

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2024 – 033125

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

1 August 2025

DATE

SIGNATURE

AKANI BUILDING SOLUTIONS (PTY) LIMITED

Applicant

and

LEBO TEBO TRADING AND PROJECTS CC

Respondent

[Registration number: 2008/237123/23]

[For its liquidation]

JUDGMENT

J Vorster, AJ.

- [1] The applicant seeks an order for the respondent's liquidation. It relies on the provisions of section 69 of the Close Corporations Act, 69 of 1984, read with Schedule 3 to the Companies Act, 71 of 2008, and section 344 of the Companies Act, 61 of 1973.

- [2] The relationship between the parties is contractual in nature. It is common cause that the respondent was appointed by the Department of Education in the Limpopo Province to render services at the Mosesane Baloyi Primary School, and that it appointed the applicant as its sub-contractor in terms of a written appointment letter dated 14 October 2022, for the provision of sanitation facilities. The contract value was R1,959,222.32 (incl. VAT), and works were expected to be completed by 31 January 2023.
- [3] According to the applicant, the works assigned to it were completed, but the respondent failed to pay an amount of R759,249.76.¹
- [4] When the application was argued, I raised a concern about the fact that the Certificate of Tendered Security was issued on 30 April 2025, a date more than 10 days before the application came before me. In this regard, section 346(3), in relevant part, provides:

“every application to the Court referred to in subsection (1), ... shall be accompanied by a certificate by the Master, issued not more than ten days before the date of the application, to the effect that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all winding-up proceedings and of all costs of administering the company in liquidation until a provisional liquidator has been appointed, or, if no provisional liquidator is appointed, of all fees and charges necessary for the discharge of the company from the winding-up.”

- [5] However, having considered the judgments in **De Wet NO v Mandelie (Edms) Bpk**,² and **Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk**,³ I conclude that: (i.) the date of the application is the date on which the application

¹ In the founding affidavit the claim was said to be R790,272.95. In reply, the applicant stated that it had made a mathematical mistake when adding the value of two outstanding invoice together, and reduced its claim to R759,249.76.

² 1983 (1) SA 544 (T) at 545 - 546

³ 1980 (2) SA 776 (NC) at 782.

is issued; and (ii.) it is not essential that the certificate be dated before the date of the application. In fact, it need not, at that date, actually exist. All that is required is that security must have been given before the matter is heard and that the security certificate must accompany the application when it is heard.⁴

[6] Turning to the merits of the application, the case advanced in the applicant's founding affidavit, where all the essential evidence to support its case must appear,⁵ is fairly straightforward. It alleges that subsequent to its common cause appointment as the respondent's sub-contractor, it completed the works and issued two invoices respectively dated 5 and 13 June 2023, which remain unpaid. It further claims that evidence of its completion of the sub-contracted works is to be found in: (i.) a certificate of practical completion issued by the Limpopo Provincial Department of Education on 3 May 2023; (ii.) a progress report dated 10 May 2023; and (iii.) email correspondence from the project manager, Mr Khuzwayo of TKQ Consulting, dated 2 November 2023, which *inter alia* refers to the fact that the works were completed.

[7] In its answering affidavit, the respondent admits its contractual relationship with the applicant, but denies that the applicant completed the works. The respondent explains that the applicant failed to complete the works, or abandoned the works. The result was that the respondent had to appoint other sub-contractors to complete the works. The answering affidavit specifically refers to the appointment of the following sub-contractors who, according to the respondent, had to complete work for which the applicant was responsible: (i.) Dusta General Services; (ii.) Rand Industrial and Mining Supplies; (iii.) Mapitsana Logistics and Projects; (iv.) BWT; and (v.) Dominion Safety.

[8] Further, the respondent concedes that the project achieved practical completion, but it says that it was as a result of work performed by other sub-

⁴ **Court v Standard Bank of SA Ltd; Court v Bester NO and Others** 1995 (3) SA 123 (A) at 131B - C.
⁵ **Director of Hospital Services v Mistry** 1979 (1) SA 626 (A) at 653H - 636B; **Botha v Smuts** 2025 (1) SA 345 (CC) at [58].

contractors, and not due to the applicant's efforts. It refers to a snag list of outstanding work that the applicant failed to complete, and to an email addressed to the funder of the project, the Development Bank of Southern Africa, dated 2 November 2023, in which it made mention of the applicant's failure.

[9] In reply, the applicant contends that the work undertaken by the sub-contractors referred to in paragraph [7] above had nothing to do with the work contractually assigned to it. It also refers to the so-called snag list and claims, with reference to colour photos, that the work on the snag list was completed.

[10] In respect of the scope of the work to be undertaken, in its replying affidavit the applicant impermissibly attempts to broaden the ambit of its claim. Whereas in the founding affidavit the applicant simply relied on the terms of the appointment letter, the replying affidavit suggests that the scope of work was extended "*through site instructions*". Paragraph 12 of the replying affidavit explains the position as follows:

"As it would appear clearer below, the applicant was given several site instructions to carry out while it was performing in terms of the contract on site. These instructions are indicated as such on page 7 of the progress report attached as annexure "A3" to the applicant's founding affidavit. I will attach further written confirmation of these instructions later in this affidavit. Resultantly, it is the carrying out of these site instructions that accounts for the total amount that the respondent is indebted to the applicant."

[11] First, this is not the case the respondent was called to meet when it filed its answering affidavit. The founding affidavit contains no express reference to site instructions or an increase to the value of the contract.

[12] Second, to the extent that the progress report, which is an annexure to the founding affidavit, refers to site instructions, the founding affidavit itself makes no mention of these site instructions. The stated purpose for which the progress

report was annexed to the founding affidavit was to confirm that the works had been completed. In this regard, the court in **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others**,⁶ made the following apposite remarks concerning annexures to an affidavit:

“Regard being had to the function of affidavits, it is not open to an applicant or a respondent to simply annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereon on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know which case must be met.”

[13] Similarly, in **Lipschitz and Schwartz NNO v Markowitz**,⁷ the court made the following comment concerning this issue:

“A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice which is designed and which still evolves as a means of accurately identifying issues and conflicts so that the Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed.”

[14] I align myself with the quoted findings, and conclude that the attempt to rely on the progress report to broaden the scope of the applicant’s claim is in my view impermissible.

⁶ 1992 (2) SA 279 (T) at 324F-H.
⁷ 1976 (3) SA 772 (W) at 117H – 776A.

- [15] When asked during argument whether the applicant could have dealt with the issues raised in its replying affidavit, in its founding affidavit (so as to afford the respondent an opportunity to engage with the issues), Mr Shongwe, who appeared for the applicant, submitted that the issues were unforeseen when the founding affidavit was prepared. Although this submission may be correct in respect of the appointment of other contractors (on which I express no firm view), it is not correct in respect of the site instructions as the applicant was clearly aware that its claim was, at least in part, based on additional work.
- [16] In argument the applicant urged me to “go deeper” and to critically evaluate the defences advanced by the respondent. It further suggested that the defences were unreasonable.
- [17] It is, however, not open for me to critically interrogate the respondent’s defence. The respondent simply had to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company.
- [18] I am in all the circumstances satisfied that the respondent succeeded in establishing that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds. In **Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd**,⁸ the Supreme Court of Appeal found:

‘This is an appeal, with the leave of the court a quo, against the dismissal of an application for the winding-up of the respondent, Marabeng (Pty) Ltd. in essence, the matter serves as a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds. This has become known as the “Badenhorst rule” after Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347-348. See also Kalil v Decotex (Pty) Ltd and another 1998 (1) SA 943 (A) at 980B-D, as well as the authorities referred to in Kalil at 980D-F. A collection of more recent authorities on the application of the

⁸ (1030/2015) [2016] ZASCA 168 (24 November 2016), para. 1.

Badenhorst rule is found in PM Meskin et al Henochsberg on the Companies Act 5 ed Vol 1 at 693—694.’

[19] I further respectfully agree with the below passage in **ABSA Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd**.⁹ There, Binns-Ward J, said the following:

“I am hesitant to accept the notion that the Badenhorst rule goes to standing. After all, as Corbett JA observed in Kalil v Decotex supra, at 980, it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent company in winding-up proceedings, while the respondent at the same time was able to establish that the claim was disputed on bona fide and reasonable grounds. The applicant in such a case would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The Badenhorst rule would thus seem to constitute a selfstanding (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is bona fide disputed. Availment of the procedure in circumstances in which the Badenhorst rule applies can be an abuse of process. It is so, however, only when the creditor knew, or should reasonably have foreseen that the debt was disputed on bona fide and reasonable grounds at the time of the institution of the proceedings.”

[20] In **Hülse - Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)**,¹⁰ Thring, J. said the following with regard to what a respondent must show to demonstrate in winding-up proceedings that a creditor-applicant’s claim is reasonably disputed:

“Apart from the fact that they dispute the applicant’s claims, and do so bona fide, ... what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of

⁹ [2012] ZAWCHC 43 (15 May 2012) para. 25.
¹⁰ 1998 (2) SA 208 (C) at 219F-220A.

fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not ... have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their claims and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such trial. This is not an application for summary judgment in which ... a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefor"... It seems to me to be sufficient for the [respondents] in the present application, as long as they do so bona fide, ... to allege facts which, if proved at a trial would constitute a good defence to the claims made against the company."

[21] A lack of *bona fides* is not readily inferred (see: **Robsen v Wax Works (Pty) Ltd and Others**¹¹), and there is nothing on the papers which leads me to conclude that the respondent does not genuinely dispute the applicant's claim. It raised the disputes it is now relying on in November 2023, long before the liquidation application was issued. The respondent has satisfied me that the grounds which they advance for disputing the applicant's claim are not unreasonable. It has alleged facts which, if proved at a trial, would constitute a good defence to the claim made against it. My conclusion that the respondent has succeeded in establishing that its indebtedness to the association is disputed on *bona fide* and reasonable grounds, renders it unnecessary to decide the question whether the respondent is able to pay its debts.

[22] What remains to consider is the question of liability for costs. The usual order is that the successful party is awarded its costs. I find no reason to deviate from the usual order.

[23] The respondent employed two counsel and during argument it was submitted

¹¹ 2001 (3) SA 1117 (C) at para. 15.

that the costs of two counsel were reasonably incurred. I agree. The respondent faced an order for its liquidation. Such an order has far-reaching commercial consequences and under the prevailing circumstances the employment of two counsel cannot be said to have been overcautious or luxurious. It was a wise and reasonable precaution on the part of the respondent.¹²

[24] As a result, the following order is made:

[24.1] The liquidation application is dismissed.

[24.2] The applicant is ordered to pay the costs occasioned by the application on scale C, such costs to include those occasioned by the employment of two counsel (where so employed).


J VORSTER, AJ

Acting Judge of the High Court

Date heard: 28 July 2025.

Judgment date: 1 August 2025.

Appearances:

For the applicant:

Counsel: C Shongwe

Instructed by: Mashiane, Moodley & Monama Attorneys (Sandton)

For the respondent:

Counsel: E Mokutu SC

(heads of argument by E Mokutu SC and M Motlogelwa)

Instructed by: Kotzé Low Swanepoel Attorneys (Vryburg)

¹² **Pride Milling Co (Pty) Ltd v Bekker NO and Another** 2022 (2) SA 410 (SCA) at 424 [40].