



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 20167/23

In the application between:

CHARL ELECTRICAL ENGINEERING CC

Applicant

and

INTEGRATED PROJECTS CONSTRUCTION (PTY) LTD

Respondent

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 12 August 2024

Judgment Delivered electronically: 11 November 2024

JUDGMENT

Montzinger AJ

Summary Introduction

1. This is an opposed application for the provisional winding-up of the respondent.
2. The applicant, ("Charl Electrical"), instituted this application, alleging that the respondent, ("Integrated Projects"), is unable to pay its debts as envisaged by

s 344(f) read with s 345 of the 1973 Act¹. It is further alleged that Integrated Projects is deemed insolvent by virtue of its failure to comply with a demand issued in terms of s 345(1)(a)(i) of the 1973 Act. Lastly, Charl Electrical alleged that given the facts and circumstances of this case, it would in any event be just and equitable for the court to order Integrated Projects' provisional winding-up in terms of s 344(h) of the 1973 Act.

3. By the time the matter was assigned to me for hearing, several interlocutory procedural issues remained unresolved. These included an objection to the urgency of the application, an opposition to Charl Electrical's request for condonation for the late filing of its replying affidavit, and Integrated Projects' interlocutory application to file a further answering affidavit in terms of uniform rule 6(5)(e). At the commencement of the hearing, Mr. Engela for Charl Electrical and Mr. Walters for Integrated Projects informed me that these issues had been resolved. Consequently, the objection to urgency was no longer pursued, Integrated Projects' request to file an additional answering affidavit was no longer contested, and Charl Electrical's condonation application for the late filing of the replying affidavit, was no longer opposed. An order that provides for these results will be issued.

Charl Electrical's claim against Integrated Projects

4. Charl Electrical operates in the construction industry, regularly acting as a consultant and subcontractor to provide electrical services for property development projects. In November 2022, it alleged to have entered into an agreement with Integrated Projects to serve as its electrical subcontractor for the Kings Corner residential property development. The value of the contract to render the electrical services was allegedly R1,244,088.48. The Kings Corner project was developed by Prospekt (Pty) Ltd ("Prospekt"), with Integrated Projects the main building contractor.

¹ Companies Act 61 of 1973 (the "1973 Act")

5. Charl Electrical alleged that under the subcontractor agreement it performed electrical work at the Kings Corner development from December 2022 to June 2023. During this period, it issued six invoices to Integrated Projects totalling R522,327.11, of which only an amount of R103,623.30 was paid.
6. Due to the non-payment of its invoices, Charl Electrical in August 2023 served Integrated Projects with a demand in terms of s 345 of the 1973 Act for payment of R418,703.81. Integrated Projects failed to satisfy the demand and on 13 November 2023 the liquidation application was launched.
7. Mr. Engela, argued that Charl Electrical have established the *prima facie* existence of a debt as well as the other requirements for liquidation. He also argued that the defences raised in opposition to the application are without merit. According to Mr. Engela the denial by Integrated Projects of the existence of the subcontractor agreement is baseless as the evidence overwhelmingly shows that a contractual relationship existed. He argued that since all the other requirements for a liquidation have been complied with, I should grant provisional winding-up order and not exercise my discretion against doing so.
8. In response to my concerns about disputes of facts in particular on the issue of Integrated Projects' liability, Mr. Engela urged me to "see the wood for the trees," and to disregard any attempt to create factual disputes.

The basis for opposing the liquidation application

9. The case for Integrated Projects is that the evidence clearly shows there was no privity of contract between it and Charl Electrical and that if an agreement existed, it was between Charl Electrical and Prospekt, the property developer. In support of its contention Integrated Projects claims that the written part of the alleged agreement, on which Charl Electrical relies, is an Occupational Health and Safety agreement, which has no relevance to the electrical work for which payment is claimed.

10. Furthermore, it is Integrated Projects' case that any work performed by Charl Electrical was carried out under the instructions of Prospekt and that Charl Electrical mistakenly sent its invoices to Integrated Projects. The explanation for making the payments totalling R103,623.30 to Charl Electrical was done at Prospekt's request.
11. Mr. Walters argued that Charl Electrical failed to *prima facie* establish the existence of its claim. He added that even if a *prima facie* claim could be established, it is disputed on *bona fide* and reasonable grounds, warranting a dismissal of the application.

The relevant legal principles

12. A creditor seeking a winding-up order of an insolvent company must do so in terms of the provisions of the 1973 Act². In addition to the aforementioned an applicant must convince the court that: (i) it is a contingent or prospective creditor of the company to be liquidated³ (i.e. the *locus standi* requirement); (ii) the respondent company's registered address is situated in the Court's jurisdictional area⁴; (iii) it has established one of the grounds listed in s 344(1)(a – h) read with s 345 (1)(a – c) of the 1973 Act.
13. The Constitutional Court has confirmed that the overarching objective behind liquidation proceedings is that it is designed to bring about a concurrence of creditors to ensure an equal distribution of the insolvent estate between them. It is for this reason that liquidation proceedings are inappropriate to resolve a dispute as to the existence of a debt⁵. The Court, in the majority judgment, stated the position, with reference to the *Badenhorst* principle⁶, as follows:

² In terms of item 9(1) of Schedule 5 of the 2008 Companies Act, the provisions of Chapter XIV of the 1973 Act continue to apply to the winding-up of companies under the 2008 Companies Act until the Minister, by notice in the *Gazette*, determines a date on which it shall cease to have effect. Accordingly, in terms of section 343 of the 1973 Act, a company may still be wound-up either by the Court, or voluntarily by way of a creditors' or a members' voluntary winding-up, except for "solvent" companies mentioned in item 9(2) of Schedule 5 of the 2008 Companies Act.

³ S 346(1)(b) of the 1973 Act

⁴ S 1, dealing with the definition of court read with 12(1) of 1973 Act; *Wild & Marr (Pty) Ltd v Intratek Properties (Pty) Ltd* 2019 (5) SA 310 (GJ) at pars [13] and [14]

⁵ *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* 2017 (12) BCLR 1562 (CC)

“...That principle is less of a principle than a sensible rule of practice. It says that if you want to claim a debt you know is disputed, you should not bring liquidation proceedings to do it. You should claim the debt by way of action – and only once your claim has been established may you, if necessary, seek to liquidate or sequester.”⁷

14. With regards to the threshold an applicant seeking the provisional liquidation of a respondent company must clear, the position is that the applicant must establish its entitlement to an order and the existence of its claim⁸, where it is disputed, *prima facie* on a balance of probabilities with reference to the affidavits⁹.
15. However, a court should draw a distinction between disputes regarding the respondent company's liability to the applicant and 'other disputes'¹⁰. The 'other disputes' is a reference to the rest of the requirements to succeed with a liquidation application, apart from the *prima facie* existence of the claim. The test to resolve a dispute with regards to the 'other requirements' is whether the balance of probabilities favours the applicant's version on the papers. If the liability of the respondent is not established, it matters not that the applicant has established the 'other requirements'.
16. In respect of the meaning of the words '*prima facie*' the court in *Kalil v Decotex* explained that it does not mean the same as the term is normally used i.e.: *in the absence of re-butting evidence*. The requirement '*prima facie*' rather means: *“...as denoting a balance of probabilities on all the*

par 145 (“*Trinity*”)

⁶ This rule states that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds. *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347 – 348

⁷ *Trinity* par 86

⁸ *Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC) (“*Orestisolve*”) par 7

⁹ *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 932 (A) at 975J-979F (“*Kalil v Decotex*”)

¹⁰ *Payslip Investment Holdings CC v Y2K Tec Ltd* 2001 (4) SA 781 (C) at 783G-I (“*Payslip Investment*”)

*affidavits...*¹¹. It therefore means that a court having to decide a contested liquidation application, at the provisional order stage, does not call into aid the help of the so-called *Plascon-Evans* rule, which requires a court to accept the allegations by the respondent 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 papers¹². Although the *Plascon-Evans* rule is available to the court at the final order stage of the liquidation proceedings¹³.

17. In determining the probabilities on all the affidavits I follow the well-established approach as set out in *Govan v Skidmore*¹⁴ to: “...select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one”. This being motion proceedings I also stay clear from any credibility findings to determine the probabilities. This is consistent with the approach that was endorsed in *National Employers*¹⁵ where the court held that it is possible to arrive at a decision simply on the probabilities without having to make specific findings on the credibility of the witnesses¹⁶.
18. If an applicant can *prima facie* establish its claim a respondent can dispute the claim *bona fide* and on reasonable grounds¹⁷. With regards to evaluating the *bona fides* and reasonableness of a respondent’s opposition to an applicant’s claim, the legal position is that *bona fides* in the (true) sense of good faith has nothing to do with the matter, as *bona fides* (genuineness) is on any reckoning not on its own sufficient to make a finding that the claim is disputed on substantial (i.e. reasonable) grounds¹⁸.

¹¹ *Kalil v Decotex* par 60

¹² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634D-635D

¹³ *Orestisolve* par 9

¹⁴ *Govan v. Skidmore*, 1952 (1) S.A. 732 (N) at p. 734; Also *Ocean Accident and Guarantee Corporation Ltd v Koch* [1963] 3 All SA 329 (A)

¹⁵ *National Employers’ General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (ECD (“*National Employers*”))

¹⁶ *National Employers* 440 G - H

¹⁷ *Orestisolve* par 8

¹⁸ *Orestisolve* par 13

19. Therefore a court faced with an opposed liquidation application first determine whether the respondent is indeed indebted to the applicant. If so, it would mean that the applicant has *prima facie* established the claim. Thereafter, the court considers whether the claim is *bona fide* disputed on reasonable grounds with reference to the *Badenhorst* rule¹⁹. If the claim cannot be disputed in terms of the applicable test, the rest of the requirements for a liquidation is then considered. However, should a court find that the applicant could not *prima facie* establish its claim because there is a real and genuine factual dispute regarding the respondent's indebtedness, an applicant can ask the court to refer the disputed issues to oral evidence²⁰. However, if a court finds that the applicant should have anticipated the factual dispute²¹ a referral to oral evidence would not serve any purpose and dismissal of the application will be the most likely result²² as the applicant would have no *locus standi* to further pursue the liquidation application.
20. In concluding on the applicable legal principles, Mr. Walters submitted that while it is generally accepted that the applicant, in a liquidation application, bears the onus of establishing its claim *prima facie*, there is uncertainty and conflicting authority regarding how a court should resolve disputes of facts at the provisional order stage. I do not find it necessary to engage in this debate or contribute to any perceived uncertainty, to the extent that there is such a debate. In my view the approach articulated in *Kalil v Decotex* remains the guiding framework how a court should determine whether an applicant has established its claim *prima facie*. This approach has been confirmed, with minor adjustments, in various subsequent judgments²³.
21. Accordingly, I understand the approach at the provisional stage to be, where the respondent's indebtedness is disputed, that a court should take a holistic view of all the allegations and supporting evidence presented in the affidavits to make a finding on the probabilities whether the applicant has *prima facie*

¹⁹ Note 6

²⁰ As per *Kalil v Decotex*

²¹ *Adbro Investment Company Ltd v Minister of Interior* 1956 (3) SA 345 (A) at 350A

²² *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016) par 11

²³ *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA)

established the respondent's indebtedness. Only once a court is satisfied on the probabilities that the respondent's liability to the applicant exists does it consider whether the respondent has raised a *bona fide* dispute of its liability to pay and did so on reasonable grounds²⁴.

Evaluation

22. After reviewing the various affidavits filed in this matter, I am of the view that the application has to fail having regard to at least two hurdles that Charl Electrical failed to clear. Firstly, it has failed to establish a *prima case* of Integrated Projects' liability in its founding affidavit. Secondly, even if the first hurdle could be cleared, it has failed to establish, on the probabilities, a *prima facie* case demonstrating that it has a claim against Integrated Projects.

Case not made out in the founding affidavit

23. Since, I am dealing with an opposed motion, as per *Room Hire*²⁵ and *Telcordia*²⁶, the applicant must still make out a case in the founding affidavit. In this matter the founding affidavit presented a case that the parties allegedly concluded a partly written, partly verbal agreement for electrical work to be performed at the King's Corner development for the total sum of R1,247,088.48, payable by way of monthly progress claims. Reliance was placed on invoices that were issued to Integrated Projects, by a quantity surveyor, to the value of R522,327.11 and of which an amount of R103,623.20 was paid.
24. Integrated Projects filed a comprehensive answering affidavit. It disclosed information which was within the knowledge of Charl Electrical and which should have formed part of the allegations in the founding affidavit. In its replying affidavit, which was filed significantly late, the reason for the late filing

²⁴ *Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218D-219C as endorsed in *Orestisolve* par 8

²⁵ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1115 (T) at p 1163. ("Room Hire")

²⁶ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at par 32 ("Telcordia")

was because Charl Electrical: “...*was not aware of the mammoth task that would be involved in preparing its replying affidavit* and also because its attorneys had to: “...*consult not only Prospekt and its attorney, but to consult with other professionals on the project in order to obtain documentary evidence which illustrates the extent of the contrived position adopted in the answering affidavit...*” Charl Electrical ultimately filed a detailed replying affidavit, which prompted Integrated Projects to apply for leave to submit a supplementary answering affidavit. This, in turn, led to Charl Electrical filing an additional replying affidavit.

25. The consequence of all the affidavits filed was that Charl Electrical relied on allegations and evidence not included in its founding affidavit to persuade the court that it has a *prima facie* claim against Integrated Projects. From the contents of the replying affidavit, the written heads of argument, and oral submissions, it is clear that Charl Electrical requires the court to accept at least the following to establish its claim against Integrated Projects:

- 25.1 The existence of the JBCC agreement and that all sub-contractors would have been appointed by Integrated Projects.

- 25.2 Also, that the JBCC agreement provides that there shall be no privity of contract between Prospekt and a subcontractor appointed by Integrated Projects.

- 25.3 a WhatsApp message from Mr Heunis (obo Prospekt) to Mr Cloete of Quansur on 15 December 2022 that presupposes an obligation on Integrated Projects to pay Charl Electrical when it is appointed as a sub-contractor.

26. The JBCC agreement therefore emerged as a central document in this case. Charl Electrical placed considerable reliance on it, not only to counter the defences raised by Integrated Projects but effectively to "complete its cause of action." Charl Electrical with hindsight advanced the case that the JBCC agreement imposed an obligation on Integrated Projects to appoint

subcontractors and precluded any direct contractual relationship between a subcontractor and the developer (Prospekt).

27. All this means that Charl Electrical has presented its case in a manner that left Integrated Projects unclear about the case it needed to answer. This is evident from the multiple sets of affidavits filed.
28. The application must therefore fail because Charl Electrical has not made out a case in its founding affidavit. It appears that Charl Electrical mistakenly relied on the principle that a court must determine whether an applicant has established its entitlement to an order and the existence of its claim²⁷ on a balance of probabilities with reference to the affidavits. However, in the context of an opposed liquidation application, "reference to affidavits" does not absolve an applicant from the obligation to set out its case fully in the founding affidavit. The notion that a party can present an incomplete case in its founding papers, supplement it through an extensive replying affidavit, and then rely on the court's duty to consider "all the affidavits" is untenable. Such an approach would undermine the purpose of liquidation proceedings, allowing for an endless exchange of affidavits in an attempt to build a claim retroactively, and would ultimately make a mockery of the process.
29. I am therefore not persuaded that Charl Electrical has made out its case in the founding affidavit. Consequently, this on its own justifies a dismissal of the application.

The existence of a prima facie claim

30. Considering, my finding on the deficient founding affidavit I do not have to continue any further to consider the application. However, to the extent that I may be wrong, or be criticised for a strict application of the *Room Hire* and *Telcordia* requirement in motion proceedings, I in any event will now consider

²⁷ *Orestisolve* par 7

all the affidavits and consider whether Charl Electrical has established on the probabilities whether it has a claim against Integrated Projects.

31. Charl Electrical must make out a *prima facie* case on the probabilities that a subcontractor agreement was concluded between it and Integrated Projects. I am not convinced that the probabilities support such a conclusion.
32. Firstly, it was alleged that a 'partly written, partly, oral agreement' was concluded between the parties in November 2022. The allegations in respect of the agreement did not have regard to how an agreement is ordinarily pleaded²⁸ as provided for in uniform rule 18(6). It was not clear which terms of the agreement were 'written', and which were 'oral'. There were also no allegations throwing light on who represented the parties at the time the agreement was concluded during November 2022 and or June 2023, or where the alleged oral and written parts of the agreement were respectively concluded.
33. I am mindful of the fundamental distinction between a cause of action²⁹ for the recovery of a debt and the factual basis required to establish an enforceable claim for the liquidation of a company³⁰. However, in this case, where liability is not admitted and the court must be guided by the probabilities to determine whether the applicant's claim has been *prima facie* established, Charl Electrical's failure to adequately set out the facts supporting the existence of the alleged subcontractor agreement in its founding affidavit is detrimental to its case.
34. Secondly, the written portion of the agreement was concluded on 15 June 2023. It seems to me that on the probabilities this document is rather intended

²⁸ A party who in his or her pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

²⁹ As per *Abrahmse & Sons v SA Railways and Harbours* 1933 CPD 626 at 633: Which requires a party to allege: *the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration to disclose a cause of action*"

³⁰ *The Standard Bank of South Africa Ltd v Tsheola Dinare Tours and Transport Brokers (Pty) Ltd* (22011/2021) [2022] ZAGPJHC 311 (6 May 2022)

to regulate Charl Electrical's obligations in terms of the Occupational Health and Safety Act, 85 of 1993 (the "OHSA"), if regard is had to the following:

34.1 The document is identified as an agreement on occupational health and safety in terms of the provisions of s 37(2) of the OHSA.

34.2 The purpose of the document is described as follows:

"The Contractor acknowledges that this agreement constitutes an agreement in terms of Section 37(2) of the OHSA, whereby all responsibility for health and safety matters relating to the work the Contractor and its workers or sub-contractors to perform on the premises in terms of the scope of work shall be the obligation of the Contractor."

34.3 The only reference that may be helpful to Charl Electrical is the fact that the document identifies the scope of work as 'Electrical Installation'. However, the remainder of the document does not support a conclusion that it has anything to do with a sub-contractor agreement to render electrical consultant services at the Kings Corner development.

34.4 There is no reference to the alleged contract value of R1,244,088.48 and the payment terms.

34.5 Although the document is not counter signed it does appear to envisage a signature by the 'client'. Integrated Projects alleged that the 'client' was Prospekt, the developer. On the probabilities this seems correct as otherwise it would have rather made mention of 'the contractor'.

35. Third, on 26 June 2023, Ms. Marieda Olivier ("Olivier"), acting on behalf of Charl Electrical, sent an email to representatives of Integrated Projects requesting payment of outstanding invoices. This was just 11 days after the alleged conclusion of the written portion of the agreement between Charl

Electrical and Integrated Projects. Notably, the email makes no reference to the existence or conclusion of the subcontractor agreement, nor does it mention that such an agreement had allegedly been formalised 11 days earlier.

36. Fourth, the full context of an email dated 14 August 2023 was not provided. The founding papers include only an email from Mr. Chris Heunis (“Heunis”) of Prospekt to Olivier, in which Heunis states that “CE was appointed by the builder.” There is no explanation as to why Heunis felt the need to clarify Charl Electrical’s appointment. It appears that Olivier sought clarification from Heunis, and he responded accordingly. If an agreement had been concluded in November 2022 and formalised in June 2023, there would have been no need for such clarification. Moreover, the probative value of Heunis’s statement that Charl Electrical was appointed by Integrated Projects, as the builder, is significantly diminished by his immediate confirmation that he had instructed his PA to contact Charl Visser, representing Charl Electrical, to arrange for payment, clearly on behalf of Prospekt. This indicates that Prospekt acknowledged a responsibility or liability for payment to Charl Electrical.
37. Fifth, the existence of the JBCC Principal Building Agreement, concluded between Prospekt and Integrated Projects on 8 August 2022, was not disclosed in the founding affidavit. Moreover, Charl Electrical’s role as a party or signatory to that agreement, whether as an agent or an electrical service consultant, was also omitted. Charl Electrical should have disclosed this agreement and clarified its relevance to its claim of being appointed as a subcontractor two months later. The only reasonable inference from its failure to disclose the JBCC agreement in the founding affidavit, which was within its knowledge, is that Charl Electrical anticipated difficulties in reconciling its alleged subcontractor relationship with Integrated Projects while simultaneously maintaining a direct relationship with Prospekt.
38. Sixth, Charl Electrical failed to disclose in its founding affidavit that it had submitted a direct design and costing quote for the Kings Corner development

to Prospekt. This omission suggests that Charl Electrical was concerned that revealing this information might support Integrated Projects' contention that a direct contractual relationship existed between Charl Electrical and Prospekt for the electrical work.

39. Seventh, Charl Electrical failed to disclose the minutes of the site meetings, which indicate that it was far more involved in the construction project than its claimed role as a subcontractor suggests. The disclosure would have cast doubt on Charl Electrical's assertion of being a subcontractor, as according to the JBCC agreement subcontractors are not required to attend site meetings unless invited.
40. The seven difficulties outlined above, which are by no means exhaustive, are sufficient to cast doubt on Charl Electrical's case. Therefore, having regard to the probabilities, and without making any credibility findings either way, I find that the most natural, plausible, and reasonable conclusion from the range of conceivable ones is that Charl Electrical did not have a subcontractor agreement with Integrated Projects. It has therefore failed to establish that it has a *prima facie* claim and therefore lacks *locus standi* to pursue Integrated Projects' liquidation. The application must therefore fail. I see no reason to deviate from the general rule that, having been unsuccessful, Charl Electrical should bear the costs.

Conclusion

41. For all the reasons set out above, I make the following order:
 - 41.1 The late filing of Charl Electrical's replying affidavit is condoned.
 - 41.2 Integrated Projects' application for leave to file a supplementary answering affidavit is granted.

41.3 The application for the provisional winding-up of Integrated Projects is dismissed with costs, including the costs of counsel on scale B from 12 April 2024.

A MONTZINGER
Acting Judge of the High Court

Appearances:

Applicant's counsel:	Mr. R Engela
Applicant's attorney:	Enderstein Malumbete Inc.
Respondent's counsel:	Mr. A Walters
Respondent's attorney:	Kemp Nabal Inc.