IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 10250/2017P

In the matter between:

CRUZN MOTORS (PTY) LTD
(REGISTRATION NUMBER 2015/359259/07) **APPLICANT**

and

THE HUSSEN FAMILY PARTNERSHIP **FIRST RESPONDENT**

NARGIS HUSSEN
(ID NO. […]) (WIDOW) **SECOND RESPONDENT**

MAHOMED IMETIAZE HUSSEN
(ID NO. […]) (UNMARRIED) **THIRD RESPONDENT**

MAHOMED IMERANE HUSSEN
(ID NO. […]) (UNMARRIED) **FOURTH RESPONDENT**

MAHOMED OSMAN HUSSEN
(ID NO. […]) (UNMARRIED) **FIFTH RESPONDENT**

MAAHOMED NOOR HUSSEN
(ID NO. […]) (UNMARRIED) **SIXTH RESPONDENT**

J U D G M E N T

STEYN J

[1] On 8 February 2018 the applicant sought the provisional sequestration of the six respondents. The applicant alleged that the first respondent, The Hussen Family Partnership, is an existing partnership, which is indebted to the applicant in an amount of R14 528 627 and that the respondents should be sequestrated since they are unable to pay the said debt.

[2] The application is opposed by all of the respondents inter alia on the grounds that there is no partnership in existence and none of them are indebted to the applicant as alleged. In addition it has been submitted that the application is procedurally fatally flawed. It has been alleged that the applicant has failed to establish compliance with s 12 of the Insolvency Act 24 of 1936 (the Act),[1] more importantly that there are material factual disputes on the papers. The respondents submitted further that the application is an abuse of process since the present application has been launched for purposes of enforcing the payment of a debt which is bona fide disputed.[2] Mr *Harpur SC*, acting for the second, third, fifth and sixth respondents, has submitted that absent a declaratory order that a partnership existed, especially in light of the material disputes of fact, no relief can be granted against a non-existent entity.[3] Ms *Lennard*, on behalf of the fourth respondent, contended that there are irreconcilable disputes of fact on the papers that are incapable of resolution without a referral to oral evidence.

Parties

[3] The applicant is a company in the motor trade that sells luxury, exclusive and exotic vehicles (new and used). The applicant identifies the respondents in the founding affidavit as follows:

'7.

The first respondent is **THE HUSSEN FAMILY PARTNERSHIP**, which:

7.1 is a partnership, the partners whereof are the individual members of the Hussen Family being the second respondent, the third respondent, the fourth respondent, the

[1] Section 12 of the Act reads:

'(*a*) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section *nine*; and

(*b*) the debtor has committed an act of insolvency or is insolvent; and

(*c*) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor.'

[2] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347 to 348.

[3] See page 226 paras 30 to 33, and 232 paras 56 to 58.

fifth respondent and the sixth respondent, whose full and further particulars are set out hereunder:

7.2 carries on various business activities including that of Dimo's Enterprises from premises situate at the Hussen Family residence at […] R. Road, La Lucia, Durban and from offices situate at office number F22, International Plaza, B Xuma (Commercial Road), Durban;

7.3 has been established and operates by virtue of the joint employment of the resources and labour of the aforementioned individual members of the Hussen Family and the joint sharing of benefits by them generated from the businesses of the Hussen Family.

8.

The second respondent is **NARGIS HUSSEN**:

8.1 who is a major businesswoman;
8.2 who is a widow;
8.3 who resides at […] R. Road, La Lucia, Durban, KwaZulu-Natal;
8.4 with identity number […];
8.5 who is the mother of the third, the fourth, the fifth and the sixth respondents;
8.6 who is a partner in the first respondent.

9.

The third respondent is **MAHOMED IMETIAZE HUSSEN**:

9.1 who is a major businessman;
9.2 with the identity number […];
9.3 who resides at […] R. Road, La Lucia, Durban, KwaZulu-Natal;
9.4 who is unmarried;
9.5 who is also known as **"MOME"**;
9.6 who is a partner in the first respondent.

10.

The fourth respondent is **MAHOMED IMERANE HUSSEN**:

10.1 who is a major businessman;
10.2 with identity number […];
10.3 who resides at […] R. Road, La Lucia, Durban, KwaZulu-Natal;
10.4 who is unmarried;
10.5 who is also known as **"DIMO"**;
10.6 who is a partner in the first respondent.

11.

The fifth respondent is **MAHOMED OSMAN HUSSEN**:

11.1 who is a major businessman;
11.2 with identity number […];
11.3 who resides at […] R. Road, La Lucia, Durban, KwaZulu-Natal;
11.4 who is unmarried;
11.5 who is also known as **"NANA"**;
11.6 who is a partner in the first respondent.

12.

The sixth respondent is **MAHOMED NOOR HUSSEN:**

12.1 who is a major businessman;
12.2 with identity number […];
12.3 who resides at […] R. Road, La Lucia, Durban, KwaZulu-Natal;
12.4 who is unmarried;
12.5 who is also known as **"NOORIE"**;
12.6 who is a partner in the first respondent.'[4]

[4] Issues to be decided in this matter:

[4] See founding affidavit paras 7 to 12.

(a) Whether the applicant has proved the existence of any partnership between the respondents.

(b) Whether the applicant has proved the alleged acts of insolvency and the alleged indebtedness.

(c) Whether the applicant has discharged its *onus.*

[5] The founding affidavit filed by the applicant fails to state the nature of the alleged partnership. There is no description of the legal nexus between the alleged indebtedness and each one of the individual respondents. The general rule to make out ones case in the founding affidavit was deviated from by the applicant in filing a replying affidavit that introduced further grounds for the respondents' sequestration.

Legal Principles

[6] Corbett JA in *Kalil v Decotex (Pty) Ltd & another*[5] dealt with the quantum of proof in a provisional sequestration application:

'The use of the words *"prima facie* case" in this context is somewhat anomalous as this term is normally used to denote the *quantum* of proof required of a party upon whom the *onus* rests, *in the absence of rebutting evidence*, in certain situations, eg where at the end of the plaintiff's case the defendant applies for absolution from the instance; or where the defendant closes his case without calling rebutting evidence; or in a criminal case where the defence asks for the discharge of the accused at the conclusion of the State case; or where an accused has not given evidence and the question arises as to whether there was sufficient evidence led by the State to call for an answer from him; or where in proceedings instituted on notice of motion the respondent takes the preliminary objection that the application does not make out a *prima facie* case for the relief claimed. The determination of the question as to whether the evidence adduced by the party bearing the *onus* constitutes a *prima facie* case is thus undertaken purely on a consideration of that evidence and without regard to any evidence which may be, or may have been, adduced in rebuttal.'[6]

[7] It is necessary for purposes of this judgment to consider the essentialia of a partnership and to measure the conduct of the respondents against the said requirements in order to determine whether any partnership has been established.[7] In *Butters v Mncora*[8] Brand JA emphasises the elements of a partnership as follows:

---

[5] *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A).

[6] At 976E-H.

[7] See 19 LAWSA paras 189 to 203. Also see E Bonthuys 'Proving express and tacit universal partnership agreements in unmarried intimate relationships' (2017) *SALJ* 263 at 266:
'Pothier's three requirements represent the essentialia for a valid partnership contract. If they are not present, there is no partnership agreement, but the parties could have a valid contract of a different kind – including a totally unique sharing agreement which does not fit into any standard contractual mode. The overall existence of the contract as well as its particular terms are determined by the

'The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make a profit. A fourth element proposed by Pothier, namely, that the partnership contract should be legitimate, has been discounted by our courts for being common to all contracts (see eg *Bester v Van Niekerk* supra at 784A).[9]

[8] In *Badenhorst v Northern Construction Enterprises (Pty) Ltd*[10] the court held:

'A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court.'[11]

[9] In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV & another v Honig*[12] the SCA reaffirmed the *Badenhorst* rule as follows:

'This is a convenient stage to raise the issue of the respondent's alleged indebtedness to the appellants. Sequestration proceedings are designed to bring about a *concursus creditorum* to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant (as in this case), the court should as a general rule dismiss the application. This is the so-called '*Badenhorst* rule'. Named after the decision in *Badenhorst v Northern Construction Enterprises Ltd*, this principle was reaffirmed by this court in *Kalil v Decotex (Pty) Ltd and Another* and applies equally in both winding-up and sequestration proceedings. It is a rule of long standing and good sense and is not likely to be departed from in circumstances such as the present. On this basis alone, the appellants may well face grave difficulty in obtaining a sequestration order against the respondent, as their counsel correctly conceded.'[13] (My emphasis.) (Footnotes omitted.)

[10] The test in a provisional winding-up of the respondents has been settled for a number of years, i.e. the applicant has to establish a *prima facie* case on affidavit.[14] The Insolvency Act treats a partnership as being a separate estate for most purposes.[15]

---

usual contractual requirements relating to legality, consensus, possibility, formalities and so forth. Animus contrahendi, or the intention to conclude a legally binding contract, is one of these general requirements.' (My emphasis.)

[8] *Butters v Mncora* 2012 (4) SA 1 (SCA).
[9] At 5E-G.
[10] 1956 (2) SA 346 (T).
[11] At 348. Also see *Business Partners Ltd v Word Focus 754 CC* 2015 (5) SA 525 (KZN) at …….
[12] *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV & another v Honig* 2012 (1) SA 247 (SCA).
[13] At 251I-252B.
[14] *Kalil v Decotex* supra at 978J-979B.
[15] Mars The Law of Insolvency in South Africa 9 ed (2008) at 594.

[11] The general rule of practice in applications has always been to request a referral to oral evidence prior to argument on the merits.[16] This rule has been broadened by the court in *Administrator, Transvaal & others v Theletsane & others*.[17] Rule 6(5)(*g*) of the Uniform Rules of Court provides for oral evidence to be heard on specified issues but it was not intended to be used for deciding issues that give rise to various factual inquiries.[18] In his heads of argument and oral submissions, Mr *Moola SC*, counsel for the applicant submitted that the applicant succeeded in its onus but 'if the court is unable to determine the application on the papers then the application should be referred for hearing of oral evidence or trial'. Reliance was placed by counsel on *Kalil v Decotex* supra at 979. I have always understood that a discretion exists to refer to oral evidence but that such an exception would be where the probabilities are evenly balanced and oral evidence may tip the scales.

[12] The applicant argued that the following facts support the contention that a partnership exists between the second to sixth respondents. These are:

(a) the respondents share a common home;
(b) they share common offices;
(c) all of them contribute to the business of Dimo's which is a partnership business;
(d) monies received by Dimo's and monies paid on behalf of Dimo's pass through the bank accounts of the various partners; and
(e) the arrangement represents a typical joint family type arrangement where the family members pool their reserves and energies for their mutual benefit.

[13] Applicant alleges that the indebtedness arose out of the sale of motor vehicles to the first respondent and avers that it concluded sale contracts with the first respondent and that the fourth respondent represented the first respondent in these transactions. Applicant substantiated its case with the fact that a meeting was held with some of the creditors of the first respondent who were owed money. The waters were muddied since the applicant also alleged that the indebtedness of the

---

[16] See *Kalil v Decotex* supra at 981D-E.
[17] *Administrator, Transvaal & others v Theletsane &* others 1991 (2) SA 192 (A) at 200 A-D. Also see discussion in Herbstein and Van Winsen 'The Civil Practice of the High Courts of South Africa Vol 1 5th ed (2009) at 461.
[18] *Ibid* at 461.

first respondent was not incurred in the normal course of trading but was part of a fraudulent scheme. This is what is stated:

'I arrived at this conclusion when I investigated certain "deals" which the First Respondent was involved in with the Applicant and HMI Investments (Pty) Ltd. The *modus operandi* employed by the first respondent involved *inter alia*, the first respondent purchasing vehicles on credit from the applicant (usually by providing post-dated cheques) and then re-selling the vehicles for cash at a lower price than that at which the vehicles were purchased for. On most occasions the post-dated cheques were not honoured. The first respondent thereby gained the cash received for vehciles purchased without having to pay therefore. Of the twenty-six (26) vehicles sold by the applicant to the first respondent, twelve were on-sold to HMI Investments (Pty) Ltd at one million seven hundred and forty five thousand (R1 745 000.00) rands lower than which the first respondent purchased the vehicles for.'[19]

[14] According to the applicant he was invited to a meeting at which the third and fourth respondents were present and he was offered a settlement which he rejected. It is contended by the applicant that the ongoing negotiations between the first respondent and various creditors constitute an act of insolvency within the meaning of s 8 of the Act.[20]

---

[19] See page 23 para 25.

[20] Section 8 reads:
'A debtor commits an act of insolvency –

(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;
(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;
(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;
(d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;
(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;
(f) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section *six* or *seven,* he fails to comply with the requirements of subsection (3) of section *four* or lodges, in terms of that subsection, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;
(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;
(h) if, being a trader, he gives notice in the *Gazette* in terms of subsection (1) of section *thirty-four*, and is thereafter unable to pay all his debts.'

[15] It is necessary to analyse the documentation used by the applicant as proof of the indebtedness. Reliance was placed on cheques that were filed as FA4(i) to FA4(viii), these are cheques furnished to the applicant allegedly on behalf of the first respondent in respect of certain purchases. The following appears *ex facie* these annexures:

FA4(i) is a cheque of Dimo's Enterprises, issued to Cruzn Motors;
FA4(ii) is a cheque of Dimo's Enterprises, issued to Cruzn Motors;
FA4(iii) is a cheque of Dimo's Enterprises, issued to Cruzn Motors;
FA4(iv) is a cheque of Dimo's Enterprises; issued to Cruzn Motors;
FA4(v) is a cheque of Pambili Investments CC, issued to TM Govender;
FA4(vi) is a cheque of PV Naidoo, which is a cash cheque;
FA4(vii) is a cheque of Pambili Investments CC issued to Lonestar Trading;
FA4(viii) is a cheque of Dimo's Enterprises, issued to AA Haffejee.
(My emphasis.)

[16] Not a single cheque refers to the first respondent, i.e. The Hussen Family Partnership. In fact cheque FA4(v) was in favour of Mr Thamothran Govender from King Williams Town and the drawer was a close corporation. The applicant however described the aforesaid cheques as follows in his founding affidavit:

'18.5 I digress to mention that on numerous occasions cheques were furnished to the applicant on behalf of the first respondent in respect of certain purchases but not all the cheques were honoured. The cheques were returned by the bank marked either "payment stopped'', "account closed" or "return to drawer". I attach marked 'FA4(i) to FA4(vii) copies of the unpaid cheques which total two million, five hundred and fifty four thousand rands (R2 554 000.00).'
(My emphasis.)

What is evident from the aforementioned negotiable instruments is that there were financial transactions between the applicant and/or Dimo's Enterprises and/or Pambili Investments CC and/or PV Naidoo. These cheques were not all issued to the applicant's business and they do not support the contention that it was issued on behalf of the first respondent nor do they support the facts as stated in para 18.5.

[17] The respondents disputed their indebtedness to the applicant on grounds that they claim are bona fide and reasonable. It was argued that the applicant's belated request to refer the application to oral evidence is nothing else than an attempt to involve the court in a process of forensic investigation of the validity of the claims which would take a very long time and many judicial hours to resolve. Further to that, this forum, i.e. the application, is not the right forum to determine the indebtedness if it is found that it is disputed on bona fide grounds. In my view I am tasked to decide on the affidavits filed by the respondents whether the grounds are bona fide and whether they have a reasonable defence.

[18] The fourth respondent has deposed to an opposing affidavit wherein he denies the existence of the entity called the Hussen Family Partnership. He also denies that he was in a partnership with any of the respondents. He admits that there were business dealings between him and the applicant but denies being indebted to the applicant as claimed. The applicant in response to the opposition filed a replying affidavit on 6 December 2017. It is in this reply that he introduced new facts and the affidavits of Abdool Carrim Sikander Hassim and Muhammed Kajee. It is also in reply that the applicant denied that there are any material disputes of fact. I consider it necessary to quote from this affidavit since Mr *Moola*, submitted that the court should refer the matter to oral evidence. I alluded to this issue earlier in this judgment.

[19] The applicant states:

'The Respondents allege that there are disputes of facts on the papers. Whilst this may at first glance appear to be so, there are no serious and/or genuine disputes of fact. Even if there are, it was not possible for me to have anticipated disputes arising as I did not force (sic) nor could I have foreseen that the Respondents would stoop to such a low level as to brazenly and repeatedly commit perjury. I point out that during my numerous discussions with the Third Respondent and the Fourth Respondent, especially during the meetings which we had, whilst at some stage my calculations was questioned but after I had provided an explanation, the Third and Fourth Respondents were satisfied with the calculations. The Third Respondent acknowledged the amount but offered to settle the indebtedness at Eight Million Rand (R8 000 000.00). Furthermore, the question as to whether Dimo's Enterprises was a part of the family business or not, although disputed by Third Respondent, was not regarded by me as a serious or genuine dispute as I perceived it as being merely a "negotiating strategy" to obtain some form of "discount" from the Applicant. It must be borne in mind that I had a long association with the Hussen family when I was a frequent visitor at their home and I was well acquainted with how their businesses were structured and that the businesses were owned by the family. Furthermore, Third Respondent "controlled" the meetings and attended all meetings and would not have done so if he was merely an

observer giving moral support to his brother. As mentioned in the Founding affidavit, the Respondents, through Dimo's Enterprises, owed various motor dealers, an amount of approximately R64 000 000.00. That credit, in such a significant amount was extended to Dimo's Enterprises, was only possible as it was commonly known that Dimo's Enterprises was a part of the Hussen family businesses, which family was reputed to be extremely wealthy. This belief that Fourth Respondent was transacting on behalf of the family businesses was reinforced by the involvement of other members of the family in the activities of the business and in particular by the delivery of cheques drawn on bank accounts of various family members and/or entities controlled by them, the transfer of funds from such accounts and the transfer of funds to the accounts of various family members and/or entities controlled by them relating to the purchase and sale of motor vehicles by the Fourth Respondent. No acceptable or credible explanation to counter the inferences arising from the aforesaid facts have been provided by the Respondents.'[21]
(My emphasis.)

[20] The fourth respondent did not only deny the existence of the first respondent, he denied that there were any business transactions between the applicant and his family members. He submitted that if he was truly indebted to the applicant as alleged, it is reasonable to expect that the applicant would have instituted either action proceedings against him or recover the monies owed through provisional sentence proceedings.[22] The fourth respondent's answering affidavit in essence boils down to the fact that the so-called Hussen Family Partnership is a figment of the applicant's imagination and hence that is why there is not a single document or any proof that suggests the existence of such a partnership.

[21] Since the applicant in oral argument[23] placed reliance on the *universorum bonorum*, it is necessary for the sake of completeness to examine the relevant cases that recognised universal partnerships.[24] In *Mühlmann supra* the court considered whether a tacit agreement was reached, recently the legal requirements for proving a universal partnership have been stated in *Butters*.[25] The applicant, in my view, had

[21] See pages 269 to 270 para 4.
[22] See page 189 paras 73 to 75.
[23] The founding affidavit failed to identify the nature of the partnership.
[24] See *Fink v Fink & another* 1945 (WLD) 226; *Mühlmann v Mühlmann* 1984 (3) SA 102 (A); *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA) and *Butters v Mncora supra.*
[25] See *supra* para 18.

failed to prove the existence of a tacit agreement[26] between the respondents in that they were partners in a universal partnership.

[22] The second to sixth respondents, excluding the fourth, in their answering affidavit submit that the existence of a partnership rests on speculation and conjecture without any proof. No documents were presented that bear the name of 'The Hussen Family Partnership'. As much as the applicant failed to state the type of partnership that is allegedly in existence, the respondents inferred that reliance was placed on a *universorum bonorum* although the term was never used in the papers. Measured against the requisites of such partnership, the said respondents contend that the application fails at multiple levels since the necessary elements have not been established on the papers. Ms *Lennard* has submitted that the applicant presented three versions which are in fact mutually destructive. I consider it necessary to list the three versions:

(a) Firstly, that both the partnership (first respondent) and the partners are liable for the alleged indebtedness;
(b) Secondly, that the fourth respondent represented the first respondent in concluding the business transactions and through this representation the first respondent is liable;
(c) Thirdly, that the second to sixth respondents are jointly and severally liable to the applicant for the alleged indebtedness.

[23] The second, third, fifth and sixth respondents, quite correctly, in my view, took issue with the applicant's attempt to introduce new facts in its replying affidavit and by introducing the affidavits of Messrs Hassim and Kajee. Not only is it impermissible to introduce these affidavits, no explanation was proffered as to why these affidavits could not be introduced at the time of launching the application. I do not intend to deviate from the general rule, absent any explanation on a request to

[26] In *McDonald v Young* 2012 (3) SA 1 (SCA) the court held that in order to establish a tacit contract the conduct of the parties must be such that it justifies an inference that there was consensus between them. (See para 11.)

allow these affidavits referred to, the applicant's case will be decided on what he has stated in the founding affidavit.

[24] In addition the respondents averred that some of the properties that the applicant contends fall within the estate of the respondents are the 'Mount Edgecombe' property and the 'La Lucia' property. The first belongs to a registered company and the second belongs to the Estate Late MO Hussen. These assets would require that the company and the executor of the estate be joined in the application.

[25] It was argued that the material disputes of fact ought to have been foreseen by the applicant and that the application is an abuse of process.[27] Respondents asked that the application be dismissed on a punitive scale.

[26] As stated earlier the applicant at first contended that it has made out a case for the order sought but then changed tune during its oral argument and invited this court to refer the matter for oral evidence. I assume that this submission was made on the basis that the probabilities relating to the indebtedness are balanced on the papers and that oral evidence might tip the balance of probabilities in favour of the applicant. I am not persuaded that I should accept the invitation. Not only was the existence of any partnership not proved on the papers, the *Badenhorst* rule militates against settling of disputes of this nature by referring the matter to oral evidence. In my view it is expected of me to determine whether the respondents in their papers

---

[27] See *Business Partners Ltd v World Focus 754 CC* 2015 (5) SA 525 (KZD) paras 8-9:
'[8] It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally trite is that an applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.
[9] The general rule is that the court will not permit an applicant to assert new facts in his replying affidavit which should have been set out in his founding affidavit. However, this rule, like all general rules, is not without exceptions. As was stated in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1)* by Nestadt J:
"This is not however an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit … This indulgence, however, will only be allowed in special or exceptional circumstances."' (Footnotes omitted.)

advanced reasonable grounds disputing the alleged indebtedness to the applicant. The applicant has failed in this application not only in law but also on facts.

[27] Applicant has failed on these papers to show that any partnership existed between the respondents, or that the respondents committed the acts of insolvency as alleged. In conclusion the applicant failed to discharge its onus.

[28] Order

The application is dismissed with costs, such costs to include senior and junior counsel where so employed.

_____

STEYN J

Application heard on :	8 February 2017
Counsel for the applicant : Instructed by :	FM Moola SC Bilal Malani & Associates
Counsel for the second, third, fifth and sixth respondents : Instructed by :	GD Harpur SC/J Naidoo Amod's Attorneys
Counsel for the fourth respondent : Instructed by :	U Lennard Zayeed Paruk Inc
Judgment handed down on :	15 May 2018