



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

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

CASE NO: 2024/149480

1 September 2025
DATE

SIGNATURE

In the matter between:

DIESEL SUPPLY LOGISTICS (PTY) LTD

Appellant

and

INTRAX INVESTMENTS 28 (PTY) LTD

Respondent

Heard: 13 August 2025

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 29 August 2025.

ORDER

1. The appeal is dismissed.

2. The appellants are to pay the respondent's costs on scale B
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JUDGMENT

Coram: Senyatsi J, Mahomed J, Snyckers AJ

- [1] This is an appeal against the decision by the court *aquo* wherein it dismissed the application for provisional winding up of the respondent. The grounds of appeal are listed in the notice of appeal which have been filed of record.
- [2] The court *aquo* dismissed the respondent's provisional application because the debt of R102 000 was disputed on bona fide and reasonable grounds. It is therefore the dismissal of the application which is now the subject of appeal.
- [3] On appeal the appellant's counsel submitted that the court *aquo* erred in dismissing its application for a provisional order to wind up the respondent. It is further argued that the court failed to properly consider fundamental principles relevant to liquidation applications.
- [4] Counsel for the respondent argued during the hearing of the appeal that the appellant had failed to show a *prima facie* case for the existence of a debt on a balance of probabilities and asserted that without a debt, there was no *locus standi*.
- [5] The central issue before us is whether the lower court correctly applied the *Badenhorst*¹ test regarding the existence of the debt and thus the appellant's standing. If we find that the court *aquo* applied the *Badenhorst* test correctly, then the appeal must fail. Conversely

¹ *Badenhorst v Northern Construction (Pty) Ltd* 1956(2) SA 346(T) at 347H-348C

if we find that the Badenhorst test was not applied correctly, then the appeal must succeed and the judgment of the court a quo must be set aside. In this assessment on appeal, there is no deference owing to the court a quo, as no exercise of any "discretion" is at issue.

- [6] To be able to make the determination, it is crucial that the basic principles relating to the test on whether the company is either factually or commercially insolvent be restated.
- [7] The legal principles concerning the consideration of commercial insolvency are well established. Schedule 5 of the Companies Act, 41 of 2008, addresses transitional arrangements. The relevant subitems of item 9 in schedule 5 state that:

"(1) Despite the repeal of the previous Act [i.e. the old Act], until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).

(2) Despite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.' (Emphasis added.) No date has been determined to affect the interim or transitional operation of item 9 of schedule 5. Chapter 14 of the old Act therefore continues to apply. Section 345 of the old Act falls within chapter 14 of the old Act and, accordingly, in terms of subitem 9(1) of schedule 5 in new Act. Section 345 continues to apply with respect to the winding-up and liquidation of companies as if the old Act had not been repealed. Subitem 9(1) is nevertheless subject to subitems 9(2) and (3). Subitem 9(2) excludes, however, s 344 of the old Act from the winding-up of solvent companies. As will appear later, the

inclusion of s 345 of the old Act, when it comes to the winding-up of solvent companies under subitem 9(1) but the exclusion of s 344 under subitem 9(2) is significant when it comes to determining what is meant by a 'solvent' company."

- [8] Section 344(f) of the former Act states that a company may be wound up by the court if "the company is unable to pay its debts as described in section 345". The relevant parts of section 345 of the old Act are set out below and read thus:

"(1) A company... shall be deemed to be unable to pay its debts if-

(a) A creditor, by cession or otherwise, to whom the company is indebted in a sum of money of 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; ...and the company... 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.'

The onus is on Applicant, as creditor, to prove that Respondent is unable to pay its debts.

- [9] Part G, chapter 2 of the new Act excludes ss 343, 344, 346, and 348 to 353 of the old Act from winding-up applications for 'solvent' companies, and includes ss 79 to 83. Section 79 states:

"Part G: Winding-up of solvent companies and deregistering companies"

Winding-up of solvent companies

(1) A solvent company may be dissolved by -

(a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either -

(i) by the company; or

(ii) by the company's creditors,

as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.

(3) If, at any time after a company has adopted a resolution contemplated in section 80, or after an application has been made to a court as contemplated in section 81, it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 5."

[10] For decades our law has recognized two forms of insolvency; firstly, factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency, a position in which a company is in such

a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities.²

[11] Section 80 of the new Act³ covers voluntary winding-up of solvent companies, while section 81 allows court-ordered winding-up of a solvent company. Under s 81(1)(ii), a court may liquidate a company if a creditor requests it on the grounds that it is just and equitable to do so.⁴ Although there has not been any controversy in this case on which Act applies, I thought it prudent to restate the legal principles on winding up of both solvent and insolvent companies.

[12] In the instant case, the liquidation application was based on an alleged inability to pay a debt said to be owing to the appellant, who had made the requisite demand, the non-satisfaction of which would deem the respondent to be unable to pay its debts and accordingly to be commercially insolvent. The dispute centred around the existence of the debt in question, and therefore the appellant's status as creditor with locus standi to bring the winding up. Regarding instances where the relevant debt is disputed, the following comments in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another*⁵ are instructive, where Rogers J said the following:

" 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

² See *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* ZASCA 173 (28 November 2013), para 16. See, for example, *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA (SCA) para 6; *Ex parte De Villiers & another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493 (A) at 502C-D; *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 596F-597H.

³ Companies act 71 of 2008

⁴ See *Boschpoort Ondernemings* (above) para 12

⁵ 2015 (4) SA 449 (WCC).

(A) at 975J –979F). This would include the existence of the applicant's claim where such is disputed.

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 to 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 debt itself."

- [13] Mr *Van Schalkwyk* argued for the appellant, that the court a quo did not consider the respondent's lack of primary facts in response to the appellant's claims. He maintained that the respondent was required to provide a genuine challenge by submitting evidence, such as proof of payment, to refute the appellant's case regarding a running account. The respondent provided only a single-month statement, which did not include all the cash-on-delivery transactions between the parties. On this basis, he contended that the respondent did not present a substantive dispute of the debt on reasonable grounds and therefore did not meet the requirements of the *Badenhorst* test.

- [14] I disagree with this proposition for several reasons. First, credibility issues in the application of the *Badenhorst* test should be addressed in action proceedings where oral evidence is available, not motion proceedings. An action is in fact pending on this very debt. Second, liquidation processes should not serve as debt collection tools. Third, the disputed R102,000 debt relates to a "COD" (cash on delivery) new arrangement. Fourth, there are conflicting statements regarding account balances. Fifth, the appellant's affidavit references both a normal account and a COD account. Sixth, it is unclear how a balance exceeding R500,000 debt could accrue on a COD account.
- [16] The basic version offered in reply was that the nil balance statements relied on by the respondent in answer related to an old debt, whereas the outstanding debt sued on was a new debt. In this regard, the reply told one that the old debt designated the debtor as Intrax Investments (Pty) Ltd, whereas as the new debt designated the debtor as "COD". There were two serious problems with this: first, one of the zero balance statements relied on in answer designated the debtor as "COD". Second, the replying affidavit itself at one point (in paragraph 26) confusingly stated that the statements attached to the answer related to the "new" debt. In argument Mr *van Schalkwyk* for the appellant submitted that this had to be seen as an error. The notion that the COD statement attached to the answer was for one month only was offered in argument before us, not in the replying affidavit, and neither in reply nor in argument could any explanation be offered for the opening balance that appeared on the nil balance COD statement attached in answer. The reason the court a quo considered the *Badenhorst* test to be

satisfied was that, despite the version about old debts and new debts, the court was confronted with two conflicting statements on the supposedly "new" debt, namely the COD account, one of which showed an outstanding balance, and one of which showed zero balance. This was sufficient for a bona fide dispute on reasonable grounds. In this, the court a quo was correct. Therefore, I agree with the dismissal of the application and find that the court a quo correctly applied the Badenhorst test.

Order

[17] In the result the following order is made:

[17.1] The appeal is dismissed.

[17.2] The appellants are to pay the respondent's costs on scale B.



**Mahomed J
JUDGE**

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

I AGREE



**Senyatsi J
JUDGE**

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

JUDGE
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

AGREE



Snyckers AJ
ACTING JUDGE
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Appearances:

For Appellant: Advocate R van Schalkwyk

For Respondent: Advocate Mhambi

Date of hearing: 13 August 2025

Date of Judgment: 1 September 2005