
SOUTH AFRICA / JUDGMENT

Havenga v Diovision (Pty) Limited (86173/2014) [2017] ZAGPPHC 1207 (15 June 2017) [2017] ZAGPPHC 1207

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo

CASE / FILE NUMBER

86173/2014

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 86173/2014

15/6/2017

In

the matter between: JOHANNES
 ANDRIES HAVENGA
 IDENTITY
 NUMBER:[....]
 Applicant
 and
 DIOVISION
 (PTY) LIMITED
 REGISTRATION
 NUMBER:[....]
 Respondent

JUDGMENT

TEFFO, J:

INTRODUCTION

- [1] The applicant seeks an order for the provisional winding-up of the respondent. The respondent opposes the application.

BACKGROUND

- [2] On 16 July 2014 the applicant and Mr Johannes Rammutloa Modise (Mr Modise) who allegedly represented the respondent at the time, concluded a consultancy agreement in terms of which the applicant as consultant, undertook to render the service of procuring a Home Loan Property in Possession book from Nedbank at discounted rates after he established

what properties were available and entered into negotiations with Nedbank to discount the housing loan book to them. The list of

properties that formed part of the housing loan book and agreed to be purchased by the respondent was annexed to the papers and marked annexure "A" to the Consultancy Agreement and "JH2" to the Founding Affidavit.

- [3] The applicant performed his obligations in terms of the Consultancy Agreement and procured a Home Loan Property in Possession Book from Nedbank at discounted rates and on 7 August 2014 the offer to purchase was accepted by Nedbank subject to a deposit of R220 000,00 being paid by the respondent in favour of Nedbank.
- [4] The respondent eventually paid the amount of R220· 000,00 to Nedbank and through its attorneys of record wrote a letter to Nedbank confirming that they held sufficient funds in trust to keep it covered for the amount offered in lieu of the package sale as the properties were referred to in annexure "A".

[5] The applicant sent an invoice for the services rendered to the respondent and also had a telephone discussion with the respondent's attorney regarding the matter. No payment was made and on 12 September 2014 he

instructed his attorneys of record to direct a letter to the respondent in terms of which he demanded payment of an amount of R369

600,00 as per the invoice by not later than 15 September 2014. Payment was not made instead the respondent through its attorneys

acknowledged receipt of his letter of demand and advised that the letter would be sent to Modise for his instructions.

[6] On 22 September 2014 the respondent requested a copy of the consultancy agreement, advised that it was of the opinion that the matter could be settled and asked if the applicant was willing to meet with it to discuss a possible settlement.

[7] The applicant through his attorneys responded to the letter by attaching the consultancy agreement and again demanding payment. No payment was made and in a letter dated 8 October 2014 the respondent's attorneys advised that they were waiting for instructions from their client and also indicated that the applicant should institute legal action.

[8] In a letter dated 10 October 2014 the applicant's attorneys gave a history of the matter and further demanded payment again from the respondent. This led to the launching of the present application.

[9] In opposition thereof the respondent raised the following issues: That the applicant does not have locus standi to demand payment of monies in the form of commission from it, he acted as an Estate Agent without being the holder of a Fidelity Fund Certificate in terms of section 26 of the Estate Agency Affairs Act, No 112 of 1976 ("the Act"), it denied that it was represented by Modise and/or that Modise was authorised and empowered to act on its behalf and represented it when the Consultancy Agreement was entered into, it denied the Consultancy Agreement and its terms and pointed out that it only became aware of the agreement on 6 August 2014 at a meeting when the offer of acceptance (JH4) was discussed. According to it Modise acted in his own personal capacity when he concluded the consultancy agreement with the applicant. The respondent alleged that it was later agreed between it and Modise that the respondent would purchase the properties. It contended that it has never at any stage agreed to pay the applicant a commission. It denied the contents of the invoice sent to it by the applicant and contended that a copy of the invoice of the same date was sent to Modise. The respondent also denied that it is insolvent.

APPLICABLE PRINCIPLES

- [10] The power of the court to grant a winding-up order is a discretionary power. Being a judicial discretion, the court shall have regard to the grounds and the reasons relied upon for moving the application. Previous decisions on the circumstances under which the court has granted winding-up orders can at best serve as guidelines. See *SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk* 1973 (3) SA 371 (C) at 3738-C.
- [11] In an application for the winding-up of a company under section 346(1)(b) of the Companies Act, 61 of 1973 (the Companies Act), the applicant must be a creditor including a 'contingent' or 'prospective' creditor. Whether the applicant is a creditor of the company sought to be wound-up, is a matter to be determined in the light of the totality of the facts adduced and the rule of law relied upon. It is unhelpful as it is inappropriate to list every class of claim which would justify an applicant being regarded as a creditor. There are bound to be infinite combinations of facts and law which may constitute a valid claim against the debtor company. A creditor under section 346(1)(b) may seek to enforce a valid claim arising from the common law, or under some statute or under any remedy which may be properly derived from the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution). The claim need not be liquidated.
- [12] A creditor would be one who has an unliquidated claim for damages arising from breach of contract. See *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) where Trengove J stated the following:
- "It seems to me, in the light of these authorities, that a contingent or prospective creditor may be defined as one who by reason of some existing *vinculum juris* has a claim against a company which may ripen into an enforceable debt on the happening of some future event or on some future date." (at 528C-D)
- "If this approach is correct, it follows, in my view, that an applicant who has a valid claim against a company for damages for breach of contract is a contingent or prospective creditor of such company and, as such, he would have *locus standi* to present a petition for the winding-up of a company."
- [13] It seems clear that the applicant must rely on an existing *vinculum juris* between himself and the debtor company. Such an enforceable legal obligation may be a prospective liability in the sense that it is enforceable on some future date or on a date determinable by reference to some future date or event. Such obligation may be a contingent liability in that it is enforceable upon the occurrence of some future event. Equally clear is that the obligation may arise *ex contractu*, *ex delicto* or *ex variis causa* inclusive of any constitutional remedy which creates an obligation which may be validly enforced in a court of law.
- [14] The onus is on the applicant to establish that he or she is a creditor with the requisite *locus standi* to apply for the winding-up of the respondent. See *Commonwealth Shippers Ltd v Mayland Properties {Pty} Ltd* 1978 (1) SA 70 (D) at 72C-E.

[15] Where the claim of the applicant is disputed, the respondent bears the onus to establish the existence of a bona fide dispute on reasonable grounds. See *Porterstraat 69 Eiendomme (Pfy) Ltd v PA Venter Worcester (pty) Ltd* 2000 (4) SA 598 (C) at 606. The dispute raised by the debtor company must be in good faith. It must be genuine and honest. The dispute so raised must of course be based on reasonable grounds. Therefore, a defence which is inherently improbable or patently false or dishonest would not qualify as a bona fide dispute:

"A debt is not bona fide disputed simply because the respondent company says that it is disputed. A dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression 'genuine dispute' connotes a plausible contention requiring the same sort of consideration as 'serious question to be tried'."

See Joubert (ed) *The Law of South Africa* Vol 4 Part 3 at para 113.

[16] In *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) Corbett JA explains the nature of the onus which rests upon the respondent in a winding-up application in the following terms:

"In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will refuse the winding-up order.

The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds." (my emphasis)

LOCUS STANDI

[17] The respondent contends that on the applicant's version, he would procure a Home Loan Property in Possession Book from Nedbank, these being properties, and that he would earn a commission of 8% on the total value of property sold by Nedbank. He is classified as an Estate Agent as he is receiving monies in the form of a commission which is

a percentage of the value of property purchased or sold. He is not in possession of the Fidelity Fund Certificate as prescribed by the Act and therefore not entitled to remuneration.

Accordingly, so it was argued, he does not have the necessary locus standi and authority to demand payment from the respondent.

[18] On the other hand it was argued on behalf of the applicant that it is not enough for the respondent to contend that he performed the acts of an estate agent in accepting the mandate, finding the buyer and being

the effective cause of the transaction between Nedbank and the respondent. It was further argued that it is also not enough to

contend that by claiming commission he was performing the act of an estate agent. It is only once it is alleged and proven that he held himself out as a person who either directly or indirectly advertised that he performed one or more of the acts which defines an estate agent that reliance can be placed on sections 26, 34 and 34A of the Act.

[19] The Act defines an estate agent as follows:

"(a) means any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person -

(i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or

(ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor, or

(iii) ...; or

(iv) ...1."

[20] Section 26 of the Act reads:

"No person shall perform any act as an estate agent unless a valid fidelity fund certificate has been issued to him or her and to every person employed by him or her as an estate agent and, if such person is-

(a) a company, to every director of that company; or

(b) a close corporation, to every member referred to in paragraph (b) of the definition of 'estate agent' of that corporation."

[21] Section 34 provides that should the applicant not have a Fidelity Fund Certificate, he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding RS 000,00 or to imprisonment for a period not exceeding five years or to both a fine and imprisonment.

[22] Section 34(A)(1) reads:

"(1) No estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (a) of the definition of 'estate agent', unless at the time of the performance of the act a valid fidelity fund certificate has been issued -

(a) to such estate agent; and

(b)if such estate agent is a company, to every director of such company, or if such estate agent is a close corporation, to every member referred to in paragraph (b) of the definition of 'estate agent' of such corporation".

[23] In support of his argument, the applicant referred to the matter of Rogut v Rogut 1982 (3) SA 928 (A) where an enquiry into the definition of an estate agent was made. The respondent in the matter claimed 10% commission of the purchase price following the sale of certain chain stores where he found and introduced a buyer who purchased the chain stores. The appellant intended by way of an amendment to his plea, to raise an alternative defence to the effect that the respondent acted as an estate agent, he was not the holder of a valid Fidelity Fund Certificate and he was therefore precluded from claiming payment of the commission. The respondent objected to the proposed amendment on the basis that the intended alternative defence was bad in law. The court was also required to interpret the definition in section (a)(i).

[24] At paragraphs 937G-938C the court said the following:

"First, the opening word in the definition is 'means'. As Broome JP observed in another context in *Warwick Investments · (pty) Ltd v Maharaj* 1954 (2) SA 470 (N) at 4728, that word 'indicates that what follows is in the nature of a precise definition'. Obviously it is not as expansive as 'includes'.

Second, as counsel for the respondent submitted, it seems clear that the words 'for the acquisition of gain' modify the holding out or the advertising, rather than the selling, buying or letting of property. This connotes that an estate agent, as defined,

is a person who is inter alia looking for business. See also the Afrikaans text, which was signed, which recites 'iemand wat, met die oog op winsbejag'.

Third, a person who merely does one or more of the acts listed in subpara (i) to (iii) does not thereby bring himself within the definition of estate agent unless he has also held himself out or advertised, for the acquisition of gain, that he is a person who does these things. I agree with Marais AJ that the contention on behalf of the appellant 'really came to this: if a person performs any of the acts listed in the definition, he is ipso facto holding himself out as a person who performs that act and is therefore an estate agent by definition. If this submission is sound, it would mean that the words "in any manner holds himself out as a person who, or directly or indirectly advertise that he", are redundant and mere surplusage. One does not lightly conclude that words in a statute are redundant; certainly nor when they are deliberately employed in a definition clause ... If the Legislature had intended that the performance simpliciter of any act listed in paras (a)(i), (ii), (iii) and (iv) of the definition of an "estate agent" should render the person performing it subject to the Act, I would have expected it to say so'.

In the result, the key words in the definition of estate agent are 'holds out' or advertises. They must precede the instructions or mandate. Without such 'holding out' or 'advertising' there cannot be an 'estate agent' as defined."

[25] The court went further to say the following at 938G:

"Of course, he first has to perform the act 'as an estate agent' before the section comes into operation against him; and he cannot be an estate agent (as defined) unless he first

holds himself out as or advertises that he is a person who sells immovable property or business undertakings, etc. So, the fundamental enquiry is still whether he held himself out or advertised that he is such a person."

[26] At 939E the court concluded by holding that:

"What the Act does is to clip the wings of those who for gain hold themselves out as sellers of immovable property, etc or advertise that they are such persons. They must apply for fidelity fund certificates and comply with the requirements of the Act, including trust funds and audits. The Act does not express an intention to apply to the case of a member of the public who has neither held himself out nor advertised as aforesaid and who accepts a mandate offered by a friend to find a buyer, etc, on a commission basis. One does not impair the freedom of the individual unless compelled by law to do so. If it is contended that the Act contains a clear implication to curb such freedom, I would say that an implication cannot be clear if it has to be astutely winkled from contextual crevices."

APPLICATION OF THE INTERPRETATION TO THE FACTS

[27] In his founding affidavit (FA) the applicant alleges that he was approached by Mr Ben Boy Tsebe who introduced him to Madise. Madise indicated to him that he represented the respondent (which allegation is denied by the respondent) and the respondent was interested in acquiring a housing loan book in bulk. He advised him that the respondent had full funding available to acquire a housing loan book in bulk. He set about the task to establish what properties were available and entered into negotiations with Nedbank to discount the housing loan book to them. After discussions between him and Madise, a consultancy agreement was concluded. See paragraphs 4.1 to 4.4 FA

[28] It is clear from the above averments that the applicant received instructions from Madise for the sale of the housing loan book without holding himself out or advertising for the instruction. The actions of holding himself out as or advertising that he is a person who sells immovable property or business undertakings, etc must precede the instructions or mandate. Nowhere in the answering affidavit (AA) has it been suggested that the applicant held himself out as or advertised that he sells immovable property for commission or business undertaking prior to him getting the instructions or mandate. There are also no allegations made in the AA that the applicant's ordinary business is that of an estate agent. No allegations were made in the correspondences which were exchanged between the parties' attorneys prior to the launching of the application that the applicant is an estate agent and/or held himself out as such or advertised that he sells immovable property for commission and that he has therefore contravened the Act.

[29] The principles enunciated in Rogut above were adopted in Estate Agents Board v Mahadeo 1991 (3) SA 49 (N) at 540 where Howard JP remarked as follows:

"Secondly, the criterion for determining whether a person is an 'estate agent' as defined is not the nature of his activities or the services he renders but whether (for the acquisition of gain) he holds himself out as, or advertises that he is a, person who (on the instructions of or on behalf of another) renders the services listed in para (a)(i)-(iv) of the definition. The key words in the definition are 'holds out' and 'advertises!'"

[30] It is not suggested in the papers that the applicant verbally or by signboard, letterhead or pamphlet held himself out as a person who sells property for commission and neither has it been suggested that he directly or indirectly advertised to that effect (see Rogut v Rogut). Merely accepting a proffered mandate does not suggest that the applicant held himself out as a person who sells immovable property, etc.

[31] I am persuaded on the papers as argued by the applicant that he did not hold himself out or advertise, within the meaning of the definition of an 'estate agent' in section 1. He did not become an estate agent as defined. He did not perform any act as an estate agent. He was therefore not obliged to take out a fidelity fund certificate and the sections referred to by the respondent, viz sections 26, 34 and 34A, do not apply to him.

[32] The argument by the respondent that the applicant does not have locus standi to demand monies in the form of a commission from it as he acted as an estate agent without being in possession of a Fidelity Fund Certificate therefore fails as it is without merit.

THE AGREEMENT

[33] The respondent has attached a confirmatory affidavit by Modise to support its denial of the Consultancy Agreement. Modise confirms that he entered into negotiations with the applicant for the purchase of certain properties in July 2014. He states that he was not authorised to act on behalf of the respondent and has never met with Mr Johan le Roux Human, the sole director of the respondent prior to that. Further to this he confirms that when he signed the Consultancy

Agreement he did not have the authority to act on behalf of the respondent and that the respondent at that stage and in meetings

subsequent thereto, has not agreed to pay the applicant a commission or any amount whatsoever.

[34] The parties in the Consultancy Agreement are the applicant who is referred to as the Consultant and Mr Johannes Rammutloa Modise represented by Diovision (Pty) Ltd who is referred to as the company. The identity numbers of both Mr Havenga, the applicant and Mr Modise and their addresses have also been included. Clause 1 of the agreement reads:

"1. Services

The Consultant agrees to undertake and complete the Services in accordance as specified in paragraph 1.1. As the only consideration due to the Consultant, regarding the subject matter of this Agreement, The Company will pay the Consultant in accordance with paragraph 9 hereunder.

1.1 The Consultant undertakes to procure a Homeloan Property in Possession book from Nedbank at discounted rates as reflected on Annexure A, attached to this Agreement which annexure shall form an integral part of this Agreement. The Consultant further undertakes to facilitate and introduce any such other business that the Consultant may source from time to time, relevant to the Company's business, and the Company undertakes not to approach, communicate in any form or manner with the source or other intermediaries of business that the Consultant has introduced to the Company ... "

Clause 9 reads:

"Fees

The fees payable shall be calculated at 8% of the purchase price determined and agreed to by the Financial Institution, as specified on Annexure A, and be payable upon signature of the Purchase Agreement received from the Financial Institution by both parties."

On the last page of the agreement the company's name is reflected as that of the respondent and the signature is that of Mr Modise.

[35] It is common cause between the parties that the Consultancy Agreement was entered into on 16 July 2014. A reading of this agreement refers to the parties as the applicant and the company, Diovision (Pty) Ltd. Throughout the agreement reference is made to the consultant and the company. Nowhere does the agreement refer to Madise acting on his own. Mr Human who deposed to the respondent's answering affidavit states that he was not aware of the existence of the Consultancy Agreement until on 6 August 2014 at a meeting when "JH4" attached to the applicant's affidavit was discussed. "JH4"

is a letter from Nedbank addressed to the applicant notifying him that Nedbank has accepted the offer to purchase. The offer to

purchase relates to the properties listed in annexure "A" to the Consultancy Agreement and it was the product of the services rendered by the applicant in terms of the Consultancy Agreement. In the Offer: Acceptance letter the respondent is referred to as the purchaser. There can be no way in which the applicant would not have known if there was a separate independent agreement from the Consultancy Agreement between the respondent and Modise as alluded to by the respondent in its papers. In terms of annexure "RA1", the resolution passed at a meeting of the directors of Diovision Proprietary Limited (the respondent) on 30 July 2014, it was resolved that the respondent buys the properties as per annexure "A" from Nedbank and that Modise is authorised to sign the Offer to Purchase necessary for the sale of the properties as per annexure "A" on behalf of the respondent and that Johan le Roux Human in his capacity as director or Johannes Rammatloa Madise and/or Jacobus Marthinus van Staden in his/her capacity as

representative be and is hereby authorised to sign the necessary for the registration of transfer in the name of the respondent.

[36] The above resolution was only signed 14 days after the Consultancy Agreement was concluded. The respondent does not explain in its papers as to how it happened that it eventually purchased the properties listed in annexure "A" which formed the integral part of the Consultancy Agreement that was entered into by and between Modise and the applicant if it was not part thereof as contended in its papers. It does not make sense that Modise who was part of the Consultancy Agreement, who did not represent the respondent when the Consultancy Agreement was entered into, which agreement led to the Offer to Purchase, eventually is authorised to sign the Offer to Purchase the same properties listed in annexure "A" attached to the Consultancy Agreement on behalf of the respondent. The contention that at a later stage the respondent agreed with Modise that it will buy the properties is far-fetched and untenable in my view taking into account the facts presented and the annexures. It also does not

make sense as to why if indeed the respondent was not part of the Consultancy Agreement, did it not raise this dispute in its correspondences with the applicant and wait for the applicant to launch the application in order to dispute the agreement in its

opposing papers.

[37] The averments made by the respondent in its papers denying the Consultancy Agreement, the authorisation thereof by Modise to represent it when the Consultancy Agreement was entered into and the fact that it never agreed to pay the applicant his consultancy fee are rejected as being far-fetched and untenable. See *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 (SCA) at 307D. In my view, the denials thereof do not raise real, genuine and bona fide disputes of fact. I find that the allegations made by the applicant are credible and consistent with the annexures.

WINDING-UP

[38] The respondent contends that it is not insolvent or in financial distress. It has attached annexure "E" to the answering affidavit to prove that it has paid an amount of R400 000,00 (four hundred thousand rand) into the trust account of its attorneys of record as security. It continues in its answering affidavit to allege that the reason for the non-payment is because it denies being indebted to the applicant for any amount whatsoever. Further to this the respondent has filed a supplementary affidavit in which it contends that it sent a letter through its attorneys to the applicant's attorneys of record on 1 September 2015 advising them that security in the amount of R412 000,00 (four hundred and twelve thousand rand) had been paid into the trust account of the attorneys of record. It was also alleged that the respondent has more than 30 unencumbered properties.

- [39] I have already found that the disputes of fact raised by the respondent are not real, genuine and bona fide. I have rejected them as untenable and far-fetched. It therefore follows that the application for the provisional winding-up of the respondent has not been disputed on bona fide and reasonable grounds. A debt is not bona fide disputed simply because the respondent company says it is disputed. See *Kyle v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T) and *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd*. According to the papers filed of record the security set for the amount claimed and attached to the answering affidavit and the proof thereof attached to the respondent's supplementary affidavit do not tally. See annexure "F" to the answering affidavit on page 86 and pages 131 to 133 of the papers.
- [40] The applicant demanded payment of his debt on numerous occasions from the respondent through the correspondences that were exchanged from 6 August 2014 until he launched the present application. The respondent has failed to pay the debt. The applicant alleged that the respondent is unable to pay his debt as contemplated in section 345 of the Companies Act, No 61 of 1973. The applicant is a creditor of the respondent. He has the requisite locus standi to bring the present winding-up proceedings. I am satisfied that the applicant has made out a case for the provisional winding-up of the respondent.

[41] Consequently I grant an order in the following terms:

41.1 That the respondent is provisionally wound-up and that a rule nisi is issued returnable on a date to be arranged with the Registrar calling upon the respondent and any interested parties to appear before this Court on the return date and advance reasons, if any, why a final winding-up order should not be granted;

41.2 That a copy of the provisional winding-up order should be served on the last known registered address of the respondent; being No 179 Lynnwood Road, Pretoria, Gauteng Province;

41.3 That a copy of the provisional winding-up order should be published once in the Government Gazette and The Star Newspaper;

41.4 That the costs of the winding-up application are costs in the winding-up of the respondent.

M J TEFFO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

FOR THE APPLICANT

I OSCHMAN

INSTRUCTED BY

PHILLIP VENTER ATTORNEYS

FOR THE RESPONDENT

BROOK STEVENS

INSTRUCTED BY

MACHOBANE KRIEL ATTORNEYS

DATE OF

JUDGMENT

15 JUNE 2017

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