



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

Case No: 14388/2024

In the matter between:

BUSINESS PARTNERS LIMITED

Applicant

[Registration Number: 1981/000918/06]

and

**THE COMPANIES AND INTELLECTUAL
PROPERTIES COMMISSION OF SOUTH AFRICA**

First Respondent

THE MINISTER OF TRADE AND INDUSTRY N.O.

Second Respondent

THE MINISTER OF FINANCE N.O.

Third Respondent

THE MINISTER OF PUBLIC WORKS N.O.

Fourth Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN

Fifth Respondent

CRYSTALL ROHWENA ADONIS

Sixth Respondent

DONOVAN THESTAN HANEKOM

Seventh Respondent

DON MO PROPERTY (PTY) LTD

Eighth Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is Part B of an opposed application in terms of which the Applicant, Business Partners Limited ("Business Partners") is seeking a provisional winding-up of the Eighth Respondent, Don Mo Property (Pty) Ltd ("Don Mo"), together with the usual ancillary relief. In Part A of this application, the Applicant sought an order that the dissolution of Don Mo be declared void in terms of section 83(4) of the Companies Act¹ ("the 2008 Companies Act") after it had been dissolved on 21 January 2024, due to its failure to file its annual returns and pay the prescribed fees in respect thereof.

[2] The orders in Part A that were granted on 04 September 2024 ("the reinstatement order"), also included *inter alia* that:

- (a) The liabilities of Don Mo, immediately prior to its dissolution on 21 January 2024, were declared to re-vest in Don Mo; and
- (b) Don Mo was joined as the Eighth Respondent in this application.

[3] The Sixth Respondent, Crystall Rohwena Adonis ("Ms Adonis"), and the Seventh Respondent, Donovan Thestan Hanekom ("Mr Hanekom") ("the directors"), were cited in this application in their capacity as the former directors of Don Mo. Pursuant to the directors giving notice of their intention to oppose the application on

¹ Act 71 of 2008.

18 July 2024, the parties agreed to regulate the further conduct of the matter in respect of the relief sought in Part B of this application as part of the reinstatement order.

Salient grounds of the application

[4] Business Partners is a creditor of Don Mo for a combined amount of R1 961 608.60, together with interests and costs. Business Partners is seeking a provisional winding-up order on the following grounds:

- (a) Don Mo is unable to pay its debts as envisaged in section 344 of the Companies Act² ("the 1973 Companies Act"), as read with section 345(1)(c) thereof, and
- (b) It is just and equitable for Don Mo to be wound up as envisaged in section 344(h) of the 1973 Companies Act.

The Term Loan Agreement

[5] The parties, namely Business Partners and Don Mo entered into a term loan agreement ("the term loan") on 5 March 2014, in terms of which Business Partners agreed to loan to Don Mo an amount of R2 249 260, subject to standard terms and conditions. A salient term of the agreement, included that the term loan was payable in full on demand as set out in the "Breach" clause thereof, which in the main stipulates that without prejudice to any of its rights in law or interest of the term loan, Business Partners would be entitled to withhold any portion of the loan not paid out and claim immediate payment of the outstanding balance payable by Don Mo to Business Partners in terms of the term loan irrespective of whether the due date for payment has arrived if, Don Mo *inter alia*³:

² Act No 61 of 1973.

³ Annexure "FA6", Clause 27, page 97.

- (a) Failed to comply with any of the terms and conditions of the term loan, or acted in conflict with any of the provisions of the term loan;
- (b) In the opinion of Business Partners, conducts its business in conflict with generally recognised business practice or any law;
- (c) Was deregistered; or
- (d) Supplied false information or withheld information from Business Partners.

The shareholder's loan agreement

[6] Business Partners and Don Mo concluded a shareholder's loan agreement ("the shareholders agreement"), on 5 March 2014, in terms of which Business Partners agreed to loan to Don Mo an amount of R1 250 000, subject to standard terms and conditions.⁴ The default clause in essence mirrored that of the term loan agreement.⁵

Point *in limine*

[7] Business Partners contended that the directors lack authority to oppose the liquidation application on behalf of Don Mo. In augmentation of this assertion, it was submitted that despite Mr Hanekom's averment that he is "duly authorised" in terms of a resolution purportedly signed by the board of directors of Don Mo on 18 July 2024, to oppose the application for the winding up of Don Mo and that he did so on behalf of Don Mo, Ms Adonis and himself, he failed to obtain the written approval of the shareholders of Don Mo as required in terms of Don Mo's Memorandum of Incorporation ("MOI")⁶.

⁴ Annexure "FA7", clause, 2, page 113.

⁵ Annexure "FA7", clause, 26, page 128.

⁶ Annexure "RA1", page 626.

[8] Business Partners referred to Clause 19 of the MOI which deals with matters which are considered to be "Material Items" which Don Mo cannot undertake *"except as may be approved or agreed to in writing by the shareholders who at the relevant time hold the higher of (i) 75% of the total voting rights in Don Mo attaching to the shares or (ii) such percentage of the total voting rights in Don Mo attaching to the shares which is equal to (100% - (less) the percentage of voting rights exercisable by Business Partners Limited + (1%))."*⁷

[9] Business Partners highlighted that a material item in terms of clause 19.2.31 of the MOI would include, *inter alia*, "the institution or defence of any legal proceedings other than those arising in the ordinary course of business."⁸ They argued that these proceedings against Don Mo are not proceedings arising in the ordinary course of Don Mo's business which ordinarily relates to property letting as set out in clause 5.1 of the MOI and is therefore, a material item for which the requisite authority is required:

*'The business of the Company as at the Signature Date is property letting or any other business undertaken by the Company thereafter subject to the requisite approval of the Shareholders as relevant Material Item pursuant to the Company's memorandum of incorporation.'*⁹

[10] Business Partners analysed that in order for Don Mo to competently resolve to oppose this liquidation application, the shareholders of Don Mo were required to approve such opposition by way of a written resolution of 64% of the voting rights attaching to the shares (100% - (less)) the percentage of voting rights exercisable by the applicant (37%) + (1%)). This calculation is predicated on the terms

⁷ Annexure "RA1", page 647.

⁸ Annexure "RA1", page 650.

⁹ Annexure "RA1", page 679.

of clause 5.2.1 of Don Mo's shareholders agreement in terms of which the issued share capital of the company comprises of 1000 shares, of which 370 (which translates in 37%), is held by Business Partners and 630 shares (which amounts to 63%), is held by the Hanekom Family Trust. Business Partners in the Replying Affidavit¹⁰ contended that no shareholders' meeting was convened for the purposes of adopting the necessary resolution. In consequence whereof, Don Mo did not resolve in writing that it may oppose the liquidation application. It was furthermore mooted that Mr Hanekom was not authorised to act and deposed to the Answering Affidavit on Don Mo's behalf. Likewise, the Attorneys purporting to act on behalf of Don Mo were not granted the requisite authority and mandate to do so.

[11] Consequently, it was argued, that there is no competent opposition of the application on behalf of Don Mo before the Court and that the matter ought to proceed, as against Don Mo, on an unopposed basis. Business Partners submitted that the directors could at best oppose the liquidation application in their personal capacity.

[12] It follows that this concession by Business Partners that Don Mo's directors have a legal interest was the reason underpinning why they were joined as parties to these proceedings as having a direct and substantial interest. The Respondents asserted that this is also borne out by the continued existence of Don Mo whose interest they are bound to serve.

[13] As to their authority to represent Don Mo, it was argued that these proceedings do indeed arise in the ordinary course of business and that Business

¹⁰ Replying Affidavit, para 23, page 602.

Partners understanding of the requisite clause is incorrect. They proffer that two discrete enquiries are to be held namely:

- (a) Firstly, whether the transaction on which the debt is based is one “in the ordinary course of business” and
- (b) Secondly, whether these legal proceedings arise out of that transaction.

[14] As to the first enquiry, it was contented that the test for whether a transaction is one in the ordinary course of business in reference to **Joosub v Ensor**¹¹ is “an objective one, namely whether having regard to the terms of the transaction and the circumstances under which it was entered into, the transaction was one which would normally have been entered into by solvent business men”. Don Mo submitted that in applying that test, the debt in question is one which arose during the ordinary course of business application since it emanates from a loan agreement granted by Business Partners to Don Mo to conduct its business.

[15] This, it was argued, is evident from clause 3 of the term loan agreement which stipulates as follows:

‘3 PURPOSE FOR WHICH THE LOAN WAS GRANTED

The loan was granted for purposes of financing:

3.1 *The business known as: Hanekom Transport...*¹²

[16] In relation to the second enquiry, reference was made to the definition in the Oxford Dictionary which defines the word “arise” to mean “to happen as a result of something of a particular situation”¹³ It was mooted that these proceedings

¹¹ 1966 (1) SA 319 (A) at 326D – E.

¹² Annexure “FA6”, page 81.

¹³ The Sixth to Eighth Respondents Heads of Argument, para 15, page 8.

therefore fall within the ambit of clause 19.2.31¹⁴ and that no shareholder approval was required and as such, the directors have the necessary authorisation to represent Don Mo in this application. The Respondents reasoned that even if clause 19, read with clause 19.2.31 constitutes a curtailment of the powers of Don Mo's directors, it is one that is untenable as a matter of law for the following reasons:

- (a) That the power to manage the company rests with the board;
- (b) The directors' powers to manage the company is derived from statute and not from the MOI;
- (c) Clause 19.2.31 is an instruction whether or not to institute legal proceedings on behalf of the company;
- (d) Clause 19.2.31 effectively strips the directors of their ability to discharge their fiduciary duties which includes protecting the company's interests in circumstances where the petitioning creditor is a shareholder, whose consent is required to protect those interests.

[17] The Respondents emphasized further that the correct remedy would have been for Business Partners to challenge the directors' authority under Rule 7, which it did not do and as such, there is no proper challenge to the directors' authority in this regard. In response to these contentions, Business Partners placed reliance on Section 66(1) of the 2008 Companies Act¹⁵ which provides for the business and affairs of a company to be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the

¹⁴ MOI, Annexure "RA1", para 19.2.31 *'the institution or defence of any legal proceedings other than those arising out of the ordinary course of business'*.

¹⁵ "The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."

company, except to the extent that this Act or the company's MOI provides otherwise. In this regard, it is uncontroverted that Business Partners and Don Mo concluded a shareholder's loan agreement containing standard terms and conditions for such loan.

[18] To strengthen the force of the Respondents' argument, they also rely on **Ganes v Telecom Namibia Ltd**¹⁶ ("Ganes") where the following was held:

'The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.'

[19] In response, Business Partners contended that **Ganes** is distinguishable in that it related to proceedings that were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the Respondent.

[20] It is uncontroverted that the directors were cited as parties who have a direct and substantial interest in the matter. It therefore follows that Don Mo's directors have *locus standi*. However, insofar as they were authorised to oppose the liquidation application on behalf of Don Mo requires the consideration of whether the MOI specifically directed how the business affairs of Don Mo were to be managed by or under the direction of its board, which ordinarily has the authority to perform any of the functions of Don Mo, in terms of Section 66(1) of the Company's Act.

[21] In this regard, Clause 19.2.31 of the MOI specifically requires that the institution or defence of any legal proceedings other than those arising in the ordinary

¹⁶ 2004 (3) SA 615 (SCA) at paras 18 – 19.

course of business must be dealt with by way of the procedure envisaged in clause 19.1 of the MOI. Much was debated around whether these proceedings are regarded as arising in the ordinary course of business. The “Business of the Company”, is clearly defined in clause 5 of the Shareholders Agreement as property letting. The “Company”, is defined in clause 1.2.13 of the Shareholders Agreement to be Don Mo. The question to be answered is whether these proceedings flow out of the ordinary course of business as envisaged in the agreement between the parties. In my view, it does not as the parties identified the need to deal with the requisite authority required as one of the material items listed in the MOI. Therefore, in order for Don Mo to competently resolve to oppose this liquidation application, the shareholders of Don Mo were required to approve such opposition by way of a written resolution. It is undisputed that no shareholders meeting was convened for the purposes of adopting the necessary resolution.

[22] I am therefore in agreement with the contention of Business Partners that there was no written resolution that Don Mo may oppose the liquidation application. In my view, the reference to *Ganes (supra)*, does not assist the Respondents, as the MOI explicitly regulated the manner in which decisions are to be taken and binds all parties thereto. Clause 19.1 unequivocally limited the directors’ powers regarding “material items” such as the winding up of the company as well as the institution or defence of any legal proceedings other than those arising in the ordinary course of business. Consequently, I find that Mr Hanekom lacked the requisite authority to depose to the Answering Affidavit on behalf of Don Mo. Notwithstanding the lack of authority, it is evident that the Respondents’ Answering Affidavit was delivered late.

Condonation

[23] In terms of the Order dated 4 September 2024, the Respondents' Answering Affidavit fell due on 12 September 2024. It was delivered on 23 September 2024, being 11 days later. On 11 September 2024, an indulgence was requested by the Respondents' attorneys to deliver the Answering Affidavit within the week of 15 September 2024, as they were waiting for information from In2Tax. The indulgence was refused, whereupon the Respondents' attorneys requested a reconsideration response the Applicant's Attorney doubled-down on his refusal.

[24] The Respondents contended that they sought only an additional week to ensure that their case in opposition was properly mounted. Owing to the delay in delivering the Answering Affidavit, the Replying Affidavit was delivered on 10 October 2023. The Applicant laments that it was prejudiced in the delivery of its heads of argument because it was prepared under time pressure owing to the lateness of the Replying Affidavit.

[25] It is the Respondents' contention that the Applicant's cry of prejudice is a hollow one as the Replying Affidavit comprises of 29 pages. The Respondents furthermore argued that the annexures to the Replying Affidavit comprised of documents that were already in the Applicant's possession and as such, the delay in preparing its heads of argument cannot be placed upon the Respondent's shoulders. There is no suggestion that the Applicant has been unable to meet the Respondents' opposition, which according to the Respondents it has; and therefore, the Applicant's contention of prejudice is unsustainable. The Respondents submitted that the Applicant's attitude in refusing the indulgence sought was manifestly unreasonable;

contending that they have made out a proper case for the late delivery of the Answering Affidavit.

[26] In the Heads of Argument, Business Partners indicated that it does not oppose the directors' application for condonation but, insofar as a punitive costs order is sought in respect thereof, it is submitted that no case is made out for such an order. I will deal further with the issue of costs later in this judgment.

Delivery of the Supplementary Answering Affidavit

[27] The Respondents sought leave to deliver a Supplementary Answering Affidavit in terms of a Notice of Application in terms of Rule 6(5)(e), which essentially deals with Don Mo's dispute with the City. In amplification of this request, the Respondents submitted that the information will be of assistance to the Court in exercising its discretion as there will be no prejudice to the Applicant. It is apparent that there was no objection to this request as the Applicant also delivered a Notice of Application in terms of Rule 6(5)(e), requesting leave to deliver the supplementary affidavit of Clinton Trevor Lang. A further Answering Affidavit was filed which is irregular by all accounts, but to which no objection was articulated.

[28] In respect of the further Supplementary Answering Affidavit filed by Mr Hanekom, the follow was stated:

*"I am an adult male and a director of the Eighth Respondent and the deponent of the Sixth, Seventh and Eighth Respondents' Answering Affidavit. I remain as described there **and I remain duly authorised**."* [emphasis added]

[29] The authority to act on behalf of Don Mo, in these proceedings as previously indicated, must be viewed within the context of whether these proceedings flow out of the ordinary course of business as envisaged in the agreement between the parties. It was already established that in order for Don Mo to competently resolve to oppose this liquidation application, the shareholders of Don Mo were required to approve such opposition by way of a written resolution. No shareholders meeting was convened for the purposes of adopting the necessary resolution. Don Mo did not in writing resolve to that it may oppose the liquidation application.

[30] Therefore, my earlier finding that Mr Hanekom lacked the requisite authority to depose to the first Answering Affidavit on behalf of Don Mo will hold true for any further Answering Affidavits attested to in this matter. There is therefore, no competent opposition in relation to Don Mo. The only recognised opposition insofar as it relates to this application is in respect of the Sixth and Seventh Respondent.

[31] In the event that I may have erred in coming to this conclusion, as will be demonstrated later in this judgment, the status of Don Mo as at the time of initiation of these proceedings was that of *bona vacantia*. Upon the reinstatement or restoration of Don Mo's status with effect from 4 September 2024, there had to have been strict compliance with the terms of the term loan and shareholders loan agreements, respectively insofar as it related to authorisations.

[32] Insofar as the further filing of Supplementary Affidavits is concerned, it is evident the content thereof primarily deals the extent and circumstances surrounding the Respondents indebtedness to the City, in an attempt to apprise the court of developments in this regard. In considering this application, it behoves this

court to be have regard to all relevant facts. Therefore, in light of the fact that there is no opposition to the further filing of these affidavits, the court has had regard thereto for the purposes of making a determination for the purposes of this application. Both parties are ad idem that the costs in relation thereto ought to be costs in the cause.

Principal submissions on behalf of Business Partners

[33] It is averred that because Don Mo had breached the term loan and shareholders loan agreements respectively, when it was placed under final deregistration on 21 January 2024, this has affected Don Mo's ability to repay Business Partners as none of Don Mo's income and/or assets vested in it during the period 21 January 2024 to 4 September 2024. This, it was argued, has had a direct impact on the security held by Business Partners. Reliance is furthermore placed on the express provision of the term loan and shareholders loan agreements which entitles Business Partners to accelerate payment of Don Mo's indebtedness under the agreements in the event of Don Mo's deregistration.

[34] Business Partners contended it was fully entitled to enforce the acceleration clause expressly provided for in the respective agreements and that the materiality of the breach is irrelevant. It was furthermore submitted that the debt that is due to Business Partners under the term loan and shareholders loan agreements became unenforceable for as long as the deregistration subsisted. Therefore, it was submitted that Business Partners would have been precluded from executing on its mortgage bond during this time.

[35] Business Partners furthermore argued that Don Mo breached the term loan and shareholders agreements in that it failed to submit its annual returns and to

pay the prescribed fee in respect thereof. In so doing, Don Mo conducted its business in conflict with the generally recognised business practice and laws of South Africa, more specifically Section 33(1) of the 2008 Companies Act¹⁷. In addition, it was submitted that Don Mo had also failed to file its income tax and VAT returns in contravention of section 28(1) of the Value Added Tax Act¹⁸ as well as Section 66(13) of the Income Tax Act¹⁹.

[36] Business Partners furthermore contended that Don Mo has failed to make payment of the municipal rates and taxes levied in respect of the immovable property which Business Partners holds as security for Don Mo's indebtedness. In this regard, it was argued that the arrear amount of R483 690.94, is indicative of the fact that the failure had to have subsisted for a prolonged period of time. This, it was argued, is a further breach of the term loan and shareholders loan agreements in that Don Mo has contravened the Local Government: Municipal Systems Act²⁰ and the Local Government: Municipal Property Rates Act²¹. Moreover, Business Partners contended that Don Mo's failure to disclose material information regarding the significant extent of the arrears of the rates and taxes owing by Don Mo, as set out in

¹⁷ '(1) Every company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the end of the anniversary of the date of its incorporation, including in that return- (a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7); and [Para. (a) substituted by s. 23 of Act 3/2011] (b) any other prescribed information. (2) Every external company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered in terms of section 23(1). (3) Each year, in its annual return filed in terms of subsection (1), every company must designate a director, employee or other person who is responsible for the company's compliance with the requirements of this Part, and Chapter 3, if it applies to the company.'

¹⁸ Act No. 89 of 1991.

¹⁹ Act No. 58 of 1962.

²⁰ Act No. 32 of 2000.

²¹ Act No. 6 of 2004.

the standard terms and conditions of the respective agreements, is a further breach of the agreements.²²

Principal submissions on behalf of Don Mo

[37] Don Mo challenges for the Application on the following grounds:

- (a) It has never defaulted on its payments to Business Partners;
- (b) It is currently trading;
- (c) Has consistent monthly cashflow;
- (d) Has operated at a net profit between 2019 to 2023;
- (e) Only has 2 other creditors namely:
 - (i) The City of Cape Town and
 - (ii) SARS.

[38] Don Mo proffered an explanation leading to its deregistration. In this regard, it elucidated that In2Tax was appointed to attend to the administrative obligations of Don Mo, which included ensuring that all annual returns were timeously filed. They say that the directors never had any reason to suspect whether In2Tax had done what it was supposed to do and at no time did the Companies and Intellectual Property Commission (CIPC) direct any correspondent to the directors. They do however, explicate that the only address on record is the physical address of Don Mo, as the registered Post Office box to which all correspondence could be sent was closed down in November 2022. In addition, they illuminated that the Applicant, who is a shareholder of Don Mo did not communicate with the directors

²² Term Loan Agreement, Clause 27.1.1 and 27.1.8; Shareholders Agreement, Clauses 26.1.1 and 26.1.7.

regarding the de-registration. In this regard, they aver that the Applicant launch this application without forewarning.

Legal Principles

[39] It is incumbent upon an Applicant to establish its case on a balance of probabilities. In this regard, the Applicant, referring to the matter of ***Kalil v Decotex (Pty) Ltd and Another***²³, contended that it has, on a balance of probabilities made out a *prima facie* case. In this matter, Corbett JA referred to the Badenhorst rule in ***Badenhorst v Northern Construction Enterprises (Pty) Ltd***²⁴ where it was stated that:

‘This rule would tend to cut across the general approach to applications for a provisional order of winding-up which I have outlined above as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while at the same time the respondent established that its indebtedness to the applicant was disputed on bona fide and reasonable grounds. Whether the Badenhorst rule should be accepted then as an exception to the general approach relating specifically to the locus standi of an applicant creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the winding-up procedure by using it as a means of putting pressure on the company to pay a debt which is bona fide disputed...need not be decided in this case....’

[40] It is trite that where the Applicant at the provisional stage shows that the debt *prima facie* exists, the onus is on the Respondent company to show that it is *bona fide* disputed on reasonable grounds. It is therefore obligatory on a Respondent to identify the disputes fully and accurately in the Answering Affidavit.²⁵

²³ 1988 (1) SA 943 (A) at 980F-H.

²⁴ 1956 (2) SA 346 (T).

²⁵ *Nampeseca (SA) Products (Pty) Ltd v Zaderer* 1999 (1) SA 886 (C) at 892H-J; *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33(C) at 40E-H.

[41] The *Badenhorst* rule finds application to legal disputes. **Orestisolve v NDFT Holdings**²⁶ offers clear guidelines as to the requirements, and legal principles applicable for consideration of factual disputes where the following was elucidated:

'[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the Badenhorst rule. If there are genuine disputes of fact regarding the existence of the Applicant's claim at the final stage, the Applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the Applicant. At the final stage, therefore, the Badenhorst rule is likely to find its main field of operation where the Applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is bona fide disputed on reasonable grounds and should thus not be determined in liquidation proceedings...

[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. It is thus unsurprising to find that the reported judgments where the Badenhorst rule has been relevant on the outcome have been cases of applications for provisional liquidation rather than final liquidation.

[12] Even where the facts are undisputed, there may be a genuine and reasonable argument whether in law those facts give rise to a claim. I have not found any case in which the Badenhorst rule has been applied, either at the provisional or final stage, to purely legal disputes. If the Badenhorst rule's foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute. But if the Badenhorst rule extends to purely legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point...the equivalent rule in England finds application where the dispute is shown to be one "whose resolution will require the sort of investigation that is normally within the province of a conventional trial". A purely legal question would not have that character...'

[42] Froneman J in **Trinity Asset Management (Pty) Ltd v Grindstone Investment 132 (Pty) Ltd**²⁷ in dealing with the Badenhorst principle stated the following:

²⁶ 2015 (4) SA 449 at 454F-455D

²⁷ 2018 (1) SA 94 (CC) at para 141.

'It concerns whether what has become known as the Badenhorst principle also applies to purely legal issues that arise in provisional liquidation proceedings. The principle holds that where there is a genuine and bona fide (good faith) factual dispute concerning a debtor's indebtedness to a creditor seeking provisional liquidation of the debtor's estate, the application for provisional liquidation should normally be dismissed. There is yet no authoritative certainty whether this principle also applies to genuine and legal disputes arising from undisputed facts...

[145] Liquidation proceedings are designed to bring about a concurrence of creditors to ensure an equal distribution of the insolvent estate between them, and are inappropriate to resolve a dispute as to the existence of a debt. In order to prevent the possible abuse of the liquidation process, the rule was developed to the effect that where there is a genuine and good faith factual dispute concerning an alleged insolvent debtor's indebtedness to a creditor, the application for provisional liquidation should normally be dismissed.'

Discretion of the Court

[43] It is trite that the Court's power to grant a winding-up order is a discretionary power, irrespective of the ground upon which the order is sought. **Absa Bank Ltd v Rhebokskloof** (*supra*)²⁸ distils the discretion of the court as follows:

*'Notwithstanding this the Court has a discretion to refuse a winding-up order in these circumstances but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, ex debito justitiae, to a winding –up order.'*²⁹

[44] The matter of **Afgri Operations Ltd v Hambs Fleet (Pty) Ltd**³⁰ succinctly deals with the overarching principles as follows:

'Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt...A court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a "very narrow one" that is rarely exercised and then in special or unusual circumstances only.'

²⁸ At 440J-441A.

²⁹ 2022 (1) SA 91 (SCA), para 12.

³⁰ 2022 (1) SA 91 (SCA), para 12.

[45] Besides to its statutory discretion, the Court has an inherent jurisdiction to prevent an abuse of the process even where a ground for winding up has been established. It is trite that liquidation proceedings are designed to bring about a *concursum creditorum*. In certain instances, *'the Court will not grant the order where the sole or predominant motive or purpose of the Applicant is something other than the bona fide bringing about of the company's liquidation for its own sake, e.g. the attempt to enforce payment of a debt bona fide disputed...'*³¹ Also instructive is what Rogers J stated in **Orestisolve** (*supra*) that:

*'If the Badenhorst [principle's] foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute.'*³² He went on to say that:

*'[I]f the Badenhorst [principle] extends to pure legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point.'*³³

[46] In the matter of **Payslip Investment Holdings CC vY2K TEC**³⁴ Brand J held that:

'It follows that Applicant has, in my view, failed to make out one of the essential requirements for the order that it seeks. Consequently, the application cannot succeed. However, even if I did conclude that respondent was unable to pay its debts, I would still, in the exercise of the judicial discretion that I am afforded in terms of s 344 of the Act, have refused the application...the inference is justified, in my view, particularly after the bank guarantee had been furnished, that the predominant motive or purpose of applicant in seeking the liquidation order, is something other than a bona fide attempt to enforce payment of its claim. In short, I cannot liquidate a public company on an application which may very well amount to an abuse of the process of this Court.'

³¹ Meskin *'Henocheberg on the Companies Act'* (Butterworths) Vol 1 [Issue 23] page 693.

³² At para 12

³³ At para 12.

³⁴ 2001 (4) SA 781 (CPD) at 789 B-C and F-G.

Is Don Mo unable to pay its debts as envisaged in section 344 of the 1973 Companies Act, as read with section 345(1)(c) thereof?

[47] One of the circumstances under which a company may be wound up by a court is if the company is unable to pay its debts as described in Section 345.³⁵ Section 345(1)(c) provides that a company is deemed to be unable to pay its debts if *inter alia* 'it is proved to the satisfaction of the court that the company is unable to pay its debts'

[48] It was unequivocally stated that Don Mo is not and has never been in arrears under the agreements. The Applicant is one of three identified creditors. The Respondent has disputed the extent of its indebtedness to the City and indicated that the debt to SARS is not yet due.

[49] The trigger event for these proceedings was Don Mo's de-registration. It is Don Mo's contention that the Applicant has brought these proceedings for a purpose other than the winding up of Don Mo, namely to exercise pressure upon it. According to the well-established *Badenhorst* principle, winding-up proceedings should not be resorted to as a means of enforcing a debt which is *bona fide* disputed on reasonable grounds.³⁶ The rationale underpinning the *Badenhorst* rule is that liquidation proceedings are not the proper forum for the resolution of disputes as to the existence or otherwise of debts. The *Badenhorst* rule is a self-standing principle that

³⁵ Section 344 (f) of the Company's Act.

³⁶ See also *Afri Operations Ltd v Hamba Fleet Management (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017) where Willis JA stated that: 'It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. This is known as the so-called 'Badenhorst rule'. Where however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.'

winding-up proceedings are not the appropriate procedure for a creditor to use when the debt is *bona fide* disputed.

[50] **Rosenbach & Co. (Pty) Ltd v Singh's Bazaars (Pty) Ltd**³⁷ deals with the principles applicable in deciding the question of whether a company should be wound up in circumstances when it is unable to pay its debts. In this regard, Caney J states that a company is in commercial insolvency when '*...a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business...*'

[51] The concept of commercial insolvency was expounded on in **Absa v Rhebokskloof**³⁸ as follows:

'The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 342(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up...'

[52] The approach in deciding whether a company is able to pay its debts when they fall due is a question of fact and is to be evaluated by considering the entirety of the company's financial position. It has been held that factual insolvency is a strong indicator of inability to pay debts.³⁹ To this end, it was argued that Don Mo is

³⁷ 1962 (4) SA 593 at 597C-D.

³⁸ 1993 (4) SA 436 (CPD) at 440F-G.

³⁹ *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 at 933I-J.

factually solvent with its assets exceeding its liabilities and its creditors do not have any debts which have fallen due or are indeed payable. This contention, is in stark contrast to the Applicant's contention that Don Mo is unable to pay its debts as envisioned in Section 344(f) read with Section 345(c) of the 1973 Companies Act.

[53] I deem it appropriate at this juncture to interpolate to deal with the submission pertaining to whether the liabilities to Don Mo's creditors are indeed payable. Don Mo contended that the Applicant is paid up to date under the agreements; the debt owing to the City has been reduced significantly and can easily be discharged and that there is no evidence that the liability in respect of Don Mo's tax obligations is due.

City of Cape Town ("the City")

[54] The Applicant contended that Don Mo is in arrears with its municipal account and owes the City an amount of R488 698.45. Don Mo disclosed that it only owed the City "the sum of R51 475.17 and which has been substantially reduced from the sum of R488 698.45 as a result of the resolution of a dispute with the City."⁴⁰ Mr Hanekom, explained in the Supplementary Answering Affidavit that on 17 October 2024, Heyns and Partners Attorneys reverted to him and advised that the arrears owed to the City are only R51 175.47. A confirmatory affidavit was attested to by Lara Van Wyk in this regard. There was an undertaking that the arrears would be settled by the end of October 2024.

⁴⁰ Founding Affidavit, para 36.5, page 33.

[55] In response hereto, the Applicant filed a supplementary affidavit on 29 October 2024. The affidavit was attested to by Mr Lang, who is the Applicant's attorney of record wherein the further exchanges between the parties were laid bare, more particularly the letter sent on Tuesday 30 October 2024 to Lara Van Wyk. In terms of the letter, they requested Heyns and Partners, on behalf of the Applicant as a 25% shareholder in the Eighth Respondent, to provide them with the following information or documentation:

- '5.1 Any and all correspondence exchanged between Heyns and Partners and the representatives of the eighth respondent in relation to their instructions to negotiate with the City of Cape Town Municipality to reduce the arrears on the company's municipal account;*
- 5.2 All correspondence exchanged between Heyns and Partners and the COCT in relation to the aforesaid negotiations;*
- 5.3 A complete copy of the email trail between Heyns and Partners and the eighth respondent since annexure A the confirmatory affidavit deposed to by Ms van Wyk, appears to not be a complete version of the email trail;*
- 5.4 All documentation received from the COCT in respect of the arrear municipal account.⁴¹*

[56] It is apparent that there were difficulties in obtaining the information sought whereupon the Applicant's Attorneys took it upon themselves to directly engage the City. Flowing from the subsequent enquiry, the latest municipal account revealed that the balance outstanding in terms of the account summary as at 21 October 2024, was an amount of R604 034.53.⁴² The amount immediately payable is indicated as R578 275.63. The amount payable by 15 November 2024, is indicated in the sum of R25 758.90. There is an active debit order linked to the account for the maximum amount of R5 000 per month.

⁴¹ Supplementary Affidavit, para 5, page 26.

⁴² Annexure "CTL4", page 41.

[57] The Applicant contended that there is no payment arrangement between the City and Don Mo in respect of the arears. They submitted that if the court is to have regard to the content of the Supplementary Affidavit as read with all the affidavits filed in relation to this matter, it is clear that the Respondents have attempted to mislead the Court on a number of occasions in relation to the financial status of Don Mo, concerning its commercial insolvency and the status of its creditors.

[58] Pursuant to the filing of the Applicant's Supplementary Affidavit, Don Mo provided proof that payment was made to the City of the reduced amount of R51 175.47. In my view, there is therefore a clear factual dispute in relation to *inter alia*:

- (a) the extent of the Respondents indebtedness to the City; and
- (b) whether a payment arrangement is still in place and the exact terms thereof (if any).

SARS

[59] The Applicant contended that Don Mo has an income tax liability which becomes due on submission of its annual income returns and which excludes penalties and interests in the amount of R294 489. The amount owing to SARS from the Respondents perspective is less, but what is clear is that there is an amount owing to SARS.

Business Partners

[60] The Applicant contended that because Don Mo is in breach of the provisions of the term loan and shareholders loan agreements, Business Partners has

elected to enforce the acceleration clause in these agreements as it is entitled to do. This has resulted in the full outstanding balance under the respective agreements becoming immediately due, owing and payable. The Respondents contended that the Applicant sought to enforce its claim on the launching of these proceedings without forewarning. According to the Respondents, the Applicant has failed to demand payment of the sums allegedly due.

[61] The Respondents contended that Don Mo is neither insolvent nor financially distressed. In augmentation of this contention, it was submitted that the Applicant has extensive security for its claim which includes a bond of R3.5million and an additional sum of R700 000 over the property which is worth R5 652 500 as well as five unlimited suretyships.

[62] The Applicant however contended that while it may be so that Don Mo holds an immovable property which serves as security for its liability to Business Partners, it has insufficient cash resources to meet its debts in the near term as they become due. To demonstrate this contention, it was established that as at 31 August 2024, Don Mo had a credit cash balance in its bank account of R23 524.43. In addition, they submitted that Don Mo operated at a loss of R130 679 as per Don Mo's Income Statement.⁴³ Further thereto, the Respondents submitted that this contention ignores the fact that Don Mo's liabilities have decreased year-on-year since 2019, and ultimately stand at their lowest recorded point in 2024.

⁴³ Court Bundle 2, page 531.

[63] It is Don Mo's further contention that the Applicant has failed to demonstrate that the application is brought for the company's sake or for the protection of the *concursum creditorum*.

It is just and equitable for Don Mo to be wound up as envisaged in section 344(h) of the 1973 Companies Act?

[64] It is trite that a company may be wound up by the Court if it appears to the Court that it is just and equitable that the company should be wound up. The Respondents argued that Section 344(h) confers on the Court a wide discretion on a conspectus of all the relevant circumstances including the competing interests of all concerned such as the creditors of the company itself. Both parties referred the court to the matter of ***Moosa NO v Mavjee Bhawan (Pty) Ltd and Another***⁴⁴.

[65] The Applicant argued that in circumstances where there is a justifiable lack of confidence in the conduct and management of a company's affairs, it is just equitable that the company be wound up. In augmentation of this contention, the matter of ***Pienaar v Thusano Foundation and Another*** ("*Pienaar*")⁴⁵ was referenced whether the following was held:

'For the loss of confidence to be justifiable it must be founded on a lack of probity in the controller's conduct, not in regard to his private affairs, but in regard to the company's business. That is to say, the conduct must be unfair or burdensome and wrongful. Furthermore, where the loss of confidence is of such a degree that there is no reasonable hope of another remedy which would make possible co-operation in the future, and the controller's misconduct is such as to justify that degree of loss of confidence, then it is "just and equitable" to wind up the company.'

⁴⁴ 1967 (3) SA 131 (T), Headnote and 136.

⁴⁵ 1992 (2) SA 552 (BG) at 583A-E.

[66] The Applicant fortified its contention that its loss of confidence in Don Mo and its directors is justifiable. In this regard, it placed reliance on the provisions of Section 76 of the 2008 Companies that sets out the standard of conduct expected from directors, more particularly Sections 76(3) – (4) that stipulates:

'(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director- (a) in good faith and for a proper purpose; (b) in the best interests of the company; and (c) with the degree of care, skill and diligence that may reasonably be expected of a person- (i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company- (a) will have satisfied the obligations of subsection (3)(b) and (c) if- (i) the director has taken reasonably diligent steps to become informed about the matter; (ii) either- (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and (b) is entitled to rely on- (i) the performance by any of the persons- (aa) referred to in subsection (5); or (bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and (ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).'

[67] The Applicant therefore contended that there is clear evidence that the directors of Don Mo have failed to carry out their duties in accordance with the requirements of the 2008 Companies Act. In augmentation, they referred to correspondence directed by Nikita Mfenyana ("Mr Mfenyana"), the former regional

consulting manager of Business Partners, in an email dated 7 March 2024 to Ms Adonis (director), pursuant to a shareholders meeting which was held between Business Partners and the Hanekom Family Trust on 9 February 2024. The following concerns were recorded in relation to the manner in which Don Mo's business was being conducted and its affairs were being managed:

- (a) Clarity on how and when the company intended to reduce or settle the outstanding amount with the City;
- (b) That it noted that Don Mo had not conducted a comprehensive audit since 2018 and that the 2018 financials were not signed. He stated that *"[t]ransparency and accurate financial reporting are essential for maintaining investor confidence"* and enquired as to when the statements could be expected;
- (c) Mr Mfenyana recorded that Don Mo's outstanding VAT and Income Tax payments *"are a cause for concern"* and underscored that timely compliance with tax regulations were crucial for the reputation of Business Partners and for financial stability;
- (d) Mr Mfenyana also recorded that despite Business Partner's efforts to assist, *"the management of financial and administrative documents within the company remains inadequate. This applies to the management of lease agreements, rent collections and property maintenance issues. Proper recordings of transactions and adherence to corporate governance principles are non-negotiable. Business Partners cannot continue to be a shareholder in a company that may be perceived as trading recklessly."*

[68] The Respondent on the other hand, argued that the Applicant's case on the ground that it is just and equitable for the company to be wound up is a flaccid which is based on the following:

- (a) That the liquidators will be able to take charge of Don Mo's assets to protect the interest of the creditors; and
- (b) That the directors have in essence "*abandoned ship, so to speak*".⁴⁶

[69] In relation to the accusation that the directors "abandoned ship", the Respondents argue, that it is without merit for the following reasons:

- (a) Don Mo has always and remains trading;
- (b) Don Mo has always and remains servicing its debt to the Applicant.

[70] To the extent that Don Mo was de-registered without the knowledge of the directors, they contended that it was as a result of an administrative oversight and was not an intentional act. In this regard, In2Tax undertook to regularise Don Mo's tax affairs and file all outstanding returns. Furthermore, the debt owing to the City has been the subject of a dispute with the Municipality upheld and reduced the indebtedness. They submit that for all these reasons, it is neither just nor equitable for wind up a financially sound company with assets exceeding its liabilities.

[71] It bears mentioning that the assertions made by Mr Mfenyana (*supra*), were not disputed by Ms Adonis and conceded that those matters required attention. It appears evident that the directors failed to take any action to address the issues raised by Business Partners, as was pointed out that it is only after this application

⁴⁶ Founding Affidavit, para 51, page 38.

was served on the Respondents that the directors took steps to attempt to regulate the affairs of Don Mo.

[72] In addition, the Applicant asserted that in attempting to address the breach of the fiduciary duties to Don Mo and regulate the position, the directors have further mismanaged Don Mo's affair by further contravening the MOI in the following respects:

- (a) In2Tax was instructed to prepare Don Mo's annual financial statements ("AFS") for the 2024 ("the 2024 AFS"), financial year after this application was served on the directors. The 2024 AFS were subsequently approved and signed by Mr Hanekom and Ms Adonis on 2 September 2024 under circumstances where Don Mo was deregistered from 21 January 2024 until its status was restored with CIPC on 4 September 2024. In the circumstances, it was argued that the directors could not therefore have competently approve the 2024 AFS on 2 September 2024.
- (b) Furthermore, the approval of the AFS for Don Mo for each financial year is defined as a "Material Item" in clause 19.2.41 of the MOI. The shareholders of Don Mo were therefore required to approve the 2024 AFS by way of special resolution as contemplated in clause 19.1 of the MOI. In this regard, the written resolutions had to be approved by 64% of the voting rights attaching to the shares (100% - (less) the percentage of voting rights exercisable by the applicant (37%) + (1%)). It is apparent that no meeting between Don Mo shareholders took place to approve the 2024 AFS, not was nay such meeting requested or convened.

(c) Moreover, it is pellucid that Don Mo's AFS's for the 2019, 2020, 2021, 2022 and 2023 financial years had not been prepared until In2Tax was instructed to do so after this application was served. These AFS were also approved and signed by the directors on 2 September 2024 with Business Partners having any insight or input in relation to its content. Furthermore, it was submitted that his conduct on the part of the directors was again unauthorised and in flagrant disregard of the provisions of the MOI and the rights that Business Partners holds in terms thereof.

[73] It was argued that the cumulative effect of these factors justified in its contention that the directors have breached their fiduciary duties to such an extent that it has resulted in a total loss of confidence in the directors' management of Don Mo's affairs. It was furthermore contended that the directors are clearly guilty of conduct that is "unfair or burdensome and wrongful" as envisaged in *Pienaar (supra)*. In addition, Business Partners submitted that the directors' misconduct is of such a degree that there is no reasonable hope of another remedy which would make co-operation between Business Partners and the directors possible in the future.

New matter raised in Replying Affidavit

[74] The Respondents contended that the Applicant has impermissibly developed an entirely new case that the directors have breached their fiduciary duties, thus justifying the Applicant's loss of confidence regarding Don Mo's affairs.⁴⁷

⁴⁷ Replying Affidavit, paras 28 – 40, page 603.

[75] It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. It is thus expected of the Applicant to disclose facts that would make out a case for the relief sought, and sufficiently inform the other party of the case it was required to meet in the founding affidavit.⁴⁸ This legal principle has been enunciated in **Director of Hospital Services v Mistry**⁴⁹ where the Appellate Division held:

"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and has been said in many other cases:

'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonias Liquor Licensing Board 1953 (3) SA 256 (C) at 260)'"

[76] It is therefore settled law that the issues and averments in support of the parties' cases should appear clearly from the Founding Affidavit. The Founding Affidavit is to contain sufficient facts upon which a court may find in the Applicant's favour. In reference to the trite legal principle that an applicant is to stand or fall by its Founding Affidavit, the Respondent correctly referred to the exception to the rule as distilled in **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd**⁵⁰ where a new matter is raised that the Applicant could not reasonably foresee, thereby necessitating further new facts in reply:

⁴⁸ See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T); *Juta & Co Ltd v De Koker* 1994 (3) SA 499 (T) at 508 B-D.

⁴⁹ 1979 (1) SA 626 (AD) at 635H-636B.

⁵⁰ 2013 (2) SA 204 (SCA) at para 26.

'A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondents' answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant.'

[77] The Respondents argue that the exception does not apply *in casu* as the Applicant alleges facts that it was already aware of. In support of this contention, the Respondents illuminated that the attached documents to the Replying Affidavit were already in the Applicant's possession before the launch of the application, save for the documents which were obtained from In2Tax.

Discussion

[78] The application for provisional winding – up is essentially predicated on Don Mo's breach of the term loan and shareholder's agreements respectively. Don Mo conceded that it breached the term loan and shareholder's loan agreement when it was placed under final deregistration on 21 January 2024. On Don Mo's own version, it is evident that it was not tax compliant and had failed to file its annual tax returns. In this regard, Don Mo accords the blame on its accountants, In2Tax Consulting Services.

[79] It is trite that the court is not impelled to grant a winding up order and retains a discretion on being satisfied that the requirements have been met as to whether or not to grant a provisional winding up order. Generally, an unpaid creditor has a right, *ex debito justitiae*, to the winding-order against a Respondent company which has not discharged that debt.

[80] Business Partners have decided to accelerate payment of the total balance owing to it by Don Mo for reasons already expounded on earlier in this judgment; which is entitled to do. It is noteworthy that prior to the institution of these proceedings, Business Partners have not demanded any payment from Don Mo. In these circumstances, the court has a wide discretion to refuse the winding up application. The Respondents contend that the Applicant will nonetheless retain to right to issue debt recovery proceedings to enforce the debt it believes it is owed and may call up the securities that it holds namely the mortgage bond and 5 unlimited sureties.

[81] The *Badenhorst* principle entrenches the principle that winding-up proceedings should not be resorted to as a means of enforcing a debt which is *bona fide* disputed on reasonable grounds. The rationale fortifying the *Badenhorst* rule is that liquidation proceeding is not the proper forum for the resolution of disputes as to the existence or otherwise of debts. It is a fundamentally accepted legal principle that where there is *bona fide* factual dispute concerning a debtor's indebtedness to a creditor seeking provisional liquidation of the debtor's estate, the application for provisional liquidation should consequentially be dismissed.

[82] It is evident that Don Mo has disputed its indebtedness to the City. In applying the *Badenhorst* rule to the factual matrix, an application should be dismissed on the basis that there is a *bona fide* dispute on reasonable grounds. The question to be answered therefore is whether there is indeed a *bona fide* dispute on reasonable grounds. The dispute in relation to Don Mo is essentially rooted in the fact that there was no demand and no default. It is also uncontroverted that the amount owing to

SARS is not yet payable. It is trite that liquidation proceedings are designed to bring about a *concursum creditorum*. It is clear that where the Applicant at the provisional stage show that the debt *prima facie* exists, the onus is on the company to show that it is *bona fide* disputed on reasonable grounds.

[83] The court having found that the directors have no authorisation to defend the application on behalf of Don Mo, the application insofar as it relates to Don Mo, is for all intents and purposes unopposed and the application ought to succeed for this reason alone as the Applicant simply needs to show at the provisional stage that the debt *prima facie* exists as set out in **Orestisolve** (*supra*). That apart, in keeping with **Rosenbach** (*supra*), without the sale of the immovable property, it is clear that Don Mo would be unable to pay its debts in the sense of being unable to meet current demands upon it, which includes its day to day liabilities in the ordinary course of its business. In applying this formula, to the circumstances as laid bare pertaining to Don Mo's liquidity, it is evident that it is in a state of commercial insolvency in the sense that it would not be able to meet its current demands in the ordinary course. By way of demonstration, Don Mo does not have the liquidity to honour the full outstanding amount owing to Business Partners, without having to sell its asset. Business Partners has elected to enforce the acceleration clause which means that the outstanding balance under the respective agreements became due, owing and payable. To reiterate, the accelerant event being Don Mo's deregistration, triggered the breach clauses in the agreements. When the deregistration occurred, the Applicant became entitled to call up the facility.

[84] The protestations raised by the directors insofar as it relates to the fact that there is equity in the property and that Business Partners may also elect to call

upon the sureties is in my view no moment insofar as it relates to the Eighth Respondent, Don Mo. The most recent statement shows that as at 31 August 2024, the credit balance in Don Mo's account was R23 524.43. I do however deem it apposite to state that this court is required, when deciding whether Don Mo is in fact commercially or factually insolvent, to make this decision of fact in light of all the circumstances of the case within the context of the factual matrix of this matter.

[85] Inasmuch as Don Mo suggested that it only has 3 major creditors, it omitted to include its liability to In2Tax for the work they have been instructed to perform to bring Don Mo's tax affairs up to date. Furthermore, the extent of Do Mo's indebtedness to SARS for example appears to exclude interest and penalty charges. The dispute regarding the outstanding amount owing to the City also appears to be ongoing as the statement paints a different picture to other assertions made in this regard. I pause here to state that I make no findings, in this regard, save to remark that it is apparent that the statement indicates a significant amount of arrears.

[86] The documents put up by Mr Hanekom, suggests that the arrears to the City, in the amount of R51 175.47 has been extinguished; however it appears as though the correspondence attached to Mr Hanekom's supplementary Answering Affidavit indicates that there was a discussion in relation with *"the instalment agreement which was put in place and the possibility of **extending same**"*⁵¹ [my emphasis]. This email is dated 17 October 2024, which indicates that Don Mo had already entered into a payment arrangement at that time. To emphasise, the account summary as at 21 October 2024, indicates that R5 000 was paid on 7 October 2024.⁵² It is also noteworthy that the amount payable immediately does not align with the

⁵¹ Supplementary Index, page 14.

⁵² Annexure "CTL4", page 41.

version of the Respondents which is by and large unsubstantiated, save for the earlier-mentioned email correspondence and proof of payment in the amount of R51 175.47. Even if an arrangement is in place with the City, which has seemingly lapsed on 18 June 2024, the *de facto* position is that if the City were to call up the full outstanding amount of approximately R485k, albeit a disputed amount, it is evident on these papers, that Don Mo will not be able to satisfy the debt immediately.

[87] To my mind, whether the asset is capable of being realised “in reasonable time” is a consideration, however, this may be a relative concept as the procedure in relation to the sale of immovable property is most certainly not an instant process. In any event, the Applicant has elected to pursue these proceedings as opposed to for instance; pursuing alternative remedies such as the calling up the 6 forms of security alluded to by the Respondents; invoking the provisions of Section 163 of the Companies Act, selling its shares and / or extricating from the business or appointing its own directors. The decision by Business Partners, it was argued, has a bearing on its *bona fides* in bringing this application. This assertion, is in my view, not supported and neither is the suggestion that the sole motive behind the launching of this application was to pursue access to the immovable property.

[88] Whilst the Respondents were at pains to demonstrate that it was able to meet its operating expenses and that the statements indicated a year on year reduction in Don Mo's liabilities, it is my considered view, that there are sufficiently clear indicators that Don Mo is commercially insolvent when considering the *locus* of the case within the context of the factual matrix. This conclusion is further underscored by the fact that the Respondents have admitted its debts and its breach. Again, the

dispute in respect of the extent of Don Mo's indebtedness to the City does not detract from the fact that the debt to Business Partners is not disputed and are in essence due for immediate payment.

[89] It is furthermore incumbent for the court to consider the provision of Section 344(h) which confers on the court a wide discretion on a conspectus of all the relevant circumstances including competing interests. Moreover, it behoves this court to deal with the consideration of whether it is just and equitable to wind up Don Mo; more particularly whether Business Partners have a justifiable lack of confidence in the conduct and management of the company's affairs.

[90] It is unrefuted that the directors were oblivious to the fact that Don Mo had been deregistered and carried on conducting its business affairs blissfully unaware that Don Mo's status had changed. This was an undeniable breach of an express provision of the term loan and shareholders agreement. In terms of the entrenched legal position, none of Don Mo's income and/or assets vested in it, for the period 21 January to 4 September 2024. This has had a cascading effect on the operations of Don Mo to the effect that the debt due to Business Partners under the term loan and shareholder's loan became unenforceable for as long as the deregistration subsisted. Inasmuch as Don Mo has a realizable asset, Business Partners would have been precluded from executing on its mortgage bond during this time.

[91] The undisputed reasons for the deregistration of Don Mo was because of its failure to file its annual returns and pay the prescribed fees in respect thereof,

which is undeniably a breach of the directors' fiduciary duties. I am therefore not persuaded that this is in effect a new ground raised by the Applicant in Reply but is an undisputed fact. In this regard, it is unrefuted that Don Mo had failed to file its income tax and VAT returns in contravention of the relevant statutory prescripts as previously stated. This is a duty of the directors. Of significance is the fact that the directors of Don Mo have in any event conceded that Don Mo was not tax compliant. I interpose, to mention that inasmuch that this court can accept that there may have been a dispute lodged regarding the amount owing to the City, the significance for the purposes of this application essentially turns on three aspects:

- (a) The identified breaches by Don Mo of the Local Government and Municipal Systems Act and Local Government Municipal Property Rates Act;
- (b) The failure on the part of Don Mo and its directors to disclose material information regarding the extent of the arrears of the rates and taxes owing and
- (c) That Don Mo and its directors evidently conducted its business in conflict with the generally recognised business practice and laws of South Africa.

[92] It is trite that the effect of the deregistration was that Don Mo was in effect deprived its legal existence.⁵³ The court in **Miller and Others v Nafcoc Investment Holdings Co Ltd and Others**⁵⁴ describes is as follows:

'Deregistration.... puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist on death.'

⁵³PM Meskin, B Galgut, and JA Junst *Henochsberg on the on the Close Corporations Act* (Durban: LexisNexis 1997) vol 3 issue 20 Com 550.

⁵⁴ 2010 (6) SA 390 (SCA) at para 11.

[93] The writers of *Henochsberg on the on the Close Corporations Act* describe the effect of deregistration as follows:

*'[I]t is submitted that the effect of deregistration of a corporation is that its existence as a legal person ceases ... and that upon such deregistration all its property, movable and immovable, corporeal and incorporeal, passes automatically (ie, without any necessity for delivery or any order of court) into the ownership of the State as bona vacantia'*⁵⁵

[94] A debt that may be due to a creditor of a company that has been deregistered is not extinguished, rendered unenforceable against the company as was held in ***Barclays National Bank Ltd v Traub; Barclays National Bank Ltd v Kalk***⁵⁶.

[95] It bears mentioning that the Respondents' Counsel referred the Court to the matter of ***Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd***⁵⁷ ("*Newlands Surgical*"), which dealt with the reinstatement of an administrative action where the court held that it is understood that *'the Legislation had...intended to alleviate the prejudicial effect on third parties or even the company which may be brought about by the retrospective effect of reinstatement under section 82(4).'*⁵⁸ In that matter the court *"declared the reinstatement of the first respondent as a company in terms of Section 82(4) of the Companies Act 71 of 2008 had retrospective effect from the date of its deregistration which included the retrospective validation of its corporate activities during that period"*⁵⁹.

⁵⁵ see also *Miller and Others v Nafcoc Investment Holdings Co Ltd and Others* 2010 (6) SA 390 (SCA) at para 11 and *Silver Sands Transport (Pty) Ltd v SA Linde (Pty) Ltd* 1973 (3) SA 548 (W) at 549C.

⁵⁶ 1981 (4) SA 291 (W) at 295D.

⁵⁷ [2015] 2 All SA 322 (SCA).

⁵⁸ At para 30.

⁵⁹ At para 31.1.

[96] The status of Don Mo had to be restored in order for Business Partners to bring Part B of the application to life. In terms of the Order granted on 4 September 2024, the dissolution of Don Mo on 21 January 2024, was declared void in terms of Section 83(4) of the 2008 Companies Act. The Companies and Intellectual Property Commission of South Africa was directed to restore the Company's name to the register of Companies. The assets immediately prior to its dissolution on 21 January 2024 were declared to be no longer *bona vacantia* and was reinvested in the Company.

[97] The Order of 4 September 2024 was very specific and did not included the retrospective validation of its corporate activities during that period. This court cannot read this into the order. If it was the intention of the court that the corporate activities were to be validated then, in my view, same would have been expressly stated as it was the case in *Newlands Surgical* ("supra").

[98] Although this order restored the status *quo ante* of Don Mo as if it had not been deregistered, the decisions made by the directors between deregistration and reinstatement which affected, Don Mo could not and should not have been made; and were evidently not sanctioned as required in terms of the agreements. The deregistration of Don Mo in effect terminated the authority of the directors to make decisions on behalf of Don Mo, which authority was not restored retrospectively by virtue of the order on 4 September 2024.

[99] This is typically a case of trying to "put humpty dumpty together again". The egg in my view broke the moment of Don Mo's deregistration. To unpick every decision and transaction of Don Mo and its directors from January 2024 to September

2024 cannot be as simple as “return as you were” as expressed in the matter of *Insamcor (Pty) Ltd v Dor-byt Light and General Engineering (Pty) Ltd*⁶⁰ where it was pointed out that this is an oversimplification to regard it as being ‘no more than a return to “as you were”’.⁶¹

[100] There existed an onerous duty on the directors of Don Mo, more specifically its directors, to ensure that Don Mo was registered at all times when they engage in commercial transactions and in litigation. As directors, they are obliged to check the ‘status’ of the corporate entities with the CIPC. The inescapable conclusion is that the directors of Don Mo have, in my view, clearly flouted their responsibilities in this regard.

[101] I agree with the Applicant that the directors have attempted to minimise the seriousness of its breach as being of a “technical” nature. The Respondent’s contention that Don Mo’s ability to service its debt to Business Partners was not affected by its deregistration cannot be sustained as the deregistration ought to have rendered Don Mo inoperative. The fact that they continued to operate as if it was “business as usual” is worrisome and indicative of the fact that the directors did not have their fingers on the pulse proverbially speaking.

[102] This conclusion is further underscored by the fact that there is an apparent scuffling to get the financial affairs in order which no doubt would have the effect of shareholders losing confidence in the manner in which the business affairs of Don Mo are being conducted.

⁶⁰ 2007 (4) SA 467 (SCA) at 475C.

⁶¹ See also *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ).

[103] The directors' misconduct in my view, is such as to justify that degree of loss of confidence as the directors have failed to carry out their duties in accordance with the statutory requirements. I am fully persuaded that the cumulative effect of the factors mentioned in this judgment justifies the contention that the directors breached their fiduciary duties which resulted in a total loss of confidence.

[104] This court cannot turn a blind eye to the directors' breach of fiduciary duties and the allegations of further mismanagement as dealt with in earlier in this judgment.

Conclusion

[105] Business Partners have approached this court under unique circumstances which in my view, warrants that the matter is to be considered in the milieu of cumulative circumstances of this matter. I am therefore not persuaded that the application launched by Applicant is tantamount to an abuse of the process of the court as alluded to by the Respondents.

[106] I am therefore satisfied having regard to the factual matrix, that Business Partners have demonstrated a justifiable lack of confidence in the conduct and management of Don Mo's affairs. I further find that the loss of confidence is of such a degree that there is no reasonable hope of another remedy which would make possible co-operation in future. I am therefore satisfied that the Applicant succeeded in showing a *prima facie* case for a provisional winding-up order to be granted.

[107] Consequently, in the exercise of my discretion, I find that Don Mo is unable to pay its debts as envisaged in section 344 of the Companies Act, as read

with section 345(1)(c) thereof, and that it is just and equitable for Don Mo to be wound up as envisaged in section 344(h) of the 1973 Companies.

Costs

[108] The Respondents sought an indulgence for the late delivery of the Answering Affidavit which was refused. Business Partners insisted on the timeous delivery of the Answering Affidavit. They argued that the lateness thereof had the consequential effect of delaying the delivery of Business Partners' Replying Affidavit as well as the Heads of Argument. It was further submitted that Business Partners has been prejudiced in its conduct of the matter in that its further papers had to be prepared under significant time pressure.

[109] Business Partners argued that it is the Respondents who seek an indulgence from the Court and the general rule in such cases with reference to case authorities, is that *"the applicant for the indulgence should pay all such costs as can be reasonably be said to be wasted because of the application, such costs to include the costs of such opposition as is in the circumstances reasonable, and not vexatious or frivolous."*⁶²

[110] In the Heads of Argument, Business Partners indicated that it does not oppose the directors' application for condonation. I, therefore, make no order as to costs in this regard. Insofar as it relates to costs of respective applications in terms of Rule 6(5)(e), I direct that those costs shall be costs in the cause. In the further exercise

⁶²*Methe & Ziegler Ltd v Stauch, Vorster and Partners* 1972 (4) SA 679 (SWA) at 683A; *Myers v Abramson* 1951 (3) SA 438 (C) at 455G.

of my discretion, I deem it appropriate that all other costs should be costs in the liquidation of the Eighth Respondent.

Orders

[111] Having read the papers filed of record and having heard Counsel for the Applicant, and the sixth, seventh and eighth respondents, in the exercise of my statutory discretionary power, the following orders are made:

- (a) The late delivery of the Respondents Answering Affidavit is condoned with no order as to costs;
- (b) Leave is granted for the delivery of the Sixth to Eighth Respondents' Supplementary Answering affidavit is condoned with costs to be costs in the cause;
- (c) Leave is granted for the delivery of the supplementary affidavit of Clinton Trevor Lang dated 30 October 2024, with costs to be costs in the cause;
- (d) The Eighth Respondent is placed under provisional liquidation as per the terms of the draft order marked "X"



P D ANDREWS
Acting Judge of the High Court of South Africa
Western Cape Division, Cape Town

APPEARANCES:

Counsel for the Applicant:

Advocate L Van Dyk

Instructed by:

Tim du Toit & Co

Counsel for the Respondent:

Advocate P MacKenzie

Instructed by:

Hanekom Attorneys Inc.

Heard on: 01 November 2024

Delivered: 29 November 2024

This judgment was handed down electronically by circulation to the parties' representatives by email.

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

PROVISIONAL LIQUIDATION

BEFORE THE HONOURABLE ACTING JUDGE ANDREWS
AT CAPE TOWN: ON FRIDAY 29 NOVEMBER 2024

Case No: 14388/2024

In the matter between:

BUSINESS PARTNERS LIMITED
[Registration Number: 1981/000918/06]

Applicant

and

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION OF SOUTH AFRICA**

First Respondent

THE MINISTER OF TRADE AND INDUSTRY N.O.

Second Respondent

THE MINISTER OF FINANCE N.O.

Third Respondent

THE MINISTER OF PUBLIC WORKS N.O.

Fourth Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN

Fifth Respondent

CRYSTALL ROHWENA ADONIS

Sixth Respondent

DONOVAN THESTAN HANEKOM

Seventh Respondent

DON MO PROPERTY (PTY) LTD

Eight Respondent

Registration No: 2014/030530/07

Teguka Business Park, Cnr Hammer & Spanner Road

Philippi East, Western Cape, Cape Town

29/11/2024
[REDACTED] DRAFT ORDER

Having read the papers filed of record and having heard counsel for the applicant and the sixth, seventh and eighth respondents, it is hereby ordered that:

1. That the eighth respondent be placed under provisional liquidation.
2. That a *rule nisi* be issued calling upon all persons interested to show cause, if any, on **29 January 2025** at 10h00 or so soon thereafter as the matter may be heard:
 - 2.1 Why the eighth respondent should not be placed under final liquidation;
and
 - 2.2 Why the costs of this application should not be costs in the liquidation on the High Court scale of fees contemplated in sub-rule 3 of Uniform Rule 67A, which shall be in accordance with scale A as indicated under Uniform Rule 69(7)
3. That service of the order be affected as follows:
 - 3.1 By one publication in each of the Cape Times and Die Burger

newspapers;

- 3.2 By service on the South African Revenue Service;
- 3.3 By service on the eighth respondent at its registered address;
- 3.4 By service on the employees of the eighth respondent by the sheriff of this Court;
- 3.5 By service on the registered trade unions representing the employees of the eighth respondent, if any, by the sheriff of this Court.

BY ORDER OF THE COURT

COURT REGISTRAR

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