

SOUTH AFRICA / JUDGMENT

Investec Bank Limited v Kulu Sand Distributors and Plant Hire CC (695/2021)

[2023] ZAMPMHC 17 (16 May 2023)

[2023] ZAMPMHC 17

COURT

Middelburg High Court, Mpumalanga

BEFORE

Vukeya

CASE / FILE NUMBER

695/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

MPUMALANGA DIVISION-

MIDDEBURG [LOCAL SEAT]

CASE NO:

695/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

(3) REVISED

16/05/2023

SIGNATURE:

In the matter between:

INVESTEC BANK

LIMITED APPLICANT

And

KULU SAND DISTRIBUTORS

AND PLANT HIRE CC

RESPONDENT

JUDGMENT**VUKEYA J**

- [1] The applicant brings an application for the provisional winding up of the respondent and seeks an order to grant a rule nisi calling upon all interested parties to show cause, if any, why the respondent should not be placed under final liquidation. It asserts that the respondent is to be wound up as it is unable to pay its debts, alternatively on the grounds that it is just and equitable to do so.
- [2] The applicant is a public company with limited liability, duly registered and incorporated in terms of the company laws of the Republic of South Africa. Its principal place of business is situated at G[...] D[...], in Sandton, Gauteng. The applicant alleges that it is the creditor of the respondent for an amount of R9 ,825, 434.80 which, according to the applicant is an aggregate current outstanding balance owing in terms of the first and second Master Lease Agreements and Schedule.
- [3] The respondent is a close corporation duly registered and incorporated in terms of the Close Corporations Act read with the Company Laws of the Republic of South Africa. Its registered office and principal place of business are situated at Naauwport, Emalahleni, Mpumalanga. The applicant alleges that the respondent is its debtor for the aforesaid amount.
- [4] The grounds for the final winding-up of a close corporation are similar to those that are applicable for the winding-up of a company. Where one applies for the winding-up of a close corporation, the grounds set out in Section 344 and 345 of the Companies Act 61 of 1973 must be relied on.
- [5] It is the version of the applicant that the respondent concluded a written Master Lease Agreement (the “MLA”) with Capital Acceptances (Pty) Ltd (“Capital”) while the respondent was represented by Pravesh Pahaladah Ganes. The MLA was concluded on 06 February 2017 and the applicant’s version is further that on 01 April 2019 Capital ceded all its rights and delegated all its obligations in and to the first MLA and Schedules to the Applicant.
- [6] The second MLA was allegedly concluded by the applicant and the respondent on 6 September
- 2019. The applicant was represented by Shivani Ramsaran and Kumarie Ruby Pillay while the respondent was represented by Pravesh Pahaladah Ganes. The first MLA relates to several goods leased to the respondent between 06 February 2017 and 26 March 2019 while the second MLA relates to goods leased to the respondent between 09 September 2019 and 15 October 2019.

- [7] During 27 January 2020, PAS attorneys, representing the respondents, forwarded a letter to the applicants requesting information relating to the various schedules of the MLA. The applicants, through its attorneys on 19 February 2010 caused a letter to be sent to the respondent's attorneys in response to the queries made in the letter.
- [8] After the respondent's attorneys acknowledged receipt of the applicant's Attorneys letter, nothing further came from the respondents. The applicant's Attorneys then sent an email to the respondent's Attorneys advising that the respondent was in breach of the first and second MLA's and schedules and demanded payment of the arrears within seven (7) days, failing which the applicant would cancel the agreements.
- [9] It is also the version of the applicant that despite having sent a notice to the respondents through its attorneys, it also sent a letter of demand to the respondents on 3 March 2020 demanding payment of the aforesaid amount within seven (7) days. No response was forthcoming from the respondents and the applicant duly cancelled the agreements and schedules. A letter confirming cancellation of the first and second MLA's and Schedules was dispatched to the respondent and its Attorneys.
- [10] During June 2020 after the agreements had been cancelled a payment of R200 000, 00 was made by the respondent. This payment was divided equally amongst the various accounts. A few meetings were held on 5 October 2020 and 18 November 2020 to discuss a settlement proposal of the respondent's accounts. Although in the meeting of the 5th of October the respondent requested an extension of the payment period to 5 years and that the arrears be debited at the end of the period of the Schedules and repaid as a balloon payment, this proposed memorandum of agreement did not succeed as the respondent's representative fell ill and contracted Covid-19.
- [11] It is the applicant's version that a string of messages were sent to the respondent requesting them to make contact and up to the date of the drafting of the applicant's affidavit, no response had been forthcoming from the respondent. It is therefore the applicant's submission that the respondent is unable to pay its debts and therefore commercially insolvent in terms of section 69 (c) of the Close Corporation Act read with section 344 (f) and section 345 (1) (c) of the Companies Act. Alternatively, the applicant submits that it is just and equitable to wind up the respondent to allow a liquidator to investigate the true affairs of the respondent and act in the advantage of the creditors.
- [12] According to the respondent, the applicant has failed to establish its locus standi to sue in terms of the first MLA because the entity purporting to have ceded the contract is not the same entity which concluded the first MLA. It contends that the first MLA and its schedules was concluded between the respondent and Capital. It is the version of the respondent that the Sale and Restructure Agreement was concluded between the Applicant and the seller named Reichmans (Pty)

Ltd.

- [13] The respondent further denies that it was in arrears with its payments and contends that the applicant was disentitled to cancel the agreements. Although the respondent admits that it suffered cash flow problems resulting from the Covid-19 Lockdown periods, it asserts that it never defaulted on its payments before Covid-19 lockdown.
- [14] Regarding the interest rates, the respondent stated that it relied on the representation made by Reichmans' broker named "Du Toit" that the interest rate would be the prime rate, when the respondent learned that more would be charged on the interest rate, i.e. prime plus 9%, it took the issue up with the applicant by email, but received no response from the applicant.
- [15] The respondent avers that the Schedules to the MLA's were signed by the respondent in error. It contends that Du Toit innocently, or negligently alternatively knowingly failed to disclose such a material fact to the respondent regarding the high interest rate otherwise the respondent would not have concluded the deals at such a high rate.
- [16] The respondent stated in its affidavit that it was prepared to settle the matter amicably with the applicant but contends that it never agreed to the high interest rate charged. According to the respondent, had the correct interest been charged, the amount already paid would be double of what was truly owed. It further denies that any consensus was reached regarding the amounts payable and the "Draft Agreement".
- [17] It is therefore the respondent's defence that the applicant overcharged it with R1 529, 138. 97 and that it intends to institute a counter-claim for such an overpayment against the applicant. The respondent further contends that, had the applicant charged proper interest, the respondent would not have been in arrears at the time of the demand and therefore the applicant was not entitled to cancel the MLA's or to launch this application.
- [18] Furthermore, the respondent avers that the granting of a liquidation order against it is not just and equitable as it is still trading; it is expecting substantial payments from Eskom and it has a substantial counter-claim against the applicant. It further contends that the applicant's claim is bona fide disputed and prays for the application to be dismissed.
- [19] The crisp issues for determination in this application are as follows:
- 19.1 Whether the respondent is indebted to the applicant and whether or not the respondent is unable to pay its debts; and should be wound-up.
- 19.2. Is the debt disputed on bona fide and reasonable grounds?
- [20] Section 344 of the Companies Act 61 of 1973 ("the Act") lists the numerous circumstances under which a company may be wound up by a court. The most relevant for this particular application is section 344 (f), where the company is unable to pay its debts as described in section 345. Section 345 provides that:
- (1) A company or body corporate shall be deemed to be unable to pay its debts if-

- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due–
- (i) has served on the company, by leaving the same as its registered office, a demand requiring the company to pay the sum due; or
- (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
- (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.

[21] It will be beneficial for purposes of this application to refer to the “Badenhorst Rule” as it was referred to mostly by the parties in their submissions. This rule was thoroughly explained in the matter of Gap Merchant Recycling CC v Goal Reach Trading 55 CC 2016 (1) SA 261 WCC, where Rogers J held as follows:

“Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the ‘Badenhorst rule’, after one of the leading cases on the subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H-348C. A distinction is thus 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 respondent’s liability, on the other hand, the question is whether the applicant’s claim is disputed on reasonable and bona fide 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).”

[22] Simply put, the Badenhorst principle provides that where the respondent’s indebtedness has been prima facie established by the applicant, the onus is on the respondent to show that this indebtedness is indeed disputed on bona fide and reasonable grounds. The rule serves as a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds.

[23] In LAWSA Vol.4 AD 3 paragraph 113 which dealt with the meaning of "bona fide dispute" on reasonable grounds it is stated that: "A debt is not bona fide disputed simply because the respondent company says that it is in dispute. The 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 a 'serious question to be tried'. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis of an honestly held belief that it is not payable and is not disputed merely for the purposes of delay or obstruction. 'Genuine' in this context means not fabricated for the purposes of the proceedings or not just thought up or brought forward without genuine belief. There can be no genuine dispute if there are not substantial grounds for disputing the debt."

[24] According to the applicant, the respondent is unable to pay its debts. It relies on section 345 (1) (c) which provides that "a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that it is unable to pay its debts". The applicant submits that the respondent has admitted to having cash-flow problems after Covid-19 Lockdowns and has made numerous

promises to make payments which have failed.

[25] The applicant's contention is that, the fact that the respondent met with Mercedes Benz for restructuring of its instalment repayments is an indication of the respondent's inability to pay its debts. Furthermore, it avers that the fact that the respondent's employees were also disgruntled by the respondent's failure to pay staff bonuses during December 2020 should be taken into consideration when deciding whether the respondent is able to pay its debts.

[26] The respondent avers that the applicant misrepresented itself and made the respondent to believe that the interest rate charged was the prime lending rate but instead the applicant charged it the prime rate plus 9%. This according to the respondents, led to the respondent's indebtedness to the applicant. It submits that when Du Toit misrepresented to it that interests would be charged at the normal prime rate instead of prime +9%, he represented the applicant and therefore the applicant should be bound by its agent's misrepresentation.

[27] In casu, the applicant's duty is to show to the court that the debt prima facie exists and it has relied on the first and second MLA's and schedules. This has not been disputed by the respondent. The onus is therefore on the respondent to show that the debt is bona fide disputed on reasonable grounds. This is normally the test when dealing with whether a provisional order for liquidation should be granted.

[28] The respondent's dissatisfaction lies on the interest rates charged as compared to what it believed it to be. It was charged "prime rate, plus 9%" whereas it believed the interest rate to be "prime rate". The respondent bases its belief to an alleged misrepresentation made by Du Toit and urges the court to find that the applicants cannot distance themselves from Du Toit

who acted as their agent. Whether Du Toit acted as an agent for the applicant is an issue which cannot be decided on the papers. This is the essence of the respondent's defence. It must be borne in mind that the respondent has not disputed its indebtedness to the applicant. Its defence is, if simply put, that the interest rate charged is higher than what they believed it to be and are alleging the existence of a counter-claim in the amount of approximately R 1 529 138. 97.

- [29] The parties' affidavits reveal some disputed facts with regards to a number of issues. The first issue relates to whether Du Toit worked as an agent for the applicant; the second issue is whether he made that misrepresentation to the respondent; the third issue is whether the MLA's did reflect the actual interests rate to be applied to the instalments and the fourth issue is whether the respondent was overcharged due to the high interest rate it alleged came as a result of the misrepresentation.
- [30] In an affidavit deposed to by Du Toit, he denies that he acts as an agent for financial institutions and also denies that he ever gave out to the respondent that he has the authority to bind the applicant in his dealings with the respondent. He states how it was implied by the applicant's representative when it agreed to provide finance to the respondents that the respondents would have to pay 'higher than normal' interest rates. He further states that the respondent's representative never queried the arrangement.
- [31] This is in direct contrast with the version of the respondent whose defence is based mostly on the alleged misrepresentation of Du Toit where it concerns the high interest rate as well as the fact that it was over-charged. Already in an email dated 29 February 2020, the respondent indeed admits it was in arrears with its payments and suggests a repayment plan to the applicant which would decrease its monthly instalment. What I find significant in this correspondence is that the respondent suggests a re-evaluation of the interest rates and already stating that it was advised that the rate was prime at the time of signing the agreements.
- [32] The applicants knew about the respondent's defence when it launched the application. It avers however that the total indebtedness of the respondent is over R10 million of which R7 million is in respect of the Capita lAcceptences Transactions and R2.1 million is in respect of the transactions concluded directly with the applicant. Almost half of the indebtedness is in respect of the future capital and the other half of the indebtedness represents arrears of over R5 million at January 31,
2021. According to the applicant, even if the respondent had a counter-claim for an over-payment of finance charges of approximately R1,5 million which could be set off, at the end of January 2021, the arrears would be approximately R3, 5 million and the total indebtedness to the applicant approximately R8, 5 million.
- [33] This may be so. However, I hold the view that the respondent's defence has merit. If indeed Du Toit, although he denies it, misrepresented to the respondent that the interest rate would be at prime rate rather than prime plus 9%, this has certainly affected the instalments to be

re-paid on a monthly basis. I am inclined to agree with the respondent that, if one would have regard to the interest rate which according to the respondent was agreed with, and that the sums be recalculated based on its version of the interest rate, then it was not in arrears when the application was launched.

- [34] Basically, regarding the debt it owes to the applicant, the respondent places in issue the interest rates charged, the relationship between the applicant and Du Toit, the manner of calculation if regard is had to what it alleges should have been the interest rate had there been no misrepresentation, and the quantum of his outstanding debt vis-à-vis his alleged counter-claim. The respondent raised these issues with the applicant even before the launching of the application and I cannot find that these issues are not genuine.
- [35] The applicants have submitted that because the respondent could not pay staff bonuses and was making arrangements with Merc for reduced instalments then it is unable to pay its debts. I am disinclined to agree with the applicant. There is no evidence on record to indicate that the respondent could not afford to pay staff salaries, a monthly obligation it has towards its employees. The 'Badenhorst Rule' which provides that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds, finds application in this application. Having had the knowledge of the fact that there were issues regarding the relationship between itself and Du Toit and the alleged misrepresentation on the interest rates applied, the applicant proceeded with a liquidation application rather than action proceedings. My considered view is that the applicant opted to use the winding-up proceedings to enforce payment of a debt which it knew would be disputed on reasonable grounds.
- [36] In *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) it was held that if the respondent, on a balance of probabilities, shows that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, then the court shall not grant the order for winding-up, provisional or final. The respondent need merely show that its indebtedness is disputed on bona fide and reasonable grounds to successfully oppose the applicant's application.
- [37] I am therefore of the considered view that the respondent has disputed the applicant's claim on reasonable and bona fide grounds.
- [38] Regarding the issue of reserved costs, the applicant, on the 12th of April 2022, when the application was to be heard, it was removed from the roll as the court bundle was not properly indexed and paginated and the Certificate of tendered security was also filed on the date of the hearing, that is, 12 April 2022. The respondent

alleges that on the 12th of April 2022 it employed services of a Senior Counsel and when the application was removed from the roll it was due to no fault on the side of the respondent.

[39] Counsel for the applicant provided an explanation for the late filing of the Certificate of Tendered Costs, he also referred to the explanatory affidavit of Altus Andre Nel which dealt with the challenges experienced from the Master's Office in Middelburg. All these challenges cannot be attributed to the respondent and therefore it should not be affected by an adverse court order. I am therefore of the view that the applicant should bear the costs of the 12th of April 2022.

[40] In the result I make the following order:

40.1. The application is dismissed, with costs.

40.2. The applicant is ordered to pay the costs of the 27th October 2022 and costs of 12 April 2022 on a party and party scale.

40.3. Costs of 12 April 2022 shall include costs of Senior Counsel.

VUKEYA LD

JUDGE OF THE HIGH COURT MPUMALANGA

For the Applicant: John Peter SC Attorneys for the Applicant: DRSM Attorneys C/O ALTUS NEL, WELTHAGEN & GELDENUYS INC. Middelburg Tel: 013 282 8081 OR 011 447 8478 Email: duncan@drsm.co.za Ref: D ROWE/CK/142280 For the respondent: Adv. Bronkhorst Attorneys for the respondent: Van Heerden and Brummer Inc. C/O Vicky Janse van Noordwyk Attorneys Inc. Middelburg Tel: 013 001 3002 Email: vicky@vjvnattorneys.co.za Ref: V Janse van Noordwyk/ Verenicque/KVV293

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Prepared on 10 October 2026 · Esheria