THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 18414/14

ORESTISOLVE (PTY) LTD t/a ESSA INVESTMENTS **APPLICANT**

And

NDFT INVESTMENTS HOLDINGS (PTY) LTD **RESPONDENT**

NAMAKWALAND DIAMOND FUND TRUST **INTERVENING CREDITOR**

Coram: ROGERS J

Heard: **18 MAY 2015**

Delivered: **28 MAY 2015**

JUDGMENT

ROGERS J:

Introduction

[1] This is the extended return day of an order for the provisional liquidation of the respondent ('NDFT'). The applicant ('Essa') is an alleged creditor in an amount of R750 000. NDFT's sole shareholder ('the Trust') was, subsequent to the grant of the provisional order, given leave to intervene to oppose final liquidation. The Trust, apart from being the company's sole shareholder, has a loan account claim against it of about R85 million. Essa is represented by Mr CJ van Coller, NDFT by Mr WJ van der Merwe and the Trust by Mr JJ Botha SC. For convenience I shall refer to NDFT and the Trust collectively as the respondents. Mr Botha delivered the main argument on their behalf.

[2] The issues are in summary: (i) whether Essa is a creditor; (ii) whether Essa's claim is bona fide disputed on reasonable grounds; (iii) whether NDFT is factually or commercially insolvent ; (iv) whether, if these questions are answered in Essa's favour, the court in its discretion should nevertheless refuse to grant a winding-up order.

[3] The procedural history is briefly the following. On 27 June 2014 Essa's attorneys sent a demand to NDFT in terms of s 345(1)(a) of the Companies Act 61 of 1973. This did not elicit payment or the securing of the claim. On 15 October 2014 Essa launched an application for NDFT's provisional liquidation.

[4] NDFT opposed and filed a short answering affidavit disputing Essa's alleged claim. Following several postponements the application for provisional liquidation was argued before Boqwana J on 11 February 2015. On 2 March 2015 she delivered judgment, finding that Essa had established its claim on a prima facie basis and that NDFT was deemed to be unable to pay its debts. She granted a provisional order returnable on 7 April 2015.

[5] On 20 March 2015 the Trust delivered an application for leave to intervene to oppose the application and to bring the return day forward to 24 March 2015. Essa

opposed the intervention. On 24 March 2015 and by agreement the Trust was granted leave to intervene and the return day was brought forward to 31 March 2015 with a timetable, costs to stand over. On 31 March 2015 the return day was postponed for hearing on the semi-urgent roll on 18 May 2015.

[6] I may dispose here of a preliminary point taken by the respondents in their heads of argument. They say that the provisional order was not served on employees in the manner required by s 346(4A). Technically this is correct, because the return says merely that when the sheriff attempted service at NDFT's premises he was told by 'the employee', one Klasse, that there was no trade union. In these circumstances, strict compliance with the sub-section required the provisional order to be served on employees by being affixed to a notice board to which employees have access. I asked Mr van der Merwe to take instructions on how many employees NDFT had. The answer was that it had three employees, namely its managing director Mr Basson (who made the original opposing affidavit in the provisional liquidation and further affidavits in the intervention application), the said Klasse and a third employee who was present with Klasse when the provisional order was served. For obvious reasons the point of non-service was not pressed in the light of this information.

The relevant legal principles

[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* 1988 (1) SA 932 (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 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 – 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 whether 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 (*Payslip Investment 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 & Another v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218D-219C).

[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where 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 Solution CC v Amagen Development (Pty) Ltd* [2010] ZAWCHC 339 paras 8-10; *Badge & Others NNO v Midnight Storm Investments 265 Pty Ltd & 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 applicant's claim at the final stage, the applicant 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. (In the present case neither side requested a referral to oral evidence.)

[11] If, on the other hand, and with due regard to the application of the *Plascon-Evans* rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's claim, there seems to be limited scope for finding that the debt is nevertheless bona fide disputed on reasonable grounds. It is thus unsurprising to find that the reported judgments where the *Badenhorst* rule has been relevant to the outcome have been cases of applications for provisional liquidation rather than final liquidation.

[12] Even where the facts are undisputed, there may be a genuine and reasonable argument whether in law those facts give rise to a claim. I have not found any case in which the *Badenhorst* rule has been applied, either at the provisional or final stage, to purely legal disputes. If the *Badenhorst* rule's foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute. But if the *Badenhorst* rule extends to purely legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. I have not conducted an exhaustive analysis of the English authorities but the position stated by the Court of Appeal in *HMRC v Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116 paras 79-80 indicates that the equivalent rule in England finds application where the dispute is shown to be one 'whose resolution will require the sort of investigation that is normally within the province of a conventional trial'. A purely legal question would not have that character.

[13] I have used the expression 'bona fide disputed on reasonable grounds' in describing the *Badenhorst* rule. The South African cases, including *Badenhorst* itself, are formulated in such a way as to indicate two requirements, namely bona fides and reasonable grounds. The view that the rule comprises two distinct components was expressly articulated in *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 218F-220C, quoted with approval in *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 at 606B-607E. In the more recent of the two English authorities cited in *Badenhorst*, namely *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 (CA), Lord Greene MR said he did not think there was any difference between 'bona fide disputed' and 'disputed on some substantial ground' and that the one was just another way of saying the other (at 198E-F). This was repeated more forcefully by Harman J in *Re a Company (No 001946 of 1991); Ex parte Fin Soft Holdings SA* [1991] BCLC 737 at 738f-740c who said that bona fides in the (true) sense of good faith has nothing to do with the matter. However English cases usually express the test in the same way as our courts (see, for example, *Tallington Lakes Ltd & Another v Ancaster International Boat Sales Ltd* [2012] EWCA Civ 1712 paras 39-41; *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1573 para 33). Including or excluding bona fides as a distinct requirement is unlikely in practice to lead to different results because bona fides (genuineness) is on any reckoning not on its own sufficient and because a finding that the claim is disputed on substantial (ie reasonable) grounds could rarely co-exist with a finding that the company is not bona fide in disputing the claim.

[14] In regard to insolvency, Mr Botha submitted in his heads of argument that the effect of the new Companies Act 71 of 2008, and in particular item 9(2) of Schedule 5, was that the provisions of the old Companies Act regarding the liquidation of insolvent companies were only applicable if the company was insolvent in the sense that its liabilities exceeded its assets. He wisely abandoned that submission after being referred to the decision in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA). The test is commercial insolvency, ie the inability of a company to pay its debts as they fall due, a situation which may prevail even though the value of the company's assets exceeds its liabilities. However, the fact that a company which is commercially insolvent has assets which in value exceed its

liabilities may be a relevant circumstance in the exercise of the court's residual discretion to refuse a winding-up order (*Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) para 6).

[15] Section 344(f) 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'. Section 345(1) sets out three circumstances in which a company 'shall be deemed to be unable to pay its debts'. Relevant to the present case are the first and third circumstances, namely non-payment in response to a statutory demand (para (a)) and actual (proven) inability to pay debts (para (c)). As to statutory demand, a company is not deemed to be unable to pay its debts merely because an established claim has not been paid or secured; what must be shown is that the company has 'neglected' to pay or secure the claim. The English cases hold that the word 'neglected' is not apt to describe a refusal to pay where the claim is bona fide disputed on some substantial ground (see, for example, *Re Lympne Investments Ltd* [1972] 2 All ER 385 (Ch) at 389; *Re a Company (No 033729 of 1982)* [1984] 1 WLR 1090 (Ch) at 1093B-G; *Palmer's Company Law* Vol 4 para 15.215; the position in Australia is the same: see *KL Tractors Ltd* [1954] VLR 505 at 508-511). This interpretation of the word 'neglected', which has support in South African authority (see, for example, *Ter Beek v United Resources CC & Another* 1997 (3) SA 315 (C) at 328G-330H; *Nedbank Ltd v Applemint Properties 22 (Pty) Ltd* [2014] ZAGPPHC 1042 paras 20-21), is essentially the *Badenhorst* rule in a different guise and thus does not in truth give a respondent an additional string to its bow.

[16] In *Ter Beek* supra, where the court was considering a statutory demand given in terms of the comparable provisions of the Close Corporations Act 69 of 1984, Van Reenen J found that the company was not, at the time of the statutory demand, bona fide disputing the claim on reasonable grounds. He thus concluded that the company had indeed 'neglected' to make payment (at 330G-H). He went on to express the view, however, that the deeming effect of a statutory demand could be neutralised by evidence rebutting the inference of an inability to pay – in that case, evidence of protracted settlement negotiations (at 330I-332A). This view was cited with approval by Malan J (as he then was) in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) paras 5 and 16. I respectfully

doubt this line of reasoning. The word 'deemed' appears in the introductory portion of s 345(1) and thus applies to all three methods of determining a company's inability to pay its debts, yet one could not sensibly say that satisfactory proof of an actual inability to pay a company's debts (para (c)) is a rebuttable presumption. As I see it, once one of the three circumstances in s 345(1) is established, the ground for winding-up specified in s 344(f) is satisfied (this is the view of the learned authors of *Henochsberg* at 707 and Blackman op cit at 14-119 – 14-120 and footnote 1 on the latter page). However, the reason for the company's refusing to make payment in response to the statutory demand might, particularly in conjunction with other circumstances, provide a basis for the court to exercise its discretion against liquidation.

[17] The extent of this discretion was the subject of some debate. Mr van Coller referred to the traditional view that where a company is unable to pay a creditor's claim the latter is ex debito justitiae entitled to a winding-up order and that the court's discretion to refuse is narrow (*Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597E-F; *Sammel & Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662F; *Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440-441). Although the ex debito justitiae maxim has been repeated in recent cases, there are other decisions holding that the legislative policies underlying the new Act require the discretion to be viewed more broadly in favour of saving ailing companies (see *Absa Bank Ltd v Newcity Group (Pty) Ltd & Other Cases* [2013] 3 All SA 146 (GSJ) paras 29-33; *Dippenaar NO & Others v Business Venture Investments No 134 (Pty) Ltd* [2014] 2 All SA 162 (WCC) paras 45-46). Where there are competing applications for liquidation and business rescue, the policy considerations underlying the business rescue procedure must inevitably derogate from the traditional approach. The two cases just mentioned extended this approach to circumstances where, although there were not competing business rescue applications, there was evidence that the companies could be saved by transactions of which particulars were furnished.

[18] I doubt that the ex debito justitiae maxim has ever been, or justified, an inflexible limitation on the court's discretion. In one of the leading English cases on the discretion to refuse a winding-up, *Re Southard & Co Ltd* [1979] 3 All ER (CA),

Buckley LJ said that, where a judicial discretion is concerned, it is mistaken to attempt to lay down rules for its exercise and that no judge can fetter any other judge in the manner of its exercise or lay down rules binding on others in the exercise of the discretion (562b-c). The ex debito justitiae maxim, I venture to suggest, conveys no more than that, once a creditor has satisfied the requirements for a liquidation order, the court may not on a whim decline to grant the order (and see Blackman op cit Vol 3 at 14-91). To borrow another judge's memorable phrase, the court 'does not sit under a palm tree'.[1] There must be some particular reason why, despite the making out of the requirements for liquidation, an order is withheld.

[19] One clear example, which is sometimes said to be outside the scope of the maxim altogether, is where the contest is not just between the petitioning creditor and the respondent company but involves a difference of opinion among the creditors themselves (in England see for example *Southard* supra at 562c-d and *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 at 638c-640b; in this country, see *SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) at 373B-H; Meskin *Henochsberg on the Companies Act* Vol 1 p 699-700). In *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd & Another* [2012] ZAWCHC 13 Binns-Ward J, while repeating this proposition, suggested that the court would attach more weight to the views of external creditors than insiders. A similar view prevails in England (*Demaglass* supra at 639e-f).

[20] It is readily understandable that the ex debito justitiae maxim is not applied where creditors have competing views. In the case of sequestration, the petitioning creditor must establish inter alia that sequestration will be to the advantage of creditors. Where the petitioning creditor has established this requirement together with the other requirements for a sequestration order, the scope for the residual discretion would understandably be limited (cf *Firstrand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) para 27). In the case of liquidation, by contrast, the petitioning creditor need not establish that liquidation will be to the advantage of creditors. If other creditors, despite having had an opportunity to oppose, do not do so, one can understand why the court might ordinarily view its discretion as limited in much the

[1] Per Warner J in *In re Cade & Sons Ltd* [1992] BCLC 213 at 227.

same way as it is in sequestration proceedings. However, if one or more creditors oppose the liquidation, a narrow approach to the court's discretion is inappropriate. The court's discretion allows it to take into account the interests of creditors as a whole and what would be to their best advantage, though naturally the court is not bound to refuse a liquidation merely because the majority of creditors by number or value oppose it. And of course the court must consider not merely that the majority of creditors opposes the winding-up but also the reasons for the opposition.

[21] Another circumstance which, in my view, would favour an exercise of the court's discretion against winding-up is where, despite the deemed inability to pay debts created by s 345(1)(a), the evidence shows that the company is not in fact commercially insolvent. It may also be relevant in this regard that the company's failure to pay is attributable to a genuine dispute concerning the claim, even if the court in the event considers the grounds of dispute are ill-founded.

[22] Mr van Coller submitted in his heads of argument that the respondents were not entitled to revisit issues decided by Boqwana J. That is incorrect. The burden of proof is different as is the approach to resolving disputes of fact. Furthermore, the company and intervening parties are entitled to place additional evidence before the court prior to the return day, as they did here.

The facts

[23] NDFT's main business is the holding of investments. According to its financial statements its principal forms of income are rent and interest. The Trust is its sole shareholder. All the directors of NDFT are also trustees of the Trust but there are further trustees who are not directors of NDFT. According to the respondents, the trustees operate independently from NDFT's management.

[24] During the first part of 2013 Mr Ruan van der Merwe (Van der Merwe) referred NDFT to Essa's Mr Gert Oosthuizen ('Oosthuizen') to assist NDFT in raising bank finance. Van der Merwe and Oosthuizen were at that time business associates, the former being a qualified attorney, the latter an ex-banker. It appears that at that time NDFT had an overdraft facility with Grindrod Bank ('Grindrod'). The

amount of the overdraft at the time of the referral does not appear from the papers but in April 2014, about a year later, the overdraft stood at about R15,4 million.

[25] On 11 June 2013 a written consultancy agreement was concluded between Essa and NDFT in terms whereof Essa was to use its best efforts and its connections in the banking sector to assist NDFT in successfully obtaining an overdraft or term loan of R30 million. Clause 2, headed 'Consideration', reads thus:

'The Consulting Party will pay the Consultant a success fee equal to 2.5% … of any credit facility granted to the Consulting Party as a result of the services rendered by the Consultant ('the Consideration'). The fee will become due and payable by the Consulting Party to the Consultant upon the issue of a facility letter, final approval or any other written notification of the approval of a credit facility by a registered financial institution to the Consulting Party. However, this fee will still be due and payable even if no such notification is issued, but a credit facility is nonetheless granted to the Consulting Party by a registered financial institution.'

[26] Clause 6 stipulated that the agreement comprised the parties' complete and exclusive agreement and that no amendment, addition, deletion or alteration would be of any effect unless reduced to writing and signed by both parties.

[27] There was an agreement between Oosthuizen and Van der Merwe that if Essa earned the success fee stipulated in the consultancy agreement, Essa would pay Van der Merwe a referral fee equal to 50% of the success fee.

[28] Essa, represented by Oosthuizen, was engaged in the following months in seeking to procure this overdraft facility for NDFT. It appears to have been recognised that a bank would require security from the Trust which at that time had a hedge fund investment in Edge Investments' Iconic Absolute Return Fund ('the Iconic investment'). The value of the Iconic investment fluctuated but was around R60 million.

[29] During December 2013 seven of the Trust's trustees signed what purported to be a resolution passed at a meeting of trustees held on 5 December 2013. The resolution was in summary (i) that the Trust take such measures as were necessary

to support NDFT to the fullest of its abilities so as to enable the company to achieve its goal of providing the Trust with a steady source of dividend income; (ii) that to that end the Trust made available and would cede, as security for an overdraft for NDFT, the Iconic investment, authorising the Trust's representative to withdraw the capital from the Iconic investment and reinvest it with the financial institution; (iii) that Mr JF Basson ('Basson') was authorized to do whatever was necessary to give effect to these resolutions and to sign all necessary documents. Basson, apart from being a trustee, was NDFT's managing director.

[30] According to the respondents, Basson provided this resolution in draft to the chairman of the trustees, Mr WJ Cloete ('Cloete'), with a request that Cloete assist in procuring the trustees' signatures by way of round robin. Cloete in his affidavit says that he could not get the signatures of all the trustees and that the matter thus had to be taken up at the next sitting of the full body of trustees, where the purported resolution of 5 December 2013 was rejected. I shall return to this later. The respondents did not say in their answering affidavits how many trustees there were, what the trust deed stipulated in regard to the passing of resolutions or when the full meeting took place. The purported resolution of 5 December 2013 made provision for 12 signatures though it does not necessarily follow that there were in fact 12 trustees as at December 2013.

[31] Oosthuizen says that on 26 February 2014 he was informed by Absa, the financial institution with which he was negotiating, that the bank had granted an overdraft facility of R30 million to NDFT. On the same day Essa issued an invoice to NDFT for R750 000. However, there is no evidence that Absa issued a facility letter as early as February 2014 though there may have been an indication in principle that Absa was willing to grant an overdraft.

[32] It appears from email correspondence which passed during March and April 2014 that Absa was not willing to accept security in the form of a pledge of the Trust's hedge fund investment and that the Trust would thus need to realise the Iconic investment and reinvest the proceeds as a fixed deposit. Indeed, that this was or might be the position is apparent from the aborted resolution of 5 December 2013.

[33] The realisation of the Iconic investment was not altogether straightforward. This appears from a letter dated 25 March 2014 addressed by Edge to Absa. Edge confirmed that it had received instructions from the Trust to realise the Iconic investment in full. Edge informed Absa that realisation of the investment required three calendar months' notice. Certain of the hedge fund's underlying investments of a less liquid nature might need to be held by NDFT in a separate structure and would thus not be part of the initial cash realised. The Iconic investment was currently pledged to Grindrod. To ensure a realisation date of 30 June 2014 (ie when the three-month notice period expired), cancellation of the Grindrod cession would have to take place by 30 April 2014.

[34] On 3 April 2014 Oosthuizen emailed Absa's Mr Cobus Louw, requesting him to ascertain from Grindrod what exactly they required in order to release the Iconic pledge. He said he was being bombarded with calls from NDFT and that there were threats that the trustees might withdraw from the transaction. He also said (in Afrikaans) he had been 'threatened with FNB', presumably meaning that Absa might lose out on the business in favour of FNB. He said they were so close and that they should do everything in their power to expedite and finalise the transaction.

[35] On 15 April 2014 Absa issued a facility letter in terms whereof Absa granted NDFT an overdraft facility of R30 million on the terms and conditions set out in the letter and in an attached facility schedule. Clause 2 of the facility letter, headed 'Suspensive Conditions', stated that the bank would make the facility available to NDFT at such time and in such manner as the bank might agree and after NDFT had (i) signed and returned the original of the facility letter and facility schedule together with a copy of an authorising resolution from the company; (ii) provided the collateral specified in the facility letter, being a cession by the Trust of a fixed deposit of R60 million together with the interest thereon (clauses 2.3 and 2.4) and a suretyship by the Trust, limited to R30 million, together with a cession of its loan account in NDFT (clause 3).

[36] On the same day Basson signed his acceptance of the facility letter on behalf of NDFT, confirming that he had been duly authorized to do so.

[37] On 15 April 2014 Absa also issued a letter to Grindrod undertaking to make payment to Grindrod of R15 416 838,27 (NDFT's then overdraft indebtedness to Grindrod) upon (i) confirmation from Grindrod that the Trust's pledge of the Iconic investment had been cancelled; (ii) payment of R60 million into a specified Absa account in the name of the Trust (ie the proposed fixed deposit which the Trust was to pledge to the bank); (iii) all conditions and collateral for the approved facility being in good order and legally binding.

[38] Although the Trust had by this date given notice to Edge for the realisation of the Iconic investment, the actual realisation had not yet occurred. Correspondence after 15 April 2014 suggests that the prompt realisation of R60 million in cash was in doubt. The email correspondence in the record does not enable one to form a complete picture of what was going on. It appears that a certain Mr Jones-Phillipson was engaged as an intermediary with Edge to facilitate the process. He emailed something to Van der Merwe on 22 April 2014.[2] The full content of Jones-Phillipson's communication has not been included in the papers but when Van der Merwe forwarded it to Oosthuizen, the latter replied that he thought Louw (of Absa) would 'have a fit' because it would mean he would have to 'amend his whole application'. He told Van der Merwe that Grindrod had proposed that Edge settle Grindrod directly and remit the balance to Absa. Oosthuizen told Van der Merwe that it was very important to know exactly how much cash would be available from Edge and that anything under R30 million would become a big problem. (This last statement may reflect a belief on Oosthuizen's part that Absa would accept a pledge of a fixed deposit in the amount of R30 million rather than the R60 million specified in the facility letter.)

[39] On 23 April 2014 Oosthuizen sent an email to Louw stating that Basson had been in touch with Edge to ascertain how much cash was available and that Oosthuizen would let Louw know as soon as they heard anything. Basson, he said, was content for Edge to settle Grindrod directly '*en dan die oortrokke fasiliteit 80/20 toevoer, soos gister bespreek*'. I have not offered a translation of the Afrikaans

[2] Record 326.

passage because counsel were not able to tell me what it meant. Oosthuizen said that he was only available until the Friday (he was going overseas).

[40] At this point the paper trail and evidence regarding the Absa facility peters out. At some stage between 23 April 2014 and 8 May 2014 something happened to cause the transaction to fail. This appears from Basson's reaction to an email which Oosthuizen sent to NDFT's accountant, Mr GK Terblanche, on that day, asking that NDFT immediately settle Essa's invoice of 26 February 2014 to avoid further action. Terblanche forwarded this to Basson who emailed Van der Merwe the next day asking him to look into the matter and saying that he did not quite understand, given that the transaction with Absa had not been successful.

[41] The respondents' evidence as to why the Absa transaction failed is to be gleaned from the manner in which Cloete explained the purported resolution of 5 December 2013. He said that at the next full sitting of the trustees the partially signed resolution was tabled. The full body of trustees decided that it would be more sensible for the Trust to increase its loan to NDFT than to place money on fixed deposit with Absa at a lower rate of interest in return for an overdraft to NDFT at a higher rate of interest. He says the trustees would have been prepared to pledge the Icon investment itself with Absa but the latter was not willing to accept security in that form.

[42] The respondents can be criticised for not having dealt with this decision by the trustees more fully. They do not say when the meeting took place and do not attach minutes or resolutions. However, and applying the *Plascon-Evans* rule, I cannot reject the truth of the respondents' version, vague as it is. As a fact, NDFT did not take up an overdraft with Absa or with any other financial institution. There must thus have been a commercial explanation for this decision, and the one provided by the respondents is plausible.

[43] As to the timing of the decision, it must have taken place after 15 April 2014. Basson, who was a trustee as well as NDFT's managing director, would not have accepted the facility letter on behalf of NDFT if he knew that the Trust had already resolved not to provide the security and not to go ahead with the transaction. This

means that the first full meeting of the trustees after 5 December 2013 must, on the respondents' version, have been after 15 April 2014, which is somewhat surprising but again I cannot say it is untrue. Furthermore, the correspondence of March and April 2014 shows that the realisation of the Iconic investment was running into difficulty. Oosthuizen mentioned in his email to Louw of 3 April 2014 that the trustees were threatening to withdraw. These difficulties may have played their part in the trustees' decision, sometime after 15 April 2014, to take a different route.

[44] It appears likely that the Trust realised at least some part of the Iconic investment in order to settle NDFT's Grindrod overdraft because NDFT's management accounts for 31 January 2015 show that the overdraft no longer existed and that the company's sole creditor of substance was the Trust, whose claim on loan account was R85 374 953.

[45] On 27 June 2014 Essa's attorneys dispatched the s 345(1)(a) demand. There is a factual dispute as to what happened thereafter. Oosthuizen says that Van der Merwe contacted him and proposed that the matter be settled on the basis that Van der Merwe abandon his referral commission and that NDFT would pay Essa the balance of the success fee (ie R375 000) in monthly instalments of R25 000. Oosthuizen said he would consider this proposal provided it was reduced to writing. He says NDFT paid R25 000 on 1 August 2014. No further payments were made and the proposed settlement was never reduced to writing.

[46] The respondents, whose affidavits included one by Van der Merwe, deny that there was any such proposed settlement. Van der Merwe says that, after NDFT's receipt of the s 345(1)(a) demand and on instructions from the company, he had several discussions with Oosthuizen in an attempt to resolve the issue. In these discussions Van der Merwe expressly informed Oosthuizen that NDFT was not prepared to concede his claim because NDFT was of the opinion that Essa had not succeeded in fulfilling its mandate and that Essa would only have been entitled to its fee if NDFT obtained the overdraft facility. Van der Merwe adds that he drafted the consultancy agreement and that it was always the intention of the parties that NDFT would pay Essa from the proceeds of the overdraft facility. He did not believe that the issuing of the facility letter with its suspensive conditions itself constituted

fulfilment of the mandate. It was for this reason that he did not believe that he himself was entitled to a referral fee.

[47] The respondents claim that the payment of R25 000 on 1 August 2014 had nothing to do with the consultancy agreement; it related to the so-called Loanfinder transaction. NDFT had been contemplating the acquisition of the Loanfinder business and Oosthuizen was involved in structuring the transaction. It appears that the transaction did not come to fruition. According to the respondents, NDFT agreed to pay Essa an ex gratia amount of R25 000 for his efforts (Essa had not submitted an invoice).

[48] The proof of payment for the amount of R25 000 is non-specific, ie does not contain a reference either to the consultancy agreement or to the Loanfinder transaction, though the respondents state that if the payment had been intended to be in respect of the consultancy agreement, there would have been a reference to Essa's invoice number. The covering email which Terblanche sent Oosthuizen on 1 August 2014 is also non-specific but records that the payment was 'in no way an acknowledgement of debt' and that NDFT reserved all its rights.

[49] In reply Oosthuizen denied that the payment had anything to do with the Loanfinder transaction. He says he did relatively little work on the Loanfinder transaction. This is not, however, a dispute which can be resolved on the papers.

[50] I should mention that Van der Merwe's interests were initially aligned with Essa's because of his arrangement with Oosthuizen for the payment of referral fee. However, in early July 2014 Van der Merwe told Oosthuizen that he had received a very attractive offer of employment from NDFT which he had accepted. In an email of 7 July 2014 he explained to Oosthuizen why this would not compromise the Loanfinder transaction. Accordingly, Van der Merwe's evidence on behalf of the respondents was not that of a disinterested witness.

[51] The liquidation application followed on 15 October 2014.

The claim

[52] Essa's case is that its commission of R750 000 became payable when Absa issued the facility letter on 15 April 2014, its being irrelevant that the facility was conditional upon the furnishing by the Trust of security. In the alternative, Essa says the condition was actually fulfilled or at least fictionally fulfilled. The respondents deny all the ways in which the claim is put.

[53] It is clear from the papers that NDFT did not in the event take up the overdraft facility and that the Trust did not as a fact make a fixed deposit of R60 million with Absa or pledge any such deposit to Absa. Although the papers focused on the requirement of a pledged fixed deposit, there is no evidence that the Trust signed the suretyship required by the facility letter or pledged its loan account in NDFT to Absa as security, and Cloete said that no such cession had occurred.[3] At the hearing of the application for provisional liquidation, Essa relied, for its contention of actual fulfilment of the fixed deposit condition, on a statement by an in-house Absa lawyer on 4 April 2014 in an internal email, her advice having been sought on the Trust's capacity to provide security.[4] The lawyer must have misunderstood the current state of play. Apart from the fact that the respondents allege that the fixed deposit never came into existence, it is clear from other correspondence that the realisation of the Icon investment could not yet have yielded the cash for a fixed deposit. As late as 23 April 2014 Oosthuizen was attempting to find out from Edge how much cash would be available. It was clearly going to be less than R60 million, possibly even less than R30 million.

[54] Accordingly, Essa's claim depends on a finding either that the issuing of the facility letter, despite its conditionality, constituted the event entitling Essa to commission or that, if fulfilment of the conditions was necessary, the conditions were fictionally fulfilled.

[55] On the respondents' version, which I must accept, there was a deliberate decision taken by the Trust not to proceed with the Absa transaction because the

[3] Para 29 record 30.
[4] Record 96.

Trust considered, in the light of Absa's refusal to accept a pledge of the Iconic investment, that it would be commercially more sensible for the Trust itself to provide whatever additional loan finance NDFT needed, including funding to settle the Grindrod overdraft.

[56] Fictional fulfilment is most often encountered where only one contract is in issue, the question being whether the one party frustrated the fulfilment of a suspensive condition to avoid his contingent obligations to the other party. Here there are two contracts, the consultancy agreement between Essa and NDFT and the facility agreement between NDFT and Absa. As between NDFT and Absa there can be no question of the fictional fulfilment of the conditions regarding the provision of security. It would never have been in the bank's interest to rely on fictional fulfilment because Absa would then have been obliged to provide the overdraft without having the security. Essa's case is that if the payment condition in the consultancy agreement required the facility agreement to be unconditional, the facility agreement should – as between Essa and NDFT, even though not as between NDFT and Absa – be regarded as having become unconditional.

[57] I accept that fictional fulfilment can operate in this way (cf *Watson v Fintrust Properties (Pty) Ltd* 1987 (2) SA 839 (C) at 757H-759H and authorities there cited). In the present case, however, the deliberate decision which caused the Absa transaction to fail was, on the facts as I must hold them to be in accordance with *Plascon-Evans*, that of the Trust, not NDFT. The Trust's decision was not taken merely as sole shareholder in relation to a transaction to which NDFT was a party; it was a decision in relation to collateral transactions which the Trust itself would have had to conclude, namely the signing of a suretyship and the pledge of a fixed deposit and its loan account. The Trust in that capacity owed no duty to Essa to provide the security which would have enabled Essa to earn its commission.

[58] But the question remains whether Essa needs to rely on fictional fulfilment. This is a question of interpretation of the consultancy agreement. The correct approach was described as follows by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 (footnotes omitted):

'… Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[5]

[59] Van der Merwe's allegation that the parties intended that the commission and success fee would be paid out of the overdraft, even if it were admissible in interpreting the consultancy agreement, would not lead to a conclusion that the commission was payable only if the overdraft was actually advanced. The parties may well have anticipated that, if a facility letter was issued, the actual advancing of money by the bank would follow promptly thereafter. The overdraft proceeds would thus have been the natural method of settling the commission. Non constat that there would be no entitlement to commission if for any reason NDFT did not actually take up the overdraft. If, for example, clause 2 of the consultancy agreement in the present case had been amplified by additional words to the effect that commission would be paid from the proceeds of the overdraft, this would have been a time clause rather than a condition, so that if for any reason this method for determining the time of payment fell away, there would have to be payment forthwith or within a reasonable period of time (*Venter Agentskappe (Edms) Bpk v De Sousa* 1990 (3) SA 103 (A)). In *Ferndale Investments (Pty) Ltd v D.I.C.K. Trust (Pty) Ltd* 1968 (1) SA 392 (A) the appellant had been given a mandate to raise a loan on mortgage for the respondent. A loan agreement was duly concluded but the respondent decided not to take up the loan and the mortgage was never registered. The mandate stated that

[5] See also *Bothma-Batho Transport (Edms) Bpk v s Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10-12.

the commission would be paid on registration of the bond. The court held that there was no reason to construe the registration of the bond as a condition failing the fulfilment of which there was no contract to pay.

[60] The starting point, as the *Natal Joint Municipal Pension Fund* case emphasises, are the words actually used in the contract. Although Essa's mandate was to assist NDFT 'in successfully obtaining credit facilities' and although the commission was styled a 'success fee', the event which was to render the commission due and payable was stated to be 'the issue of a facility letter, final approval or any other written notification of the approval of a credit facility' by the bank to NDFT. I do not think the reference to 'success' requires one to interpret the payment condition as meaning that the conditions specified in a duly issued facility letter had to be fulfilled before the commission would become due and payable. On the face of it, the words are not so qualified. Success, in context, means the issuing of the facility letter.

[61] Fulfilment by an agent of his mandate may often require there to come into existence a binding contract between his principal and a third party of which he (the agent) was the effective cause. Typically this is the case where an estate agent receives a mandate to 'find a buyer' (*Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) at 596H-I). A binding contract would mean one which is or has become unconditional. In *Gluckman v Landau & Co* 1944 TPD 261 at 268 Murray J said:

'Normally the services of an estate agent are invoked where the principal desires to dispose of his property and receive the proceeds thereof. He has in contemplation an actual sale as the event upon which his promise to pay commission must be fulfilled and the agent realises this. The same principle applies *mutatis mutandis* where the agent is approached in regard to securing leases, or raising loans, and where the principal desires to buy or to hire, not to sell or to lease…'

[62] But the learned judge went on to say that it is possible that the principal may bind himself to pay commission on different terms. The cases emphasise that it is ultimately a matter of construction of the mandate (see also *Watson* supra at 747H-750I and authorities there collected). Thus in *Commercial Business Brokers v Hassen* 1985 (3) SA 583 (N) the agent was the effective cause of the sale of a

business. The sale was subject to the suspensive condition that the lessor of the business premises should agree to a substitution of the purchaser as the lessee. This condition failed. The agent was nevertheless held to be entitled to his commission because the sale agreement contained unambiguous language to the effect that the agent earned the commission upon the signing of the agreement, this being a stipulatio alteri the benefit of which the agent had accepted.

[63] In the present case the consultancy agreement does not say that the event entitling Essa to commission is the conclusion of a facility agreement or the actual advancing of money on overdraft. The commission was payable upon the issuing of a facility letter, final approval or any other written notification of the approval of the credit facility by the bank. It may be that some limitation must be read into the language of clause 2 since otherwise the bank might notionally have issued a facility letter on terms which were unreasonable or unrealistic and had no prospect of achieving the purpose of enabling NDFT to get an overdraft. This of course is not a very likely scenario because typically the issuing of a facility letter would be preceded by negotiations regarding interest rates, fees and security. Be that as it may, any such implied limitation would be sufficiently satisfied if the facility letter was on terms and conditions acceptable to NDFT, and that those terms and conditions were acceptable is proved by NDFT's written acceptance. To imply a further qualification, that the commission would only be earned if the security specified in the facility letter was actually furnished by NDFT's sole shareholder, seems to me to go beyond what would be justified by the language of the consultancy agreement viewed in the light of surrounding circumstances and commercial common sense.

[64] Accordingly, and if the granting of a final order depended only on whether Essa had established its claim, I would have been inclined to hold that the claim had been duly established. I do not think there is any relevant factual dispute which would preclude such a finding. However, in the light of my other conclusions, it is not necessary for me finally to decide this point and it may be undesirable to do so in view of the fact that the claim may become the subject of future litigation.

Bona fide disputed on reasonable grounds?

[65] I alluded earlier in this judgment to the *Badenhorst* rule and its scope, if any, once the court has determined that there are no genuine factual disputes regarding the claim, the only issue being whether in law those facts give rise to a claim. Here the only point of dispute regarding the claim is the interpretation of the consultancy agreement. While interpretation of a contract may be a mixed question of fact and law, there are in this case no factual disputes regarding the surrounding circumstances. At least where the interpretation of the contract appears to the court to be clear, there seems little scope for saying that the respondent is nevertheless disputing the claim on reasonable grounds.

[66] Because I find it unnecessary finally to determine the existence of the claim on the papers, I also need not finally decide whether the claim is being disputed on reasonable grounds. Once again, though, and if this were the only obstacle in the way of a final order, I am far from satisfied that I would have withheld a final order on the basis of the *Badenhorst* rule.

[67] I must emphasise, though, that the *Badenhorst* rule is conventionally formulated as requiring the company to satisfy the court of two things: its bona fides and the reasonableness of its grounds for disputing the claim. If the respondents were to fail in their reliance on the *Badenhorst* rule, it would be for failure to satisfy the second of these requirements. As to the first, I cannot find on the papers that the respondents are not genuine in disputing the claim. Bona fides is a question of fact. At the stage of a final order, it must be assessed in accordance with the *Plascon-Evans* rule. Even though the onus on a particular issue in motion proceedings might rest on the respondent, this does not reverse the operation of the *Plascon-Evans* rule (see *Ngqumba en 'n Ander v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259E-263D; *Rawlins & Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541I-542B). And bona fides, in the context of the *Badenhorst* rule, does not in my view require that the company should hold a belief that at trial its defence to the claim would definitely succeed or even be more likely than not to succeed. It would be sufficient, I think, that the company genuinely wishes to contest the claim and believes it has reasonable prospects of success.

[68] I mention bona fides at this point, because it bears on the two remaining issues to be addressed below, namely inability to pay debts and discretion. A finding that the company is not bona fide in disputing the applicant's claim would usually go hand in hand with a finding that the claim is being disputed solely for purposes of delay; and such a purpose would often support an inference that the company is unable to pay its debts and militate against the exercise of a discretion in its favour.

Inability to pay its debts and discretion

[69] If one assumes in Essa's favour that its claim has been established on the papers and is not being disputed on reasonable grounds, it would – subject to any residual discretion – be entitled to a final order if NDFT's inability to pay its debts in the ordinary course has been proved. In its founding papers Essa relied on the 'presumption' created by s 345(1)(a) but also alleged that NDFT was in fact unable to pay its debts. The latter allegation was based on NDFT's alleged attempt to settle the commission claim by offering monthly instalments. In the initial answering affidavit, NDFT focused on Essa's alleged claim, concluding that because the claim supposedly did not exist it could not be inferred that NDFT was unable to pay its debts.

[70] Pursuant to the intervention, considerably more information was placed before the court regarding NDFT's financial state of affairs, including its audited financial statements for the year ended 28 February 2013 and its management accounts of January 2015. These financial statements were attached to the affidavit of Terblanche, who practises as a chartered accountant and who has been involved in NDFT's financial administration for several years. He explained that NDFT's audited financial statements for the year ended 28 February 2014 were not available because certain companies in which NDFT held shares had not yet completed their audits. Essa, while continuing to rely on the presumption created by s 345(1)(a), disputed that the attached financial statements showed that NDFT was actually or commercially solvent.

[71] On the facts of the present case, determined in accordance with *Plascon-Evans*, NDFT refused to make payment because it considered that Essa's

commission had not been earned and this had been conveyed to Essa prior to the launching of the liquidation application. NDFT did not make an offer to settle the claim, and the amount of R25 000 which the company paid 1 August 2014 was unrelated to the consultancy agreement. But if one were to find that NDFT's grounds for disputing the claim were not reasonable (which might well be the case), there would have been a 'neglect' to pay within the meaning of s 345(1)(a). If s 345(1)(a) creates only a rebuttable presumption (see *Ter Beek* and *Body Corporate of Fish Eagle* supra), one would need to investigate whether the presumption has been rebutted by evidence that NDFT is not commercially insolvent. Alternatively, and on the view I take of s 345(1)(a), the question would be whether, despite the deemed inability to pay debts, the court's discretion should nevertheless be exercised against granting a final order. Whatever other limits there may be on the residual discretion, I do not see why it should be restricted where the court is satisfied that the company is commercially solvent and the statutory presumption of commercial insolvency has arisen only because the company has misguidedly but genuinely disputed the claim and therefore refused pay it.

[72] It is thus necessary to examine whether, on the papers, NDFT is actually commercially insolvent. In this regard, one must bear in mind that NDFT is an investment company, not a trading company. Apart from its indebtedness on loan account to the Trust, NDFT appears not to incur any significant operational debts on a routine basis. There is no evidence that NDFT has ever defaulted in the payment of its debts to any other creditors. The respondents have denied that NDFT is factually or commercially insolvent, an assertion supported by Terblanche with reference to the financial statements.

[73] The 2013 audited financial statements contain figures for the company and consolidated figures for the company and its subsidiaries. In what follows I use the figures for the company. The position would not be materially different if one utilised the consolidated numbers. As at 28 February 2013 NDFT had current assets of R30 323 570 (including cash of R21 209 428) and investment assets of R53 321 534, totalling R83 645 104. The notes to the financial statements indicate that the assets were carried at fair value. The company's sole liability was its indebtedness to the Trust on loan account in an amount of R81 441 745, in regard

to which no capital payments were anticipated within the next 12 months. The company had no current liabilities. If the Grindrod overdraft facility was in place (which it may have been, because the company's financing costs for the year included bank interest of about R1,674 million), there was no overdrawn balance at year-end. Overall, the company's assets exceeded its liabilities by R2 203 359. The income statement reflects that NDFT's investment operations ran at a loss for the year of R2 157 149. There would have been a profit but for interest of R5 834 568 on the Trust's loan account.

[74] As at 28 February 2013 NDFT was thus neither factually or commercially insolvent. The fact that its investment operations ran at a loss naturally does not mean that it was commercially insolvent. Provided a company has resources from which to meet current demands, it matters not, when one is considering solvency, whether its operations in any particular year are or are not profitable.

[75] There are no financial statements for the year ended 28 February 2014. However, it appears that by that stage the company's liabilities may have exceeded, or been at risk of exceeding, its assets because the Trust signed a subordination agreement. The agreement recorded that as at 28 February 2014 the Trust's loan claim stood at R81 069 802, R10 million of which the Trust agreed to subordinate so as to enable the claims of other creditors to be paid in full. The agreement was to remain in force for as long as the liabilities of the company exceeded its assets fairly valued. The agreement was still in force as at January 2015. In terms thereof the Trust was not only precluded from proving the subordinated portion of its claim in NDFT's liquidation if this would reduce the dividend payable to other creditors; the Trust also agreed that it would not be repaid or be entitled to demand payment of the subordinated portion for as long as the subordination agreement remained in force. It was recorded that interest at 9,25% per annum was payable on the loan account but would not actually be paid but be added to the subordinated amount. The agreement was stated to be for the benefit of all other creditors of NDFT, present and future. The subordination agreement thus contained terms which would bring about all the usual effects of a subordination agreement as described by Goldstone JA in *Ex parte De Villiers & Another NNO: In re Carbon Developments (Pty) Ltd (In Liquidation)* 1993 (1) SA 493 (A) at 504I-506F.

[76] The management accounts as at 31 January 2015 reflect that the company had current assets of R1 446 844 (including cash of R1 293 462) and fixed assets of R80 342 804, totalling R81 789 648. The company's sole liabilities were its indebtedness to the Trust on loan account in an amount of R85 374 953 and a PAYE indebtedness to SARS of R9 010. The Grindrod overdraft, which one knows was about R15,4 million in April 2014, no longer existed. Overall, the company's liabilities exceeded its assets by R3 594 316 before taking the subordination of R10 million into account. The income statement reflects that NDFT's investment operations ran at a loss for the year of R941 311, including interest of R426 151 paid to Grindrod and management fees of R842 854. The income statement does not reflect interest on the Trust's loan account, the accounting for which would naturally increase the loss for the year.

[77] Mr van Coller says that if the Trust decided to fund NDFT itself rather than letting NDFT take up the Absa overdraft, one would have expected the Trust's loan account to have increased by more than it did. However, there is no reason to doubt that the Trust did provide the additional funding because as a fact the Grindrod overdraft was discharged and NDFT did not as at January 2015 have any creditors apart from the Trust and a minimal amount owing to SARS. One cannot assume that there was no intervening reduction in the loan account between 28 February 2014 (when the amount owing to the Trust was R81 069 802) and 31 January 2015 (when the amount was R85 383 963). Quite possibly, for example, money raised by NDFT on overdraft with Grindrod or other cash resources on hand were used, after 28 February 2014, to reduce the loan account before it was again increased to the amount reflected as at 31 January 2015.

[78] One of the assets reflected in the 2013 financial statements and the management accounts is a 100% shareholding in a company called Killogie Investments (Pty) Ltd ('Killogie'). This was carried at a value of about R36 million. On 23 February 2015 NDFT and Rainbow Nation Property Fund PPC ('Rainbow') concluded an agreement in terms whereof Rainbow bought the shares in Killogie for R32 million, payable in semi-annual instalments of R4 million over the period February 2015 to September 2018. The first instalment of R4 million was paid into NDFT's attorneys' trust account prior to the granting of the provisional order. The

respondents say that upon the grant of the provisional liquidation their attorney informed the provisional liquidator of the transaction and of the funds held, with a view to transferring same to an account opened by the liquidator. These matters are confirmed under oath by NDFT's attorney.

[79] The management accounts as at January 2015 do not include Essa's claim because NDFT disputes it. If the claim were added to the balance sheet, the excess of the company's liabilities over its assets would rise to R4 344 316 before taking into account the R10 million subordination. The company had cash on hand as at 31 January 2015 of R1 293 462. Since that date it has received R4 million as a first instalment from the sale of its shares in Killogie. It is, I suppose, theoretically possible that the Trust could demand repayment from NDFT of the unsubordinated portion of its loan, being about R75,3 million, in which case NDFT would have to realise investments in order to repay both Essa and the Trust. The papers do not traverse how quickly the assets could be realised because no one has suggested that the Trust is likely to take so extraordinary a step (one which would for practical purposes entail a liquidation of the company, the very thing the Trust is resisting). I do not think I should assess NDFT's ability to pay its debts on such a far-fetched supposition. Many companies operate with substantial shareholder loan accounts and I do not think their ability to pay their debts in the ordinary course of business is ever judged on the basis that the shareholder could notionally call up the loan account at any time.

[80] A final consideration which deserves mention is that Oosthuizen spent some months assisting NDFT to obtain bank finance. He can be expected to have had access to NDFT's financial information for this purpose. He would presumably not have negotiated a R30 million overdraft with Absa if he thought NDFT was commercially insolvent.

[81] In my view, NDFT is not commercially insolvent. If in due course it were established that NDFT is obliged to pay Essa R750 000 (or perhaps R350 000, if Van der Merwe abandons in favour of NDFT his claim to a referral fee, or R325 000, if - as Oosthuizen claims - the company has already paid Essa R25 000), the company would, on the information available to me, have the liquid resources to pay

it. There are no other creditors competing for NDFT's liquid resources. It has substantial investments which could, if necessary, be realised in part to yield further cash. NDFT has hitherto received substantial financial support from the Trust. It was this very support which in the event led to NDFT's not taking up the Absa overdraft. It is most unlikely that the Trust would put NDFT's survival at risk by not providing any funds which the company might need to discharge such claim as Essa proves.[6] It seems to me completely unrealistic in these circumstances to say that NDFT is commercially insolvent.

[82] NDFT's commercial solvency, coupled with the fact that the company's largest creditor by far (albeit an insider) opposes liquidation, provides a sufficient basis for exercising my discretion against a final order. The Trust is admittedly not an independent creditor but its interests nevertheless deserve some consideration. Cloete, the chairman of the trustees, says that the Trust's beneficiaries are members of the Namaqualand community and that the Trust applies all its resources for the benefit of indigent members of that community. He says NDFT was established for the very purpose of achieving higher returns on a part of the Trust's resources for the benefit of the community, whose needs are very great.

Conclusion

[83] I have thus come to the conclusion that the provisional order should be discharged.

[84] Regarding costs, Essa succeeded in obtaining a provisional order. Nothing in my judgment shows that a provisional order was not justified on the evidence before Boqwana J and on the test applicable at the provisional stage. The costs order Essa sought was the usual one, namely that its costs be costs in the liquidation. This will fall away with the discharge of the provisional order. Essa did not in those circumstances asked for costs against NDFT. I think the parties should bear their own costs of the appearances and argument relating to the provisional liquidation.

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[6] And see Cloete's affidavit para 10 at record 131.

[85] In regard to the subsequent costs, I do not think the Trust was justified in bringing its intervention application on such short notice. The costs of 24 March 2015 were occasioned by the Trust's precipitate action and it should bear the costs of the appearance on that day.

[86] As to the remaining costs, including those reserved on 31 March 2015, they would ordinarily follow the result. However, and after careful consideration, I have concluded that this would not be a just outcome. A large part of the intervention and amplified opposition were devoted to questions on which, had a final decision thereon been needed, I would probably have decided in Essa's favour. The only point on which the respondents have definitely succeeded is the invocation of my residual discretion against a winding-up order. In the circumstances I believe the parties should bear their own costs.

[87] I make the following order:

(a) The provisional order of liquidation granted on 2 March 2015 is discharged.

(b) The intervening creditor shall pay the applicant's costs of the appearance on 24 March 2015.

(c) Save as aforesaid the parties shall bear their own costs in respect of the proceedings for provisional and final liquidation.

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ROGERS J

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