# IN THE HIGH COURT OF SOUTH AFRICA,

# FREE STATE DIVISION, BLOEMFONTEIN

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

Case Number: 3834/2023

In the matter between:

**ANTHILL DEVELOPMENTS (PTY) LTD** Applicant

and

**REDANT DEVELOPMENTS (PTY) LTD** Respondent

**STELERO (PTY) LTD** Intervening Respondent

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**JUDGMENT BY:** REINDERS, J

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**HEARD ON:** 18 APRIL 2024

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**DELIVERED ON:** 12 AUGUST 2024

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

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[1] This is the extended return day of a provisional order of liquidation granted by this court on 10 August 2023 against the first respondent, Redant Developments (Pty) Ltd (Redant). The applicant, Ant Hill Developments (Pty) Ltd (Anthill) moves for a final order of liquidation. Redant does not oppose the confirmation of the provisional order. However, the application is opposed by

the intervening respondent Stelero (Pty) Ltd (Stelero) having successfully applied for an order to intervene.

[2] The deponent to Anthill's founding and replying affidavit is its co-director Mr AH Erasmus. It is common cause that Redant's present directors are Mr HJ de Beer, Mr JHS Le Roux and Mr AH Erasmus (Jnr). The shareholders of Redant is Anthill (as a holder of 50% of the issued shares) and Stelero (as a holder of 50% shares). Mr le Roux (the deponent to Stelero's answering affidavit) is also a co-director of Stelero. Redant is the owner of several erven which form part of the Red Rock Estate development situated in close proximity to the Woodland Hills Wildlife Estate in Bloemfontein. The ownership of the said erven was initially held by Stelero Trust (the Trust) of which Mr Le Roux is a trustee. In short, Redant's ownership of the erven was as a result of an Agreement of Sale concluded in 2015 between the Trust and the entity now known as Redant, with Anthill to be required to invest further funds in Redant for the development of Red Rock Estate. A Shareholders Agreement and Memorandum of Incorporation (the MOI) were likewise concluded.

[3] Anthill obtained a provisional order of liquidation averring amongst others that it is a creditor of Redant in an amount of R 6 995 156-00, having demanded payment for the amount in terms of the Companies Act, 61 of 1973 (the Act). It is stressed in the papers that Anthill prosecutes this application in its capacity as a creditor of Redant and not as a shareholder thereof. Anthill further avers that Redant conducts business in a state of commercial insolvency and is factually insolvent as envisaged in sec 345(1)(c) of the Act. It submits that it would be just and equitable that Redant be finally wound-up in terms of sec 344(h) of the Act, based thereon that a deadlock exist between the directors and shareholders and that Redant's substratum has disappeared (in that it cannot take such further steps as are required for the development of Red Rock Estate or any other investment activities). It is submitted that Redant has no secured creditors and as such all of its creditors, including both Anthill and Stelero, stands to receive a sizeable dividend which is a demonstrateable advantage to Anthill, Redant and other possible creditors.

[4] Stelero resists the final relief claimed, relying thereon that Redant's indebtedness to Anthill is disputed on bona fide grounds. As a point of departure it submits that Anthill is not a creditor of Redant and consequently does not have the necessary locus standi to bring this application. Stelero is of the view that a material factual dispute exists regarding the computation of the indebtedness which ought to have been forseen by Anthill. Moreover, so the argument goes, the application for liquidation is not bona fide, constitutes an abuse of process and has been lodged with an ulterior motive to force a sale of Anthill's shares in Redant. Stelero denies that Redant is commercially or factually insolvent and submits that, even if court should find that Redant is commercially insolvent, regard should be had thereto that Redant's assets exceeds it liabilities in value.

[5] In ***Orestisolve (Pty) Limited t/a Essa Investments v NDFT Investment Holdings (Pty) Limited and Another***[1], the court having discussed the test to be applied at the provisional stage, proceeded as follows in paragraph [10] of the judgment:

> "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)."

and held further:[2]

[1] *2015 (4) SA 449 (WCC).*
[2] At para [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.

[6] The Supreme Court of Appeal in ***Imobrite (Pty) Ltd v DTL Boerdery CC***[3], the summarised the principles to be applied in insolvency cases where a debt is disputed, as follows:

*"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debt. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused.*

*A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights".*

[7] An unpaid creditor's right *ex debito justitiae*, to a winding-up order against a company that has not discharged its debts, however, remains undisturbed. [4] The court exercises a narrow discretion when deciding on a liquidation application as found in ***Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited***[5] in illustrating why a court will not be easily swayed towards exercising its discretion in favour of a debtor that has not discharged its debts:

[3] (1007/20) [2022] ZASCA 67.
[4] ***Afgri Operations Limited v Hamba Fleet (Pty) Ltd*** 2022 (1) SA 91 (SCA) at para [12].
[5] 2014 (2) SA 518 (SCA).

*"[17] That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one: the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company who owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets."*

[8] It is not necessary to prove actual insolvency for the purposes of section 344 (f) of the Companies Act. In ***Standard Bank of South Africa v R-Bay Logistics CC***[6] it was held that "*if there was evidence that the respondent's company is commercially insolvent (ie cannot pay its debts when they fall due) that is enough for a Court to find that the required case under section 344 (f) has been proved*". However, a discretion in favour of not granting a liquidation order in circumstances where a company is commercially insolvent, must be based on a solid factual foundation.

[9] In ***Orestisolve*** it was held that the fact that a company's investment operations ran at a loss, does not mean that it was commercially insolvent. Provided a company has resources from which to meet current demands, it matters not, when one is considering solvency, whether its operations in any particular year are or are not profitable.[7]

[10] In Anthill's founding affidavit the deponent explains that Redant's indebtedness to Anthill is evident from its financial statements for the year ending 28 February 2022 which was signed by both Mesrs De Beer and Mr Le Roux, being co-

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[6] 2013 (2) SA 295 (KZD).

[7] ***Orestisolve*** supra at par [74].

directors of Redant. Anthill avers that Redant's indebtedness reflected as a loan account in the amount at the time of R 6 995 156.00 is expressly and unambiguously recorded, and there cannot exist any dispute that Mr Le Roux signed these statements. It concludes therefore that Redant's failure to respond to the demand in any way whatsoever, is by operation of law deemed to be unable to pay its debts and is therefore in a state of insolvency. Moreover, the insolvency is apparent from its financial statement which reflects losses for the financial years ending February 2021 and 2011. The respondent is not in a position to liquidate its assets (in the form of erven), rendering it just and equitable that Redant be wound-up.

[11] In a single paragraph dealing with his signature, Mr Le Roux in his opposing affidavit avers that he was pressured continuously by Mr de Beer to sign this financial statement which he did under protest, averring that "by appending my signature to the financial statements, I did not agree that Anthill's loan account was correct."

[12] It is common cause that the 2015 agreement recorded that pursuant to Redant being created, Anthill and Stelero would not only hold equal shareholding in Redant, but would also be holders of equal loan accounts against Redant in the amount of R4 million, being the sum of R 3 600 000.00 and R 400 000.00. Moreover, Anthill agreed to make payment of Anthill's indebtedness to the Standard Bank of South Africa in the amount of R 1 025 553.39 (exclusive of interest). This payment was however made on the condition that that a reduction/credit of Stelero's loan account against Redant would decrease by the aforementioned amount.

[13] Anthill submitted that Redant had at no relevant time whether on bona fide grounds or at all disputed its indebtedness to Anthill, and Stelero in opposing the application could not place any evidence before court in the form of a single piece of communication in whatsoever form to show that Redant's indebtedness to Anthill in respect of the loan account (despite Redant being legally represented all throughout) is disputed, more specifically at the time

when the demand for payment was made by Anthill. The only enquiry by Stelero dealt with the reduction of Stelero's loan account against Redant (which was explained by Mr De Beer) but at no stage whatsoever did Stelero deal with the extent of Redant's indebtedness on the loan account. In fact, the denial of the indebtedness as well as the allegations that signing of the statements was done under duress, came to light for the first time in Stelero's opposition to the relief claimed for a final order of liquidation. Anthill urged me to find that Stelero failed to adduce the necessary averments to establish that it had signed the statement under duress in order to void the same.[8]

[14] In 2019 Anthill, Stelero and Redant concluded a Sale of Shares Agreement. Counsel appearing for Anthill argued that Stelero failed to take the court into its confidence that such agreement was in truth not only signed by Stelero but in terms of the agreement Stelero sought to purchase Anthill's shares and loan in the amount of R 6 995 156-00 being the exact amount of Redant's agreed indebtedness to Anthill in respect of its loan account at the time of the conclusion of the latter agreement. This conduct, so the argument went, raises the rhetorical question that if Redant was not indebted to Anthill and Stelero denied this indebtedness, why would it conclude an agreement for the purchase of the exact same amount of its indebtedness at the time. Anthill ultimately submitted that none of the defences raised by Stelero in opposition to the final relief claimed was ever raised in the string of communication as annexed to Anthill's founding affidavit, thus illustrative thereof that these purported grounds are not made bona fide and does not meet the threshold of being disputed on reasonable grounds.

[15] In submission before me counsel for Stelero hinted that Mr Le Roux's signature is in fact irrelevant, ostensibly on the basis that the claimed amount was never a loan account in the first place. In reply to Anthill's submission that Redant is both factually and commercially insolvent, Stelero argues that even should the court find the existence of a loan, Anthill is not entitled to simply call up a shareholder's loan and seeks to rely thereon to advance its case that Redant

[8] ***Arend and Another v Astra Furnishers (Pty) Ltd*** 1974 (1) SA 298 (C).

is commercially insolvent. According to Stelero, the MOI records (clause 6.6.3.3) that any amount reflected under a loan account of a shareholder shall be re-payable only in the event of the winding-up of Redant, or if Redant is placed under business rescue, or if the shareholders resolve to re-pay such loan of any portion thereof by way of special resolution. In addition, so the argument went, the Shareholders' Agreement provides for compulsory dispute resolution mechanisms as envisaged in clause 7, which Anthill had failed to pursue.

[16] Anthill in reply alludes thereto that on a purposeful interpretation of the said clause 6.6.3.3 it is evident that in the absence of any agreement by the shareholder and the company of terms for repayment of shareholder's loans, such payments would be repayable on demand. It furthermore submitted that clause 7 in turn is only applicable in the event of breach, which is not pleaded by Stelero.

[17] Apart from its denial of any indebtedness by Redant to Anthill, Stelero adds that it is not competent in law (in terms of sec 346(2) of the Act) for a shareholder of a company to apply for the liquidation of such company on the grounds of an alleged inability to pay its debts and/or factual insolvency. As mentioned, Anthill moves for the relief it claims in its capacity as a creditor of Redant, and there is thus no merit in this ground of opposition in my view.

[18] It is my considered view that there is no genuine factual dispute regarding the existence (and correctness) of the Anthill's claim. Put differently, I have not been convinced that the debt is bona fide disputed on reasonable grounds by Stelero. I am satisfied that Anthill has proven on a balance of probabilities that it has the necessary locus standi as creditor of Redant to have petitioned to this court, that Redant is indebted to it in the amount as claimed, is unable to make payment thereof despite demand ,and that there would be an advantage to the general body of creditors. In my view Anthill has made out a case for a final order of liquidation.

[19] Having reached the immediate aforementioned conclusion, it is in my view not necessary to deal with the rest of the grounds upon which Anthill places reliance for the winding-up of Redant.

19.1 However, and in the event that I be wrong in such conclusion, Anthill also relies thereon that Redant is factually insolvent. In opposing this contention, Stelero argued that should the loan (the amount of debt) be taken out of the equation for purposes of determining Redant's solvency, it's assets by far exceeds its liabilities, thereby negating a conclusion that Redant is factually insolvent. No independent expert valuations of the erven were proffered by Stelero, safe to state that the purchase price of the erven at the time was R 7,2 million and adding that it was sold for less than its actual value. As I have concluded, the debt was proven by Anthill.

19.2 Moreover, Anthill also submitted that Redant is commercially insolvent. Redant's inability to have paid its debt towards Anthill, is unassailable and indicative thereof that it is in a state of commercial insolvency. Anthill in my view demonstrated that, apart from the loan amount, it had also contributed and paid for several other expenses of Redant. Stelero pressed on me that Anthill stands in a fiduciary relationship with Redant, a factor which this court should take into account in exercising its discretion not to grant a final order of liquidation. Anthill's reply thereto was a confirmation that the application is brought by Anthill as a creditor, and not as a shareholder. I do not deem it necessary to deal with the final ground relied upon by Anthill, namely that it would be just and equitable for Redant to be wound-up. In this regard counsel for Stelero invited my attention to the judgment of ***Bester and Others v Coral Lagoon Investments 232 (Pty) Ltd*** [9] wherein Henney J declined to exercise his discretion for the granting of a final order of liquidation in favour of the applicant. Although it was submitted that the judgment is on all fours with this application, it ought to be noticed that the applicant

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[9] 2013 (6) SA 295 (WCC)

was unsuccessful in its ground of the respondent's inability to pay its debts in view of the voidness of the loan agreement relied upon, unlike in this instance where Anthill was successful in not only proving the indebtedness of Redant, but also its factual and commercial insolvency. In my discretion, Anthill is entitled to a final order of liquidation.

[20] Anthill duly complied with the order for the provisional liquidation of Redant in respect of service thereof.

[21] Having reached the conclusions as I did herein above, I make the following order:

21.1 The respondent company Redant Developments (Pty) Ltd is placed under final liquidation in the hands of the Master of the High Court (Free State Provincial Division).

21.2 The costs of this application shall be costs in the administration of the liquidated estate.

[redacted]

C REINDERS, J

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| On behalf of the Applicant: | Adv S Tsangarakis |
| Instructed by: | Honey Attorneys<br>BLOEMFONTEIN |

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| On behalf of the Intervening Respondent: | Adv R van der Merwe |
| Instructed by: | McIntyre Van der Post Incorporated<br>BLOEMFONTEIN |