IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number: 4772/2023

In the matter between:

FUTUREFIN (PTY) LTD Applicant

and

AUTO PRINS (PTY) LTD Respondent

JUDGMENT BY: REINDERS, J

HEARD ON: 7 MARCH 2024

DELIVERED ON: 28 JUNE 2024

This judgment was handed down in open court and distributed to the parties via electronic mail communication.

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[1] The applicant company prays for an order that the respondent company be placed under provisional liquidation[1] in the hands of the Master of the High Court, together with the usual ancillary relief in applications of this nature.

[2] According to the applicant, the respondent is indebted to it in the amount of R 961 225.11 (together with interest) being the balance due and payable to the

[1] Relying on sections 344 and 345 of the Companies Act 61 of 1973 read together with the Companies Act 71 of 2008.

applicant in respect of a signed Acknowledgement of Debt (the "AOD": annexure "DLV 4") drawn in favour of the applicant by the respondent on 21 July 2022. The applicant avers that it holds no security from the respondent for these payments due to it.

[3] The respondent opposes the application. In its answering affidavit the deponent, as the sole director of the respondent, states that the respondent bases its opposition thereon that the applicant does not have the necessary locus standi to bring the application and/or the respondent's indebtedness is disputed on bona fide and reasonable grounds.

[4] Rogers J held as follows in _Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another:_[2]

> "[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…
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> [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 to 14 – 83). A

[2] 2015 (4) SA 449 (WCC).

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…"

[5] In *Hulse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening*[3] Thring J said the following:

"I think it is important to bear in mind exactly what it is the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claim, and do so bona fide, which is now common cause, 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, in this matter, have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their 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 a trial. This is not an application for summary judgment in which, in terms of the Supreme Court Rule 32 (3), a defendant who resists such an application be 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."

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[3] 1998 (2) SA 208 (C) 219E-220A.

[6] In its defence the respondent disputes the applicant's locus standi to pursue the application. It is averred that no valid causa exists for the AOD upon which the application is based. Respondent points out that in terms of the AOD the respondent is described as "the debtor" and the applicant as "the creditor" and that respondent's indebtedness arises from the sale of vehicles by the creditor to the debtor. However, in terms of the Master Rental Agreement the entity known as Futureneers Drive (Pty) Ltd purchased vehicles and rented it to dealers and once sold, would receive payment from the dealer. This Agreement was concluded between Futureneers Drive (Pty) Ltd and the respondent who did not sell any vehicles owned by the applicant. The debt referred to in the AOD certainly did not arise from the sale of vehicles by the applicant to the respondent. It is concluded that the amount of R 138 500.00 was never due by the respondent to the applicant. The respondent disputes therefore that the applicant has a claim or locus standi to pursue a liquidation application. Respondent further relies on an agreement in terms whereof a partial payment in the sum of R 580 000-00 was made, but states that after delivery of a certain Hyundai- vehicle for the aforementioned value, applicant disputed such value and issued two summonses against the respondent based on the AOD. Whilst these actions are pending, it launched this application for liquidation. Respondent submits that this is an abuse of court processes.

[7] The applicant in the founding papers explained that it issued the liquidation application having learned that a company known as Autostar has started doing business from the same address as respondent and that it considers that respondent has closed its doors and moved its assets into a new entity. Applicant's attorney enquired from the respondent to clarify same, however the applicant did not believe the contents of the response it received. The response received before the liquidation application was issued, was that Autostar and Autoprince are two separate companies that have been trading on occasion from the same premises and that "the guiding minds" of both are the same person. No transfer of assets has taken place and both entities are trading. Respondent in this respect states that Autostar was registered as GNR Motors (Pty) Ltd in 1988 whilst respondent was incorporated in 2017.

[8] Applying the principles stated above I should be mindful thereof that it is unnecessary and undesirable to come to any final conclusion as to the legal validity of the respondent's defences. It would be sufficient to find that the respondent has discharged the onus of showing that the debt is disputed on bona fide and reasonable grounds, and if so, liquidation proceedings would be inappropriate to establish the existence of the debt.[4]

[9] A factor weighing heavily with me is that the applicant has instituted two actions against the respondent on the same AOD it relies upon in these proceedings. The Master Rental Agreement on face value does not support the applicant's version that respondent is indebted to the applicant arising from the sale of vehicles by the applicant to the respondent. In reply the applicant concedes that this is so, but says that such claim has been ceded to it. The liquidation application was not prompted by respondent's failure to pay in terms of the AOD. On the contrary, failure to pay resulted in summons to be issued. The liquidation application was prompted by applicant's concern of Autostar doing business from the same premises. In this respect the applicant was supplied with information and it appears that both companies have existed for several years. The applicant harbours certain suspicions in respect of the respondent and Autostar, but as mentioned, it remains suspicions and no facts have been adduced to contradict the explanation given by the respondent and which was available before the initiation of the liquidation proceedings.

[10] The factual disputes between the parties will in all probability be ventilated in the mentioned two action proceedings. I cannot resolve that on the papers, however I can and do find that the respondent has shown that the debt is disputed on bona fide and reasonable grounds within the context of liquidation proceedings. It follows that the application for liquidation cannot be granted.

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[4] See: *Investec Bank Ltd & Another v Lewis* 2002 (2) SA 111 (C) at 119 F-H.

[11] There is no reason why costs should not follow the result. In my view the appropriate scale for such costs should be on a Scale B as envisaged in Uniform Rule 67A.

[12] I make the following order:

The application is dismissed with costs on Scale B.

[redacted]

C REINDERS, J

On behalf of the Applicant:	Adv A Sander
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