In exercising its discretion, which must be exercised judicially, the court must have regard to the reasons for the proposed winding up. The Court must also guard against the abuse of the Court process, against frivolous application or against perverting the winding up process to enforce payment of a debt, the existence of which is bona fide disputed¹.

[12] For the Court to exercise its judicial discretion, the approach it must adopt, where the respondent disputes the validity of the alleged debt, is to consider whether the respondent has, on a balance of probability convinced the Court, not that the debt is not payable, but that it is disputed on *bona fide* and reasonable grounds; vide *Badenhorst v Northern Construction Enterprises Pty Ltd*.²

[13] In my view, the following citation is apposite to this matter. The Court in *Robson v Wax Works (Pty) Ltd and Other*³ said:

“[13] The applicant was aware prior to the institution of the application that his money claims against the first respondent were

¹ Henochsberg on Companies Act at Vol 1 691 [issue 1] -694 [Issue 23].

² 1956 (2) 346 at 347 H-348.

³ 2001 (3) SA 1117 at 1122B-G.

disputed. It is trite that winding up proceedings are inappropriate when brought by a creditor whose claims are reasonably and bona fide disputed. See *Badenhorst v Northern Construction Enterprises Pty Ltd* 1956 (2)SA 346 (T) and many subsequent cases in which the so-called *Badenhorst* rule has been applied (some of which are collected in *Kali v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980D-f). The institution by a creditor of winding up proceedings in such circumstances has on occasion been stigmatised as an abuse of process.

[14] What a respondent must show to demonstrate in winding up proceedings that a creditor-applicant's claim is reasonably disputed has recently been restated by this Court (per Thring J) in *Hülse-Reutter and Another v HEG Consulting Enterprises 9Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219F-220A:

'Apart from the fact that they dispute the applicant's claims, and do so *bona fide*,... what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not... have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their claims and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such trial. This is not an application for summary judgment in which... a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the court that he has a *bona fide* defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefor"... It seems to me to be sufficient for the [respondents] in the present application, as long as they do so *bona fide*,... to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company.'

[14] From the very fact that the proceedings instituted by the respondent against the applicant are pending, it is safe to assume that the applicant is disputing its indebtedness to the respondent, in as much as the respondent disputes that it is indebted to the applicant. These are disputes that can not be resolved on affidavits. For each party to succeed on its claims against the other, viva vice evidence would have to be lead. That being the position, I can safely assume that there is a dispute of fact as regards to who is indebted to the other and to what extent. But besides, when the applicant initiated the present proceedings against the respondent, was aware of the pending action of the respondent against it.

[15] In *Blackman Jooste Everingham commentary on Company Act* Volume 3 pages 14-79 it is stated that "the procedure for winding up is not designed for the resolution of disputes for the existence or non-existence of a debt, and therefore winding up proceedings are not appropriate, and ought not to be resorted to, in order to enforce payment of a debt, the existence of which is *bone fide* disputed by the company on reasonable or substantial ground. 'Great care must be taken by a Court to ensure that liquidation proceedings are not employed to shut the doors of the Court to a Respondent who may well on the basis of evidence placed before an appropriate court convert a

bona fide dispute into one which is clearly compelling in successful.”⁴

- [16] Where there is a *bona fide* dispute of facts, and the respondent *bona fide* and on reasonable grounds disputes the claim, then the court should not lightly grant a winding up order; *vide Kyle and Others v Maritz & Pieterse Inc.*⁵

- [17] I am of the view that the respondent has satisfied me that he has a *bona fide* defence against the applicant's alleged claim, in the form of a counter claim. I need not interrogate whether he will succeed with his claim against the applicant. In the premises, in the light of the herein above referred to authorities, I am of the view that in the circumstances of this case an appropriate order is to dismiss the applicant's application with costs.

- [18] *In casu* both parties employed senior counsel. It shows that the case is very important to both parties especially having regard to the respective claims each party alleges that it is being owed by the other. It is therefore justifiable that the successful party be entitled to the costs of senior counsel as well.

- [19] I therefore make the following order:

⁴ Vide *Porterstraat 69 Eindomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4).

⁵ 2002 (3) ALL SA 223(T) at page 227 para [13].

1. That the application is dismissed.
2. That the applicant to pay the costs of this application, which costs shall include the costs of senior counsel.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 03 / 07 / 2009

APPLICANT'S ATT : MARK EFSTRATIOU INC

PLAINTIFFS' ADV : ADV A C FERREIRA (SC)

DEFENDANT'S ATT : J.P.A VENTER ATTROENYS

DEFENDANT'S ADV : ADV M M RIP (SC)