

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: YES/NO |

10/02/25
DATE

SIGNATURE

Case Number: 031028/2023
Case Number: 031035/2023

In the matter between:

Case Number 031028/2023

**JALTECH STRUCTURING (PTY) LTD
(Reg. no. 2017/142518/07)**

Applicant

and

**IMPACT EMPOWERMENT VENTURES (PTY) LTD
(Reg. no. 2018/012520/07)**

Respondent

And:

In the matter between

Case Number 031035/2023

**JALTECH STRUCTURING (PTY) LTD
(Reg. no. 2017/142518/07)**

Applicant

and

**IMPACT INVESTMENT MANAGEMENT
(Reg. no. 2017/319397/07)**

Respondent

JUDGMENT

INTRODUCTION

- [1] By way of introduction, I am Thembile Joyini, acting judge appointed by Judge President Mlambo to prepare this judgement, based on the papers and written argument. This is based on an agreement by the parties that this be done after the acting judge who heard the matter failed to hand down the judgment despite numerous requests by the Judge President.
- [2] As a starting point, the parties have brought to the attention of the court through a joint practice note that Jaltech Structuring (Pty) Ltd is the applicant in two parallel winding-up applications. Under case number 31028/2023, the respondent is Impact Empowerment Ventures (Pty) Ltd and under case number 31035/2023, the respondent is Impact Investment Management. The two respondents in the said two winding-up applications are related entities. The extended return days of the provisional winding-up orders in both applications was 5 February 2024. The material facts and disputes between the parties in both applications are for the most part identical. The two winding-up applications ought, with respect, to be enrolled and determined together before the same Judge. This has been done and this is the reason why all the parties have been cited above under their case numbers respectively. For the sake of convenience, the two respondents will be referred to hereinafter as ("the respondents") and the two applications will be referred to hereinafter as ("the applications").
- [3] The applications for the winding up of the respondents are brought on the basis that the respondents are unable to pay their debts as and when they fall due for payment. According to the applicant, the respondents are deemed to be unable to pay their debts and as such, it is just and equitable for the respondents to be wound-up.
- [4] The applications are brought in terms of section 344(f) read with section 345(1)(a) and/or (c) of the 1973 Companies Act. These applications are, separately and cumulatively, also brought on a just and equitable basis in terms

of section 344(h) of the 1973 Companies Act. The aforesaid provisions of the 1973 Companies Act must be read together with item 9 of Schedule 5 of the 2008 Companies Act.

- [5] On or about 27 September 2021, the applicant and the respondents ("parties") entered into a settlement agreement. The purpose of the settlement agreement was to settle the payment of the outstanding fees that were due to the applicant pursuant to the letter of engagement. The settlement agreement is however a stand-alone agreement and exists independently from the letter of engagement.
- [6] During the period July 2021 to April 2022, the respondents duly paid the applicant the first capital amount of R1, 984, 577.16 in accordance with the settlement agreement.
- [7] Also, during the period September 2021 to April 2022, the respondents, once again, paid the applicant 3 of the 8 equal instalments in respect of the second capital amount in terms of and as defined in the settlement agreement, and in the cumulative amount of R1, 624, 303.11.
- [8] The respondents started breaching the settlement agreement when they failed to pay the applicant the fourth instalment of the second capital amount that was due on or before the end of June 2022.
- [9] The applicant is a substantial creditor of the respondents in the amount of R2, 707, 171.85. On 17 August 2022, the respondents' attorneys addressed a response to the applicant stating that the respondents do not dispute the amount of R2, 707, 171.85 in respect of the second capital amount that is due, owing and payable to the applicant. According to the applicant, whilst the response is marked '*without prejudice*', it is nevertheless admissible in this liquidation application because, *inter alia*, it contains an admission of insolvency on the part of the respondents. For this reason, the letter is not privileged and its contents are accordingly admissible.
- [10] Due to the failure of the respondents to make payments, the applicant delivered a letter of demand in terms of section 345(1)(a)(i) of the old Companies Act, 61

of 1973 ("the Companies Act").¹ The respondents responded to the statutory letter of demand on 31 January 2023 denying for the first time that the applicant's claim in respect of the second capital amount is due and payable. According to the applicant, the respondents were thus deemed commercially insolvent as they could not pay their debts as and when they fell due and payable and thus ought to be wound-up.

- [11] The respondents opposed the applications for the winding up of the respondents on a number of grounds and/or defences: First, on the defence of privileged settlement negotiations; second, on the application to strike out certain portions of the founding papers; third, the defence of breach of the letter of engagement; fourth, on the defence that the applicant had to be a registered financial service provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS"); fifth, on the defence of duress; and sixth, on the defence of disputed debt. I now consider each of these defences in turn.

DEFENCE OF PRIVILEGED SETTLEMENT NEGOTIATIONS

- [12] In opposing this defence, the applicant argues that whilst the general rule is that correspondence that forms part of settlement negotiations are privileged from disclosure, there are exceptions to the general rule (including those communications marked 'without prejudice').
- [13] The applicant supported its argument by referring the court to *Absa Bank Ltd v Hammerle Group*² where the Supreme Court of Appeal said the following with regard to 'without prejudice' communications: "[13] *It is true that as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice. However, there are exceptions to this rule. One of these exceptions is that an offer made, even on a 'without prejudice' basis, is admissible in evidence as an*

¹ Schedule 5 of the Companies Act 71 of 2008 provides for a transitional arrangement that Chapter 14 of the (old) Companies Act will continue to apply with respect to the winding-up and liquidation of companies as if the latter Act had not been repealed.

² 2015 (5) SA 215 (SCA) at para [13].

act of insolvency. Where a party therefore concedes insolvency, as the respondent did in this case, public policy dictates that such admissions of insolvency should not be precluded from sequestration or winding-up proceedings, even if made on a privileged occasion. The reason for the exception is that liquidation or insolvency proceedings is a matter which by its very nature involves the public interest. A concursus creditorum is created and the trading public is protected from the risk of further dealing with a person or company trading in insolvent circumstances. It follows that any admission of such insolvency, whether made in confidence or otherwise, cannot be considered privileged. This is explained by the words of Van Schalkwyk J in Absa Bank Ltd v Chopdat,³ when he said:

'[A]s a matter of public policy, an act of insolvency should not always be afforded the same protection which the common law privilege accords to settlement negotiations.

A creditor who undertakes the sequestration of a debtor's estate is not merely engaging in private litigation; he initiates a juridical process which can have extensive and indeed profound consequences for many other creditors, some of whom might be gravely prejudiced if the debtor is permitted to continue to trade whilst insolvent. I would therefore be inclined to draw an analogy between the individual who seeks to protect from disclosure a criminal threat upon the basis of privilege and the debtor who objects to the disclosure of an act of insolvency on the same basis.'

In the final analysis, the learned judge said at 1094F:

*'In this case the respondent has admitted his insolvency. Public policy would require that such admission should not be precluded from these proceedings, even if made on a privileged occasion.'*⁴

³ *Absa Bank Ltd v Chopdat* 2000 (2) SA 1088 (W) at 1092H-1094F.

⁴ *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) paras 23-24 which affirmed the principle enunciated in *Chopdat*.

- [14] I am persuaded by the applicant's argument and as such, the respondents' defence is accordingly hereby rejected.

APPLICATION TO STRIKE OUT

- [15] The respondents submitted applications for an order that the following portions of the founding affidavit and annexures thereto be struck out in accordance with the provisions of Rule 6(15) of the Uniform Rules of Court on the basis that they refer to privileged settlement negotiations between the applicant and the respondents. These portions are paragraphs 26, 32, 54, 55, 56, 57, and 58 of the founding affidavit and annexures "BH6" and "BH9" to the founding affidavit. I now proceed to deal with this application, which is also opposed by the applicant.
- [16] The respondents rely on Rule 6(15) which provides: *'the court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, irrelevant, with an appropriate order as to costs, including costs between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.'*
- [17] Application to strike out can be brought against a pleading or affidavit. In this case, it is brought against paragraphs 26, 32, 54, 55, 56, 57, and 58 of the founding affidavit; and annexures "BH6" and "BH9" to the founding affidavit.
- [18] The court shall not grant the application to strike out unless it is satisfied that the party seeking such striking out will be prejudiced in its claim or defence.
- [19] In *Beinash v Wixley*,⁵ the court emphasised the two requirements to be satisfied before an application to strike out a matter from a pleading or affidavit can succeed. These requirements are: the matter sought to be struck out must

⁵ [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 733A-B.

indeed be scandalous, vexatious, or irrelevant; and the court must be satisfied that if such a matter was not struck out the party seeking a relief will be prejudiced.

[20] It has been held that the striking out procedure is not intended to be utilised to make technical objections which merely serve to increase costs and are of no advantage to the litigating parties. It is for these reasons that sufficient degree of prejudice should be present and such proof of prejudice is required. See the case of *Anderson and Another v Port Elizabeth Municipality*⁶.

[21] The meanings of the terms 'scandalous', 'vexatious' and 'irrelevant' are set out succinctly in the case of *Vaatz v Law Society of Namibia*⁷ where reference is made to the basic grammatical meaning given these terms in the *Shorter Oxford English Dictionary*. The court adopted the meanings assigned to the terms by the dictionary.

[22] The respondents have not submitted how they will suffer prejudice. It is also not clear in what respect such prejudice will come about. As the referenced authorities indicate, it is imperative that sufficient prejudice must be shown. I submit that prejudice must be deduced from the facts. On the facts of this case, I am unable to discern any such prejudice. It is on this basis that the respondents' applications to strike out paragraphs 26, 32, 54, 55, 56, 57, and 58 of the founding affidavit; and annexures "BH6" and "BH9" to the founding affidavit in terms of Rule 6(15) are hereby dismissed.

DEFENCE OF BREACH OF THE LETTER OF ENGAGEMENT

[23] The applicant argues that its cause of action is based on the settlement agreement, and not the letter of engagement. The purpose of the settlement agreement was to settle the payment of the outstanding fees that were due to

⁶ 1954 (2) SA 299 (E).

⁷ 1991 (3) SA 563 (NM) at 566C, 566H-567B.

the applicant pursuant to the letter of engagement. The settlement agreement constitutes a compromise and is however a stand-alone agreement and exists independently from the letter of engagement. The second capital amount that is due to the applicant arises from the settlement agreement and not the letter of engagement.

- [24] I am also persuaded by the applicant's argument and as such, the respondents' defence is accordingly hereby rejected.

DEFENCE OF FINANCIAL ADVISORY AND INTERMEDIARY SERVICES

- [25] The respondents argue that from the nature of the applicant's role and services it undertook to perform in terms of the letter of engagement, the applicant had to be a registered financial service provider in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS").

- [26] According to the applicant, the general services identified in the letter of engagement did not require the applicant to register as a financial service provider in terms of FIAS. Accordingly, this defence is also hereby rejected.

DEFENCE OF DURESS

- [27] The respondents contend that the settlement agreement (being the applicant's cause of action) was concluded pursuant to duress and/or intimidation.
- [28] According to the applicant, the respondents' allegations of duress and intimidation, and their challenge to the validity of the settlement agreement, are patently false and contrived. The respondents opportunistically raises the issue of duress in an attempt to dispute the debt and their indebtedness to the applicant. The respondents make a tenuous reference to duress and undue influence without pleading the objective facts (corroborated by any tangible evidence) necessary to sustain either.

[29] The requirements regarding the use of duress as a defence in a court of law vary by state. The following are the general requirements that must be present:

[29.1] The party is in immediate threat of serious bodily harm or death. The threat made to the victim must be constant. For example, holding a gun to someone's head is considered a qualified threat.

[29.2] The party believes that the perpetrator of the act will carry out the threat. The fear of the threat is justifiable if a reasonable person would likely experience the same level of fear when faced with the same threat.

[29.3] There is no opportunity to escape safely, except by committing the unlawful act. If the court is convinced that the plaintiff had an opportunity to escape unharmed without committing the illegal act, then duress cannot be used as a defense for committing an illegal act.

[30] The respondents have not met these requirements and as such, their defence of duress is hereby rejected.

DISPUTED DEBT

[31] The respondents argue that the *"applicant attempts to use liquidation proceedings to claim a bona fide disputed debt and as such, its application constitutes a gross abuse of the process of court as well as the provisions of the Companies Act No. 71 of 1973 (herein "the Old Act")."* The respondents referred the court to Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another⁸ where it was held as follows:

"The relevant legal principles

[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a prima facie basis, meaning that the

⁸ (18414/14) [2015] ZAWCHC 71; 2015 (4) SA 449 (WCC) (28 May 2015).

*applicant must show that the balance of probabilities on the affidavits is in its favour (Kalil v Decotex (Pty) Ltd **1988 (1) SA 932** (A) at 975J-979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a prima facie case.)*

*[8] Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence of which is bona fide disputed on reasonable grounds is part of the broader principle that the court's processes should not be abused. In the context of liquidation proceedings, the rule is generally known as the Badenhorst rule from the leading eponymous case on the subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd **1956 (2) SA 346** (T) at 347H-348C, and is generally now treated as an independent rule not dependent on proof of actual abuse of process (Blackman et al Commentary on the Companies Act Vol 3 at 14-82 – 14-83). A distinction must thus be drawn between factual disputes relating to the respondent's liability to the applicant and disputes relating to the other requirements for liquidation. At the provisional stage, the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to the applicant's claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is bona fide disputed on reasonable grounds; a court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicant's claim has been made out (Payslip Investment Holdings CC v Y2K Tec Ltd **2001 (4) SA 781** (C) at 783G-I). However, where the applicant at the provisional stage shows that the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd **1998 (2) SA 208** (C) at 218D-219C).*

[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must

instead apply the Plascon-Evans rule (Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) para 4; Golden Mile Financial Solution CC v Amagen Development (Pty) Ltd [2010] ZAWCHC 339 paras 8-10; Badge & Others NNO v Midnight Storm Investments 265 Pty Ltd & Another 2012 (2) SA 28 (GSJ) para 14)."

- [32] According to the applicant, the respondents cannot legitimately dispute their indebtedness due to the fact that on or about 27 September 2021, the applicant and the respondents ("parties") entered into a settlement agreement. The purpose of the settlement agreement was to settle the payment of the outstanding fees that were due to the applicant pursuant to the letter of engagement. The settlement agreement is however a stand-alone agreement and exists independently from the letter of engagement. During the period July 2021 to April 2022, the respondents duly paid the applicant the first capital amount of R1, 984, 577.16 in accordance with the settlement agreement. Also, during the period September 2021 to April 2022, the respondents, once again, paid the applicant 3 of the 8 equal instalments in respect of the second capital amount in terms of and as defined in the settlement agreement, and in the cumulative amount of R1, 624, 303.11.
- [33] As stated above, the applicant is a substantial creditor of the respondents in the amount of R2, 707, 171.85. On 17 August 2022, the respondents' attorneys addressed a response to the applicant stating that the respondents do not dispute the amount of R2, 707, 171.85 in respect of the second capital amount that is due, owing and payable to the applicant. According to the applicant, whilst the response is marked '*without prejudice*', it is nevertheless admissible in this liquidation application because, *inter alia*, it contains an admission of insolvency on the part of the respondents. For this reason, the letter is not privileged and its contents are accordingly admissible.
- [34] Despite all this, the respondents replied to the statutory letter of demand on 31 January 2023 denying for the first time that the applicant's claim in respect of second capital amount is due and payable. Disputing the debt, the respondents thus denied that they were liable for the amount claimed.

[35] Section 344 of the Companies Act is the source of authority that vests a court with the power to liquidate a company in certain circumstances. Sub-section 344(1) read with section 345(1)(a)(i) of the Companies Act provides that a company may be wound-up by a court if it is unable to pay its debts and that the company will be deemed to be unable to pay its debts if a creditor who is owed not less than R100 serves on the company a demand requiring the company to pay the sum due and the company fails to comply.

[36] In *casu*, the respondents are disputing the debt allegedly due to the applicant. In ***Imobrite (Pty) Ltd v DTL Boerdery CC***⁹, the Supreme Court of Appeal summarised the principles to be applied in cases where a debt is disputed as follows: *"It is trite that, by their very nature, winding-up proceedings are not designed to resolve disputes pertaining to the existence or non-existence of a debt. Thus, winding-up proceedings ought not to be resorted to enforce a debt that is bona fide (genuinely) disputed on reasonable grounds. That approach is part of the broader principle that the court's processes should not be abused. A winding-up order will not be granted where the sole or predominant motive or purpose of seeking the winding-up order is something other than the bona fide bringing about of the company's liquidation. It would also constitute an abuse of process if there is an attempt to enforce payment of a debt which is bona fide disputed, or where the motive is to oppress or defraud the company or frustrate its rights"*.

[37] However, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a company that has not discharged its debts¹⁰. The court exercises a narrow discretion when deciding on a liquidation application and the following observations in ***Boschpoort Ondernemings (Pty) Ltd v Absa Bank Limited***¹¹ appositely illustrate why a court will not be easily swayed towards exercising its discretion in favour of a debtor that has not discharged its debts: "[17] *That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of time. The reasons are not hard to find: the valuation of assets, other*

⁹ (1007/20) [2022] ZASCA 67 (May 2022).

¹⁰ ***Afgri Operations Limited v Hamba Fleet (Pty) Ltd*** 2022 (1) SA 91 (SCA) at para [12].

¹¹ 2014 (2) SA 518 (SCA).

than cash, is a notoriously elastic and often highly subjective one: the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company who owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets."

[38] Section 346(1)(b) of the Companies Act confers *locus standi* on all creditors of a company where the debt due is R100 or more. If a creditor establishes a case for liquidation, where a portion of the amount of the debt is disputed by the debtor or the precise amount of the debt is uncertain, such a dispute will not constitute a defence.¹² In accordance with what is generally known as the **Badenhorst** rule¹³, *locus standi* will only be deemed to be absent where the existence of the whole of the debt is *bona fide* disputed on reasonable grounds. Where *prima facie* the debt exists, the onus is on the respondent to show that the debt is *bona fide* disputed on reasonable grounds¹⁴.

[39] In **Orestisolve (Pty) Limited t/a Essa Investments v NDFT Investment Holdings (Pty) Limited and Another**¹⁵, Rogers J expressed the view that the **Badenhorst** rule only applies at the provisional stage of liquidation proceedings where there was a factual dispute relating to the respondent's liability to the applicant, and the test to be applied for a final liquidation order where material facts are in dispute is the **Plascon-Evans** test as expressed in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**¹⁶. Thus, when an applicant seeks final relief in liquidation proceedings and there are conflicting versions of fact, the court must accept the version of the respondent together with any facts admitted in the applicant's papers, unless the respondent's version is far-fetched and clearly untenable. With respect, I am of the view that both

¹² **Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others** 1976 (2) SA 856 (W).

¹³ After one of the leading cases on the subject, **Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T).

¹⁴ **Fresh Investments (Pty) Ltd v Marabeng (Pty) Ltd** (1030/2015) [2016] ZASCA 168 (24 November 2016)

¹⁵ 2015 (4) SA 449 (WCC). See also, **Gap Merchant Recycling CC v Gold Reach Trading 55 CC** 2016 (1) SA 261 (WCC).

¹⁶ [1984] ZASCA 51; 1984 (3) SA 623 (A).

the **Badenhorst** rule and **Plascon-Evans** test must be applied where there is a factual dispute in respect of a respondent's indebtedness in an application for a final liquidation order: quite simply, the **Badenhorst** rule and **Plascon-Evans** test serve different purposes. As Movshovich AJ commented in **Voltex (Pty) Limited t/a Atlas Group v Resilient Rock (Pty) Limited**¹⁷, the **Plascon-Evans** test is concerned largely with rules of procedure and evidence and not the substantive requirements for an application to succeed whilst the **Badenhorst** rule is not a rule of procedure but relates to substantive requirements as to what a party must establish to make out a claim or establish a defence.

- [40] That the **Badenhorst** rule finds application in the final order stage of liquidation proceedings was confirmed by the Supreme Court of Appeal in cases such as **Afgri Operations v Hamba Fleet (Pty) Ltd**¹⁸ and **Fresh Investments (Pty) Ltd v Marabeng (Pty) Ltd**¹⁹ - admittedly, these cases were decided after **Orestisolve** and **Gap**. Thus, in **Fresh Investments supra**, Fourie AJA in dealing with an application for a final order for the winding up of a company employed the **Badenhorst** rule stated as follows: "*The guidelines laid down in Kalil*²⁰ as to how factual disputes relating to the respondent's indebtedness is in an application such as the present should be approached, were stated thus by Brand J in **Payslip Investment Holdings CC v Y2K Tek Ltd** 2001 (4) SA 781 (C) at 783 H-I: 'with reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant had made out a case on the probabilities. The stated exception regarding disputes about a applicant's claim does cut across the approached factual disputes in general'."

¹⁷ (case number 2021/29872) [2022] ZAGPJHC 241 (26 April 2022).

¹⁸ 2022 (1) SA 91 (SCA) at para [12].

¹⁹ 1030/2015) [2016] ZASCA 168 (24 November 2016)

²⁰ **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (A).

[41] It is not necessary to prove actual insolvency for the purposes of section 344 (f) of the Companies Act. In *Standard Bank of South Africa v R-Bay Logistics CC*²¹ it was held that “*if there was evidence that the respondent’s company is commercially insolvent (i.e. cannot pay its debts when they fall due) that is enough for a Court to find that the required case under section 344 (f) has been proved*”. It goes without saying that the exercise of a discretion in favour of not granting a liquidation order in circumstances where a company is commercially insolvent must be based on a solid factual foundation.

CONCLUSION

- [42] In determining this matter, I must be guided by caselaw and well-established principles applicable to applications of this nature. In this regard, I need also to draw certain inferences and weigh probabilities as they emerge from the parties’ respective submissions, affidavits, and heads of argument.
- [43] On the facts placed before this court, the applicant has established its claim on a *prima facie* basis. The respondents cannot legitimately dispute their indebtedness due to the fact that on or about 27 September 2021, the applicant and the respondents entered into a settlement agreement. The purpose of the settlement agreement was to settle the payment of the outstanding fees that were due to the applicant. During the period July 2021 to April 2022, the respondents duly paid the applicant the first capital amount of R1, 984, 577.16 in accordance with the settlement agreement. Also, during the period September 2021 to April 2022, the respondents, once again, paid the applicant 3 of the 8 equal instalments in respect of the second capital amount in terms of and as defined in the settlement agreement, and in the cumulative amount of R1, 624, 303.11.
- [44] On 17 August 2022, the respondents’ attorneys addressed a response to the applicant stating that the respondents do not dispute the amount of R2, 707, 171.85 in respect of the second capital amount that is due, owing and payable to the applicant. According to the applicant, whilst the response is marked ‘*without prejudice*’, it is nevertheless admissible in this liquidation application

²¹ 2013 (2) SA 295 (KZD).

because, *inter alia*, it contains an admission of insolvency on the part of the respondents. For this reason, the letter is not privileged and its contents are accordingly admissible.

- [45] Apart from their bald assertion that the debt is not due and payable because it is disputed, the respondents have offered no supporting evidence to substantiate their position. This must reflect negatively on the *bona fides* of their defence. In the absence of a genuinely disputed debt, the conclusion is ineluctable that the respondents are commercially insolvent. As Malan J (as he then was) stated in ***Body Corporate of Fish Eagle v Group Twelve Investments***:²² “The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts... If the respondent admits a debt over R100 even though the respondent’s indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent’s own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts”.

- [46] The courts have held that the respondent’s failure to effect payment of a debt after a statutory demand is presumptive of insolvency. The respondents have not indicated anywhere in their answering affidavits that they have the assets, resources, or sources of income to pay their debts as and when they fall due or to pay the debt owing to the applicant. Accordingly, on a conspectus of the evidence placed before this Court, I am of the view that the applicant has established that the respondents are commercially insolvent. Where *prima facie* the debt exists, the onus is on the respondents to show that the debt is *bona fide* disputed on reasonable grounds²³. The respondents have not shown that their indebtedness is genuinely disputed on reasonable grounds. In the circumstances of this matter, the applicant is entitled to seek the liquidation of the respondents. All the requirements for a liquidation order have been met,

²² 2003 (5) SA 414 (W) at 428B-C.

²³ *Fresh Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016)

including the formalities prescribed by section 346 of the Companies Act. In conclusion, the applications must therefore succeed.

COSTS

[47] The parties agree that the costs of the initial hearings should be costs in the cause and, if winding-up orders are to be granted, then the aforesaid costs become costs in the winding-up of the respective respondents.

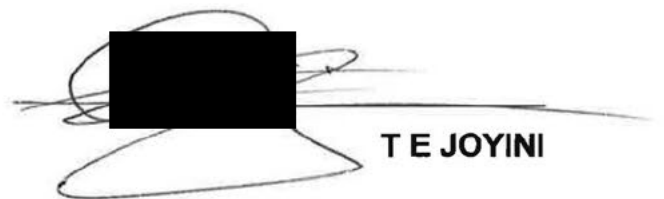
ORDER

[48] In the circumstances, I make the following order:

[48.1] Both applications for the winding up of the respondents (in case numbers 031028/2023 and 031035/2023 respectively) that are brought on the basis that the respondents are unable to pay their debts as and when they fall due for payment are granted.

[48.2] Both respondents (in case numbers 031028/2023 and 031035/2023 respectively) are placed into final winding-up in the hands of the Master of the High Court.

[48.3] Costs of both applications are to be costs in the winding-up of both respondents referred to in paragraph [48.2] above.

A handwritten signature in dark ink, consisting of a large, stylized 'T' and 'J' with a horizontal line extending to the right. A black rectangular redaction box covers the middle part of the signature.

T E JOYINI

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicant: Adv GW Amm

Instructed by: Morgan Law Inc.

Email: ryan@morganlaw.co.za / gregoryammpa@islandgroup.co.za

For the respondent: Adv LW De Beer

Instructed by: Heckroodt & Associates

Email: philip@heckroodtlegal.com / hannah@heckroodtlegal.com / ldb@gkchambers.co.za

Date of Hearing: 7 February 2024

Date of Judgment: 10 February 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 10 February 2025 at 10h00.