



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable / Not reportable

Case No.: 2883/2023

In the matter between:

**JENNY VAN DAM N.O.
ANTON WOUTER VAN DAM N.O.
PIETER MARTIN VAN DEN HEEVER N.O.
JENNY VAN DAM**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT**

and

**CANNABAT MANUFACTURERS
INTERNATIONAL (PTY) LTD**

RESPONDENT

Neutral Citation: *J van Dam N.O. and Others v Cannabat Manufacturers (Pty) Ltd*
(2883/2023) [2025] ZAFSHC 192 (27 June 2025)

Coram: Van Rhyn J

Heard: 24 April 2025

Delivered: 27 June 2025

Summary: Company – winding-up – s 345(1)(a), (c) and s 344(h) of Companies Act 61 of 1973 – respondent is a creditor of the applicants. Basis of indebtedness are agreements entered into between applicants and respondent. Litigation in Magistrate's Court prior to liquidation application – dispute pending – abuse of process. Indebtedness subject of dispute – debt bona fide disputed on reasonable grounds.

ORDER

The application for the winding-up of the respondent is dismissed with costs on an attorney and client scale, which costs shall include costs of two counsel on Scale C and Scale B (respectively and where so employed).

JUDGMENT

Van Rhyn J

[1] This is an opposed application for the winding-up of the respondent on the basis that it is unable to pay its debts as envisaged in s 344(f), read with s 345(1)(a) and/or (c) of the Companies Act 61 of 1973 (the '1973 Companies Act'). The application is, separately and cumulatively, also brought, on a just and equitable basis in terms of s 344(h) of the 1973 Companies Act, which provisions must be read together with item 9 of Schedule 5 of the Companies Act 71 of 2008 (the '2008 Companies Act').

[2] The first applicant is Jenny van Dam N.O., second applicant is Anton Wouter Van Dam N.O. and the third applicant is Pieter Martin van den Heever N.O, cited in their capacities as trustees of the JJRC Family Trust with registration number IT 229/99 (the 'trust'). The fourth applicant is Jenny van Dam cited in her personal capacity. The respondent is Cannabat Manufacturers International (Pty) Ltd, a company with registered address at 162 General Hertzog Road, Vereeniging, Gauteng Province and main place of business at 9 Swartberg Street, Vaalpark, Sasolburg, Free State Province.

[3] The dispute between the parties relates to a written memorandum of agreement ('the MOA') entered into between the trust, the fourth applicant and the respondent on 6 July 2021 at Vanderbijlpark. From the MOA flowed two separate sale agreements, the first in respect of immovable property between the trust and the respondent and the second, in respect of certain movable property between the fourth applicant and the respondent.

[4] In terms of the immovable property sale agreement, the respondent purchased a property known as Holding 146, Mantervrede Agricultural Holdings, Gauteng for the purchase price of R13 000 000 payable within 14 days from the date of the agreement, being 6 July 2021. The respondent took occupation of the property and agreed to pay occupational rent in the amount of R300 000 per month as well as the costs for consumption of water and electricity together with rates, taxes and levies. According to the applicant, respondent breached the immovable property sale agreement by failing to make certain payments as set out in the founding affidavit.

[5] In terms of the movable property sale agreement the fourth respondent sold the assets described in an annexure thereto to the respondent for the purchase price of R7 000 000. It is recorded that an amount of R2 439 813.88 had already been paid by the respondent. The balance of the purchase price in the amount of R4 560 186.12 was payable to the fourth applicant on date of delivery of the assets. The fourth applicant contends that the respondent breached the movable property sale agreement by failing to make the agreed payments.

[6] The applicants contend that the respondent does not deny the existence of the two agreements of sale pertaining to the immovable property and the movable assets. The applicants have attached the said written agreements to the founding affidavit in support of the contention regarding the respondent's indebtedness relating to the two agreements of sale.

[7] On 27 June 2022 the applicants, through its attorney, addressed an initial letter of demand to the respondent by way of email. Thereafter, on 13 March 2023, a notice in terms of the provisions of s 345(1) of the 1973 Companies Act was delivered, per email, to the respondent's attorney of record. The notice in terms of s 345(1) was furthermore served by the Sheriff, Sasolburg, on 12 April 2023 at 9 Swartberg Street Vaalpark, Sasolburg by affixing the said notice to the main gate. On behalf of the applicants, it is argued that the respondent remains in occupation of the property without making any payment in respect of such occupation and the total indebtedness of the respondent to the applicants amount to R6 070 000. 00. The respondent made certain payments, the last of which was made on 13 September 2022 in the amount of R250 000 in respect of occupational rent. The applicants contend that the respondent failed to respond to the s 345(1) Notice.

[8] The applicants are not able to present a detailed and accurate analysis of the respondent's financial position but contend that the respondent's financial position is obviously to be measured against the indebtedness as set out in the papers. Furthermore, the respondent does not own immovable property or any traceable assets. It is thus submitted that the respondent is commercially insolvent and unable to pay its debts when due and payable.

[9] The application for liquidation was issued on 9 June 2023 and enrolled to be heard on the opposed motion court roll on 21 November 2024. On 21 November 2024 the matter was postponed to 13 March 2025 with the applicants to pay the wasted costs occasioned by the postponement. The applicants have subsequently filed an application for leave to appeal against the costs order made on 13 March 2025. On 21 November 2024 the respondent sought leave to file a supplementary answering affidavit, which application was opposed by the applicants. Respondent was granted leave to file its supplementary affidavit and the applicants were ordered to pay the costs of opposing the application by the respondent.

[10] In response to the respondent's supplementary answering affidavit, the applicants served and filed their supplementary affidavit on 27 February 2025. On 13 March 2025 the application for liquidation was once more postponed due to none of the parties having filed updated practice notes and updated heads of argument subsequent to the filing of the respective further affidavits. The application was postponed to 24 April 2025 with no order as to costs. Thereafter both parties filed updated practice notes and supplementary heads of argument.

[11] Given the respondent's failure to meet its obligations under the various agreements with the applicants and to respond to the applicant's statutory demand to rehabilitate the debt and to settle the full outstanding balance owing, the applicants contend that the respondent is unable to pay its debts which indebtedness has, *prima facie*, been established. The applicants contend that, on the respondent's own version, with reference to Annexure 'X' appended to the respondent's supplementary affidavit, only the amount of debt is disputed and the admitted liability is for at least R200. The onus to dispute the indebtedness on bona fide and reasonable grounds is on the respondent and taking into

consideration that the respondent has not disputed the applicants' *locus standi* or that the applicants are a creditor in an amount of less than R200 for purposes of s 345(1)(a) of the 1973 Companies Act, the respondent is deemed to be unable to pay its debt. A final winding-up order is sought by the applicants.

[12] At the hearing of the matter, Mr Strydom SC (appearing with Mr Roux), counsel on behalf of the respondent elaborated on the grounds of opposition to the relief sought by the applicants and raised certain legal points relied upon by the respondents. To a certain extent many of the legal points have been addressed by the respondent in the answering and the supplementary affidavit. Any further legal points were argued on the basis that a legal point can be raised at any stage of the proceedings, contingent on the point being supported by the facts and not resulting in prejudice or unfairness to the other party. The following legal points were raised:

- (a) Jurisdiction of the court;
- (b) The Notice in terms of s 345(1);
- (c) Abuse of process;
- (d) Locus standi of the applicants; and
- (e) New evidence contained in the supplementary affidavit filed by the applicants.

Jurisdiction.

[13] As to the issue regarding the jurisdiction of the court, the respondent contends that reliance placed by the applicants that the court has the requisite jurisdiction to hear and determine the application '...in the light thereof that the respondent's Domicilium address falls within the area of jurisdiction' of this court, *per se* does not create the requisite jurisdiction.

[14] In terms of the 2008 Companies Act, the registered address of a company must be situated at the principal or only place of business.¹ Accordingly for purposes of winding-up, the court having jurisdiction over the registered address of the company, being the same address as its principal or only place of business, has requisite jurisdiction. Section 224(3) of the 2008 Companies Act provides that the repeal of the 1973 Companies Act does not affect the transitional arrangements contained in Schedule 5, Item 9 of the 2008 Companies Act. In that schedule provision is made for the continued application of Chapter 14 of the

¹ Section 23(3) Companies Act 71 of 2008.

1973 Companies Act. Accordingly, any winding up under the 2008 Companies Act, other than a winding up in respect of a solvent company, must take place under the 1973 Companies Act as if the same had not been repealed.²

[15] Creditors in a winding-up application under Chapter 14 of the 1973 Companies Act have a choice of two jurisdictions in which to institute proceedings – either where the registered office is situated, or where the company's 'main office' or 'principal place of business' was located.³ From the content of the Companies and Intellectual Property Commission's report (Annexure 'JVD 4') to the founding affidavit, the respondent was registered on 8 July 2019 with 'physical address' at 162 General Hertzog Road, Three Rivers, Vereeniging, Gauteng. The application for liquidation was served upon the respondent at 9 Swartberg Street, Vaalpark, Sasolburg by affixing the application and annexures thereto to the main gate.

[16] In the answering affidavit it is denied that the court has jurisdiction to hear the application for liquidation. A court must have jurisdiction for its judgment or order to be valid. Jurisdiction may be defined as follows: '... the power or competence which a Court has to hear and determine an issue between parties and limitations may be put upon such power in relation to territory, subject matter, amount in dispute, parties etc.'⁴ The time for determining whether a court has jurisdiction is when proceedings commence – that is when the initiating papers are served on the defendant or respondent. Jurisdiction is determined with reference to the allegations made in the pleadings and not the substantive merits of the matter. The applicants' averment in the founding affidavit are therefore the determining factor since it contains the legal basis of the claim under which the applicant has chosen to invoke the court's competence.⁵

[17] Section 21(1)(a) of the Superior Courts Act 10 of 2013 states in general terms that high courts have jurisdiction over all persons residing or being in their respective areas of jurisdiction, thus confirming the common-law rules of jurisdiction. A domestic corporation or

² *Van der Merwe v Duraline (Pty) Ltd* [2013] ZAWCHC 213 (23/08/2013), *Wild & Marr (Pty) Ltd v Intratek Properties (Pty) Ltd* 2019 (5) SA 310 (GJ).

³ *Diary Board v John T Rennie and Company (Pty) Ltd* 1976 (3) SA 768 at 771; *Bisonboard Ltd. v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A).

⁴ *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424.

⁵ *Gcaba v Minister for Safety and Security* 2010 (1) BCLR 35 (CC), 2010 (1) SA 238 (CC) para 75.

legal person is resident both at the place where its registered office is located and where its principal place of business is. Domicile is described as: A place of residence or customary habitation; a dwelling-place; a home or the place of a person's permanent residence, which he or she leaves only temporarily.⁶

[18] In *TW Beckett & Co v H Kroomer Ltd* 1912 AD 324 Innes JA held as follows at 334: 'Now, the terms "reside" and "residence" can only be used in their true significance with regard to natural persons. The residence of a legal *persona*, like a company, artificially created, must be a mere notional conception introduced for purposes of jurisdiction and law . . . The only home which a corporation can be said to have is the place where the operations for which it was called into existence are carried on.' In *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) the majority judgment deals with the issue when a company can be said to 'reside' within the territory of a court. A company 'resides' at its principal place of business in South Africa and also at its registered office. This means that if the principal place of business and the registered office of the company are at different locations, the company 'resides' at both these addresses. The question whether a particular place is a company's principal place of business is a factual matter which, if disputed, would involve evidence as to where the company's general administration takes place.

[19] In *Wild & Mar (Pty) Ltd v Intratek Properties (Pty) Ltd* 2019 (5) SA 310 Sutherland J held that the dual jurisdiction regime provided for in s 12(1) of the 1973 Companies Act still stands. The court had to decide whether an application for the winding-up of the respondent company (Intratek) was correctly served at its principal place of business in Johannesburg. The respondent company argued that since its registered office was in the jurisdictional area of another court, the Mpumalanga division, Nelspruit, only that court had jurisdiction. Sutherland J held that service of a winding-up application may also take place at the principal place of business.

[20] For purposes of service of process, rule 4(1)(a)(v) of the Uniform Rules of Court provides that service upon a company may be effected by delivering a copy of the process to a responsible employee at the company's registered office or its principal place of business within the court's jurisdiction. This is irrelevant when it comes to the issue of

⁶ The New Shorter Oxford English Dictionary, Vol I (4 ed) at 725.

jurisdiction. No allegation is made in the founding affidavit pertaining to where the 'domicilium address' of the respondent is located for purposes of jurisdiction, whether it is the address situated in Gauteng or the address situated in the Free State Province. The issue of this court's jurisdiction is disputed. Therefore, the question whether the respondent is domiciled within the court's jurisdiction remains a factual matter which depend on evidence as to where the company's general administration takes place. In my view, the averment that the respondent is domiciled within the court's jurisdiction is insufficient to establish that this court has the requisite jurisdiction to adjudicate this application for the winding-up of the respondent. In the event that I am wrong in this conclusion, I also deal with the following legal points raised by the respondent.

Statutory demand in terms of s 345(1) of the 1973 Act.

[21] The applicants avers that the respondent is unable to pay its debts. It relies on section 345(1)(a)(i) in support thereof. The section provides as follows:

'345. When company deemed unable to pay its debts. –

- (1) A company or body corporate shall be deemed unable to pay its debts if –
 - (a) a creditor, by session or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) ...

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

- (b) ...
- (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.'

[22] A notice in terms of s 345(1)(a)(i) was sent per email to the attorneys acting on behalf of the respondent on 13 March 2023. In the said notice reference is made to the sale agreement and the respondent's breach thereof due to the failure to make payment of the deposit, the purchase price, the occupational rent and payment of the costs of water, electricity consumed, rates and taxes. A letter of demand dated 27 June 2022, in terms whereof the trust demanded payment in the amount of R6 239 273.30 within seven days, is appended to the demand in terms of s 345(1).

[23] In the email to the attorneys acting on behalf of the respondent it was stated that ' . . the aforesaid notice will also be served on the registered address which according to CIPC is 162 General Hertzog Road, Three Rivers, Vereeniging, Gauteng'. The return of service however indicates that the notice in terms of s 345(1) was served by affixing same to the main gate at the 'place of business', being 9 Swartberg Street, Vaalpark, Sasolburg. The applicants' submission is that although the demand was not delivered at the registered address of the respondent there has been substantial compliance with the provisions of s345(a)(i) of the 1973 Companies Act and reliance is placed on the judgment of Van Dijkhorst J in *Nathaniel & Efthymarkis Properties v Hartbeesspruit Landgoed CC* 1996 (2) B All SA 317 (T)

[24] On behalf of the respondent it is argued that the said notice omits to mention any specific amount. At best for the applicants, the initial letter of demand is appended to the s 345(1) notice and reference is made to an amount in the letter of demand. Without mentioning the amount due there cannot be contended by the applicants that the notice includes the required contents and the notice is therefore ineffective. The respondent furthermore submits that the letter is not a demand as contemplated in section 345(1)(a)(i) as the demand was not served upon the respondent's registered address and the provisions of s 345(1)(a)(i) of the 1973 Companies Act are peremptory and must be strictly complied with. As a result, the applicant failed to comply with the provisions contained in section 345(1)(a)(i) of the 1973 Companies Act for purposes of this application and the respondent cannot be deemed to be insolvent in terms of section 345(1) of the 1973 Companies Act.

[25] In *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W), the provisions of s 112(a) of the Companies Act 46 of 1926 were considered. A letter of demand was not delivered at the company's registered address but it had been received by the company. A further letter was sent per registered post to the correct registered address but was returned by the post office. Coetzee, J held as follows: 'The way in which this section is framed is significant. Only if the prerequisites enumerated in a conditional clause exist does the court have the power to order a winding-up of the company on this ground. Hence each of the conditions contained in this subsection must be strictly satisfied a priori. 'Service' on the company of a demand is required and the method of its service is exclusively described as 'by leaving the same at its registered office'.⁷ . . . However, the deeming provision is phrased in such a way that until it is shown that service in this specified manner has taken place, it

⁷ *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 917B-D.

does not operate at all.'

[26] In *BP & JP Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1977 (3) SA 753 (W), the court held that the respondent must have been served with the demand by leaving it at its registered office in order to rely on section 345 (1)(a)(i). The provisions of s345(1)(a)(i) must be strictly complied with, in particular the mode of service prescribed by the Legislature. The full court in the appeal upheld the decision of the court *a quo* but left open the question as to whether or not substantial compliance with the provisions of s 345(1)(a) would suffice.⁸ In *Nathaniel & Efthymakis Properties v Hartbeestspruit Landgoed CC* [1996] 2 ALL SA 317 (T), the court found that substantial compliance with section 69(1)(a) of the Close Corporation Act 69 of 1984, which is the corollary of section 345 of the 1973 Companies Act, would suffice, as long as the close corporation had in fact received the demand. It held that to hold otherwise 'would elevate form above substance'.

[27] P. Delpont in *Henocheberg on the Companies Act 71 of 2008*⁹ holds the view that:
'... the question is not whether a demand is ineffective if it is not delivered to the company's registered office, but that the intention of the Legislature is that, provided that it is shown that the relevant demand was delivered to its registered office, a company will be deemed to be unable to pay its debts as contemplated by s 345(1)(a)(i) without proof that the company has actually received such demand. On this basis a demand not left at the registered office is not a demand for the purposes of s 345(1)(a) even if the company in fact received it; conversely, a demand left at the registered office is a demand for such purposes even if it does not in fact come to the attention of the company (see *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 (3) SA 815 (O) at 824, referred to with approval in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) at 418B–C.'

[28] On appeal in *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481 (W), it was held that the conditions which must be satisfied before the deeming provision of s 345(1)(a)(i) of the 1973 Companies Act can operate in an application for the provisional winding-up order are: (a) there was to be a demand; (b) which was to be left, i.e. delivered; and (c) at the company's registered office. I am not convinced that the notice in terms of s 345(1)(a)(i) sent to the respondent's attorneys on 27 June 2022 or served at the address

⁸ *BP & JP Investments (Pty) Ltd v Hardroad Pty Ltd* 1978 (2) SA 481 (W) at 486E–487D.

⁹ *Henocheberg on the Companies Act 71 of 2008*. Issue 18. APPI-66.

at 9 Swartberg Street, Vaalpark, Sasolburg, which is not the registered office of the respondent, comply with the requirements of s 345(1)(a)(i) of the 1973 Companies Act. If the Legislature intended other forms of service, it would have been provided for. Therefore, the applicants cannot rely on the provisions of s 345(1)(a)(i) of the 1973 Companies Act.

Abuse of process.

[29] During 2022 an action was instituted by the applicants in the Regional Court at Vanderbijlpark, Gauteng Province, for confirmation of the cancellation of the immovable property sale agreement, insofar as it may be required, restoration of possession of the immovable property and payment of an amount of R4 200 000 in respect of occupational rent calculated from July 2021 to September 2022. The applicants furthermore claimed payment in the sum of R300 000 per month for each month that the first defendant, Mr Barend Daniel de Beer, remains in occupation of the immovable property. Further relief sought relates to the eviction of all persons occupying the property and, by the fourth applicant, the cancellation of the movable property sale agreement and return of certain of the assets.

[30] Payment of the amounts claimed in the action is disputed by the respondent. In the plea, the respondent contends that the agreements are void *ab initio* by virtue of the fact that the initial and the subsequent agreements were fraudulently concluded between the parties. Respondent instituted a conditional counterclaim relying on the voidness of the three agreements relied upon by the applicants in the founding affidavit and the initial agreements and claiming payment in the amount of R613 000 being in respect of necessary and useful improvements to the immovable property resulting in the enrichment of the trust which was at the expense or impoverishment of the respondent. The applicants filed a plea to the counterclaim as well as a replication. Several amendments to the initial pleadings have been effected. The adjudication of the magistrates' court matter has been kept in abeyance.

[31] On behalf of the respondent it is argued that the applicants, *mala fide*, failed to disclose the pending litigation instituted in the magistrate's court in the founding affidavit in an attempt to mislead the court and in an endeavour to convey to the court that the respondent owes the amounts as claimed by them without revealing that the claim has in fact been disputed. The respondent contends that winding-up application is not designed for the resolution of disputes as to the existence or non-existence of a debt. It is not, as argued

by the applicants, the quantum of indebtedness that is disputed by the respondent – it is the indebtedness to the applicants which has been placed in dispute.

[32] Subsequent to the respondent filing its answering affidavit to bring the existence of the pending proceedings in the magistrates' court to the attention of this court, the applicant, after a long delay, persists with the application for the winding-up of the respondent. It is argued that the statutory claim for liquidation cannot succeed if the alleged amount of indebtedness is the subject of a *bona fide* dispute on reasonable grounds.

[33] Mrs Pretorius, counsel on behalf of the applicants, argued that it is not disputed that the liquidation application and the proceedings in the magistrates' court relate to the same parties and that the amount claimed in the action is the same amount which remains unpaid in term of the statutory demand (the s 345(1) notice) in the matter at hand. With reference to case law, the applicants contend that the point of abuse of process raised by the respondent on the basis that the cause of action in the action proceedings and the application for liquidation, is the same and cannot succeed as the cause of action for the recovery of a liquidated debt is different from the set of facts in support of a winding-up order. The nature of relief sought in the action proceedings vastly differ from the relief claimed in the winding-up application. The applicants contend that the fact that there is pending litigation in the magistrates' court is not a defence for the relief claimed in the liquidation application and cannot be a bar for instituting winding-up proceedings. In the result the preliminary point of abuse of process ought to be dismissed.

[34] The respondent furthermore argues that at the time when the applicants filed their replying affidavit, the respondent had already filed its first amendment of the plea in the action. In the first amendment reliance is placed on a settlement agreement (*transactio*) which was entered into and between the applicants and the respondent. The applicants failed to deal with the amended defence, raised by the respondent in the amended plea, in their replying affidavit and, without any explanation continued to deal with the previous defence, which to their knowledge had already been substituted with a defence pertaining to a settlement agreement.

[35] This left the respondent with no alternative but to apply for leave to file a supplementary affidavit to deal with the subsequent amendments to the pleadings in the

action. The application for leave to file a supplementary affidavit by the respondent was opposed. Daniso J granted condonation for the filing of the supplementary affidavit whereafter the applicants sought a postponement of the matter. The applicants filed a supplementary affidavit dealing with settlement discussions between Mr van Dam (one of the trustees of the trust) and Mr de Beer. These personal discussions, according to the respondent, were conducted without prejudice for settlement purposes and forms the basis of the further legal point pertaining to the new evidence contained in the supplementary affidavit filed by the applicants.

[36] The applicants deny the existence of a settlement agreement (transactio) as pleaded in the plea and counterclaim in the action, however they rely upon the contents thereof in the argument that it is undeniable that the respondent owes a substantial amount to the applicants and is evidently unable to pay its debts as and when it becomes due. The argument on behalf of the applicants is that Annexure X, which was appended to the respondent's supplementary affidavit, does not constitute a settlement agreement. It is merely a payment schedule. It is argued that, even though the agreement as contained in Annexure X came into existence during 2023, it is opportunistic of the respondent to raise the existence thereof in the liquidation application as Annexure X does not raise a *bona fide* defence on reasonable grounds.

[37] In the counterclaim filed in the action the respondent tendered back the immovable property and claimed payment of the improvements to the property. It is clear that Mr van Dam and Mr De Beer did have discussions pertaining to the disputes. However, the question whether these discussions resulted in a settlement of the dispute or whether their discussions resulted in the conclusion of a payment schedule, remains to be adjudicated upon.

[38] Evidently numerous written agreements were concluded between the parties. In the plea filed by the respondent in the action it is alleged that an initial offer was made to the respondent for the sale of the immovable property together with the movable contents at an all-inclusive price of R20 million. The offer was accepted by the respondent which then culminated into two written agreements, one relating to the immovable property for R13 million and the other agreement, pertaining to the movable assets for R7 million. According to the respondent the contents of the property's value was far less than the inflated amount

of R7 million which inflated amount was overhauled by the applicants in order to avoid payment of 'transfer fees' and 'tax liabilities'. From the above-mentioned initial agreements followed the MOU and the further two agreements relied upon by the applicants in the founding affidavit.

[39] The contention on behalf of the respondent is therefore that the three agreements appended to the founding affidavit were concluded with an unlawful purpose and *in fraudem legis* and are void *ab initio*. The applicants contend that the mere fact that a contract is unsuccessfully designed to escape the provisions of the law does not itself render it unenforceable. It is unenforceable only if the true nature of the relationship is one that the law forbids. Furthermore, the transfer duty is payable by the purchaser of the immovable property, the respondent in the matter at hand. Transfer duty is calculated in accordance with the fair value- (as determined) or the consideration payable, or the declared value, whichever is the greater and the Commissioner of the South African Revenue Service will determine the amount payable by the respondent.

[40] The only party that stands to benefit is the respondent, therefore, so the argument goes, the respondent failed to *prima facie* establish that the agreements and/or transactions are *in fraudem legis*. According to the applicants the agreements were entered into for the genuine purpose to sell the immovable property as well as the movable assets. There exists no legal basis for the respondent to claim that the agreements are unlawful and void *ab initio*. Therefore, the defence that the debt is disputed on bona fide and reasonable grounds must fail.

[41] Whether a particular transaction was a simulated transaction is a question of its genuineness. If it were genuine the court would give effect to it and, if not the court would give effect to the underlying transaction that it concealed. Whether it was genuine will depend on a consideration of all the facts and circumstances surrounding the transaction.¹⁰ The adjudication of the disputes pertaining to the multiple agreements, the settlement agreement, if any, and whether the payment of the amount claimed by the applicants in the action is subject to a condition or not, are all matters to be adjudicated in the pending action. Witnesses will have to be called and the matter will be heard subsequent to the parties

¹⁰ *Roshcon v Anchor Auto Body Builders* 2014 (4) SA 319 paras 27, 32 and 37.

tendering evidence as to the issues in dispute. These issues cannot be unravelled by this court.

[42] Liquidation is intended to resolve the financial state of a company that cannot meet its obligations, not to resolve disputes about the existence or non-existence of debts¹¹. Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds. It is trite that when a debtor company owes money and is not insolvent, a creditor must utilise action proceedings and issue summons for payment of the debt.

[43] The applicants initially issued summons in the Magistrate's Court during 2022 in an attempt to resolve the dispute pertaining to the agreements of sale concluded between the parties. However, on 9 June 2023 the application for the winding-up of the respondent was issued and was only enrolled for hearing during November 2024. According to the applicants, the liquidation application was kept in abeyance for some time in the belief that the matter could be settled. It is common cause that the parties were involved in settlement discussions. To this extent the applicant places reliance on the settlement discussions in support of the contention that, on their own version, the respondent is indebted to the applicants and is clearly not in the financial position to pay its debt as and when necessary.

[44] In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd & Another* 2015 (4) SA 449 (WCC) Rogers J held as follows:

'[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a *prima facie* basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour (*Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 975J-979F). This would include the existence of the applicant's claim where such is disputed. (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

¹¹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348.

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 – 347C, 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 when 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. (*Payslips Investments 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 and Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218 D-219C).

[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. When 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 Solutions CC Amagen Development (Pty) Ltd* [2010 ZAWCHC 339 paras 8 – 10; *Badge and Others NNO v Midnight Storm Investments 265 (Pty) Ltd and Another* 2012 (2) SA 28 (GSJ) para 14.

[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 application, it 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.'

[45] Section 347 of the 1973 Companies Act sets out the court's powers under the said Act when seized of an application for the winding-up of a company. The salient feature is that the court has a discretion whether or not to grant a winding-up order even if the ground on which the application is brought is established and irrespective of the nature of such ground; but all the provisions of the section are partially regulatory of the manner of exercise

of the discretion of the court.

[46] Upon reading and considering the affidavits, annexures thereto, and submissions on behalf of the applicants and respondent and having considered the relevant case law, I am unable to find that the respondent are not genuine in disputing the claim by the applicants. It appears to me that the respondent clearly wishes to contest the claim having tendered the property back to the applicants. The respondent does not have to establish, even on the probabilities, that it will as a matter of fact succeed in the pending action. I am of the view that the respondent's defence is bona fide and reasonable.

[47] In *Walter McNaughten (Pty) Ltd v Impala Caravans (Pty) Ltd* 1976 (1) SA 189 (W) the court held that the applicant was aware of the basis on which the application for the winding-up of the respondent company would be opposed, the grounds thereof being disclosed in correspondence between the parties' legal representatives. The applicant should have foreseen that a dispute of fact in relation to whether or not it was a creditor would arise which would be irresolvable without *viva voce* evidence. The applicant was directed to pay the respondent's costs on an attorney and client scale.

[48] Notwithstanding the defences raised by the respondent in the action proceedings instituted by the applicants in the magistrates' court and with the applicants well and truly aware of the respondent's stance pertaining to the agreements, the applicants launched the present liquidation application without revealing the existence of the pending litigation. The applicants knew that its claim to be a creditor would be challenged. I therefore agree with the contention by the respondent that the application constitutes an abuse of process and stands to be dismissed on this basis alone. I therefore do not deem it necessary to deal with the further points raised by the respondent.

[49] The respondent seeks an order for the dismissal of the application on a punitive scale of costs including cost of two counsel on scale C. There is no reason why the respondent in the circumstances should be mulcted with costs. Having regard to the cost order made in the matter of *Walter McNaughten (Pty) Ltd v Impala Caravans (Pty) Ltd* 1976 (1) SA 189 (W), the respondent should be reimbursed for its legal costs on a punitive scale as between attorney and client including costs of two counsel, where so employed.

[50] In the result it is ordered that:

1. The application for the winding-up of the respondent is dismissed with costs on an attorney and client scale, which costs shall include costs of two counsel on scale C and scale B (respectively and where so employed).

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VAN RHYN, J

Appearances

For the Applicant:

Instructed by:

L A Pretorius

Kleingeld Attorneys

Bloemfontein

For the Respondent:

Instructed by:

T Strydom SC

L A Roux

Hendre Conradie Attorneys

Bloemfontein