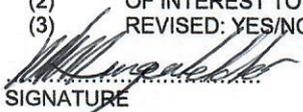




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.:72926/2019

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

In the matter between:-

NATURE'S CHOICE (PTY) LTD

Applicant

and

**FRESH EARTH GLUTEN FREE
BAKE HOUSE (PTY) LTD
Registration number 2012/122804/07**

Respondent

JUDGMENT

M M LINGENFELDER A J

INTRODUCTION

1. This is an application where the applicant seeks the liquidation of the respondent on the basis that it is unable to pay its debts in terms of the provisions of Sec 344(f) read with the provisions of Sec 345(1)(a)(ii) and Sec 345(1)(c) of the Companies Act 1973, read with items 9 of schedule 6 of the Companies Act 2008.

BACKGROUND

2. The applicant and the respondent entered into a written indicative “non-binding offer” during October 2018 for the acquisition of the respondent’s shareholding and related shareholder’s loan claims. There were various conditions precedent to the agreement; and it is common cause that this agreement did not materialize.
3. During February 2019 the parties entered into a further oral agreement (the so-called “temporary agreement”) in terms whereof the respondent would purchase raw material from suppliers on the applicant’s account, due to the fact that the respondent at the time was experiencing financial difficulties and was not in a position to order and pay for raw materials. In terms of this agreement, the applicant would make payment to the suppliers, the raw materials would be delivered to the respondent and the applicant would then invoice the respondent for the raw material purchased on its account. The respondent would use the raw material to manufacture products, mainly for Futurelife, who was a customer of the respondent.
4. The applicant contends that payment for the raw material had to be made by the respondent within 30 days from date of invoice by the applicant to

the respondent. It was printed on the invoices that payment had to be made within 30 days. The respondent denies that it was a term of the agreement that payment had to be made within 30 days, but instead states in the answering affidavit that payment would be dependent upon the respondent's cash flow. The intention was to make payment to the applicant once it received sufficient funds from Futurelife.

5. The amount outstanding for raw materials purchased on the applicant's account as at 26 August 2019 was R655 935.67. The respondent does not dispute the amount outstanding, but disputes that the amount is due and payable.
6. The respondent's contention that payment of the amount is not due, is not borne out by the correspondence annexed to the founding affidavit of the application. Various e-mails were exchanged about the outstanding amount and the payment thereof. The respondent states in the correspondence that it will make payment towards the account to reduce the amount, as much as it can afford. Perhaps the most telling of the respondent's attitude is the e-mail of 30 April 2019 wherein it is stated that the respondent is committed to make re-payment of the loan, but that the only request is to be allowed some time to pay it back. In a further e-mail in May 2019 a re-payment proposal was made by the respondent to the applicant, stating again that payment of the outstanding amount is a priority, but that the respondent was experiencing cash-flow problems. The proposal was not acceptable to the applicant.
7. The respondent's defence throughout is not that it is not indebted to the applicant, but that the respondent would be given reasonable terms and a

reasonable period for repayment. According to the respondent, reasonable terms would be what the respondent could afford. No submission is made by the respondent as to what would be a reasonable period.

8. The respondent makes a bald submission that it is not commercially insolvent at present, without any facts to substantiate this statement, yet it also states that should it be liquidated, concurrent creditors will receive a nominal dividend. This is clearly an admission that it is not in a position to pay its creditors – as the respondent states in its answering affidavit it is “managing” the claims of its creditors.

THE LEGAL POSITION

9. The respondent alleges that there is a factual dispute between the parties, namely whether the debt is due, and that the so-called *Badenhorst*-rule¹ is applicable. According to the *Badenhorst*-rule, liquidation procedure is not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds. On this basis the respondent argues that the application should be dismissed.
10. The guidelines as to how factual disputes regarding the respondent's indebtedness in an application such as the present should be approached were laid out in *Kalil v Decotex (Pty) Ltd & another*², and these guidelines were re-iterated by Brand J in *Payslip Investment Holdings CC v Y2K Tec Limited*³ at 783 H – I:

¹ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T)

² *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A)

³ *Payslip Investment Holding CC v Y2K Tec Limited* 2001 (4) SA 781 (C)

“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 the respondent on reasonable and bona fide grounds.”

11. A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed that fact that is said to be disputed.⁴
12. Even if the respondent’s contention is accepted that payment was not due within 30 days from date of invoice, I cannot find that the respondent’s dispute is reasonable or bona fide on its own version that the debt would be payable in a reasonable time. The contention that the debt is not due, was never raised by the respondent before the answering affidavit. In fact, all the correspondence confirm that the respondent was aware that payment had to be made, was committed to payment, but could not make payment due to cash flow difficulties. A proposal was even made by the respondent as to the re-payment of the debt. All of this goes directly against the version that payment is not due.
13. The first correspondence regarding the outstanding debt was in April 2019 and on the respondent’s version, it must be accepted that the applicant at the very latest demanded payment at that stage. The respondent’s counsel also did not attempt to submit that even on the respondent’s version that it would be granted a reasonable time for payment, that the period between April 2019 and the hearing of the application in August 2020, is not reasonable.

⁴ J C Wightman t/a J W Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA) at 13

14. The proper approach in deciding the question whether a company should be wound up on the basis that the respondent is unable to pay its debt, is stated in *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*⁵ as follows:
- "...if it is established that a company is unable to pay its debts, in the sense of being unable to meet current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency".*
15. The applicant has under the circumstances established its claim that it is a creditor of the respondent and that the respondent is unable to make payment thereof, and is entitled, *ex debito justitiae*, to a winding-up order.

ORDER

I accordingly make the following order:

1. The respondent is placed under final liquidation;
2. The costs of this application are to be costs in the liquidation.



M M LINGENFELDER

ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

For the Applicant: Adv. C T Vetter

Instructed by: Cliffe Dekker Hofmeyr Inc

⁵ *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597

For the Respondent: Adv R Goslett
Instructed by: Dewey Hertzberg Levey Inc

Date of hearing: 3 August 2020

Date of judgment: 4 August 2020