

SOUTH AFRICA / JUDGMENT

Lyconet Austria GmbH v Weiglhofer and Others (82122/2023) [2024]

ZAGPJHC 980 (27 September 2024)

[2024] ZAGPJHC 980

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van Vuuren AJ

CASE / FILE NUMBER

82122/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case no: 82122/2023

(1) REPORTABLE: Yes/No:

(2) OF INTEREST TO OTHER

JUDGES

(3) REVISED

In the matter between:

LYCONET
AUSTRIA GmbH
Applicant
/ Intervening Party
and
ALBERT
WEIGLHOFFER
First
Respondent
WAYNE
KRAMBECK
Second
Respondent
ONICAFLEX
(PTY) LTD
Third
Respondent
LYCONET
SOUTH AFRICA (PTY) LTD

(in
liquidation)
Fourth
Respondent

Coram: Van Vuuren AJ
Heard: 13 September 2024
Delivered: 27 September 2024
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JUDGMENT

Van Vuuren AJ

Introduction

- [1] Lyconet Austria GmbH (Lyconet Austria) intervened in the winding-up proceedings brought against Lyconet South Africa (Pty) Limited (Lyconet SA) by Mr Albert Weiglhofer, Mr Wayne Krambeck and Onicaflex (Pty) Limited.
- [2] Lyconet SA, at the time represented by attorney Mr Ian Small-Smith, did not resist the application for its winding-up.
- [3] An order finally winding up Lyconet SA was made on 21 June 2024.
- [4] Lyconet Austria, as intervening party and sole shareholder of Lyconet SA, brought an application for leave to appeal the judgment and final winding-up order.
- [5] Although the notice of application for leave to appeal lists numerous grounds, the central questions remain, as they were before: whether evidence was presented of an extant debt owed by Lyconet SA to Mr Weiglhofer, Mr Krambeck and Onicaflex; and if so, whether the debt had become prescribed? Lyconet Austria also asserted that the Court, in placing Lyconet SA in final winding-up, applied a higher threshold than that set in *Badenhorst*.^[1]

The raised threshold

- [6] The Superior Courts Act raised the threshold^[2] that leave to appeal may only be given in terms of section 17(1)(a) of the Superior Courts Act^[3] where the Court is of the opinion that the appeal will have a reasonable prospect of success^[4] or, there is a compelling reason why an appeal should be heard.^[5]
- [7] The raised threshold in section 17(1)(a) was described by in *Mont Chevaux*^[6] as follows:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion,

see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word ‘would’ in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

[8] The heightened threshold described in *Mont Chevaux*[7] has since been endorsed in *Notshokovu*. [8]

[9] mere possibility of success, an arguable case, or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success. [9]

[10] In *Mkhitha*[10] the Supreme Court of Appeal reiterated:

“[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”

[11] The grounds for leave to appeal advanced on behalf the applicant accordingly require consideration against this raised threshold.

The central questions

The Promise and undertaking by Lyconet SA

[12] The first question is whether evidence was presented of an extant debt owed by Lyconet SA to Mr Weiglhofer, Mr Krambeck and Onicaflex. In the judgment under consideration, it was held that Lyconet SA accepted liability for payment of the amounts due to the first to third respondents arising from the Promise made by the scheme founder, Mr Hubert Freidl, to marketers achieving certain set targets. The respondents gave particularity of the Promise entitling them, respectively, to payments of €2,500,000, €1,000,000 and €500,000. The evidence regarding the Promise and Lyconet SA’s acceptance of the obligation to make payment in terms thereof was set out in the affidavit deposed to by Mr Weiglhofer and corroborated by Mr Krambeck and Mr Grobler who were in attendance at the conference where the Promise was made.

[13] The payment obligation taken on by Lyconet SA was confirmed by Mr John Allan, who at the relevant time was Lyconet SA's managing and only director. Mr Allan confirmed Lyconet SA's inability to discharge the indebtedness to the first to third respondents.

Mr Krambeck further explained in his answering affidavit in the rescission application brought by Lyconet Austria against an earlier winding-up order by Van Nieuwenhuizen AJ that a prior claim by a Ms Lin, based on the same Promise, was settled by Lyconet SA on the instructions of Mr Freidl. Mr Krambeck's evidence was corroborated in the confirmatory affidavits of Mr Grobler and Mr Allan.

[14] In contrast, Mr Radovan Vitoshevich, who was on 24 August 2023 mandated by power of attorney to represent the interests of Lyconet Austria, sought to deny the Promise, its terms, and the obligation to pay the debts arising from the promise by Lyconet SA on the bases that: he had "not seen or heard the exact presentation or speech ... but can with certainty confirm that they are wrong"; and by stating that "it is more probable than not, that at the 2017 annual conference the presentation would have entailed" something different. Mr Vitoshevich reiterated that although he had not witnessed the specific presentation, he sought to confirm that the first to third respondents "completely misinterpreted that which would have been said."

[15] The latter constitutes the highwater mark of Lyconet Austria's contest to the factual evidence of the Promise established by the respondents.

[16] Mr Vitoshevich's protest and denial will in my view be insufficient to bring another court to find that the Promise was not made in the terms put forward by the first to third respondents.

[17] The position on whether Lyconet SA took on the obligation to pay marketers such as the first to third respondents in terms of the Promise suffers the same fate. The denial advanced by Lyconet Austria through Mr Vitoshevich is not sufficient to make any inroad on the evidence of Mr Allan, as managing director of Lyconet SA at the time, on the obligations it took on to pay in terms of the Promise. Mr Vitoshevich did not assert any knowledge of whether Lyconet SA in fact took on the obligations to pay in terms of the Promise. Lyconet Austria, in my view, did not present evidence that creates a prima facie dispute that reaches the threshold set in *Badenhorst*.^[11]

[18] I do not consider Lyconet Austria's objections likely to persuade another court to reach a finding other than that Lyconet SA assumed the said obligations under the Promise.

Is there traction in Lyconet Austria's prescription complaint?

[19] Although the first to third respondents strongly argued that on their reading of the decision in *Lipschitz*^[12] a shareholder such as the applicant may not have the necessary interest to raise a plea of prescription, it was not necessary to make a finding in that regard.

[20] It was held, in accordance with trite principle, that a party raising a plea of prescription is saddled with the onus of proving it. It was further held, with reference to Gericke,[13] that the party wishing to raise prescription has to prove “both the date of the inception and the date of the completion of the period of prescription”, [14] which Lyconet Austria failed to demonstrate.

[21] A question debated during the hearing of the application for leave to appeal was whether, with reference to the threshold set by the Badenhorst rule,[15] it was required that Lyconet Austria, who sought to rely upon a defence of prescription, should have complied with the requirements

set in Gericke?[16] Counsel for Lyconet Austria submitted that the requirements in Gericke were not consistently applied and that despite an absence of evidence of the dates of inception and completion of the period of prescription, the Badenhorst threshold was met.

[22] I disagree with those submissions and consider it necessary that the basic requisites for a defence of prescription had to be put up in evidence. In my view the applicant is unlikely to persuade another court that such requisites can be disregarded when considering a defence of prescription through the lens of Badenhorst.[17]

Conclusion on the central questions

[23] I accordingly form the view that another court is unlikely to reach a different conclusion on the central questions. Evidence was presented of an extant debt owed by Lyconet SA to Mr Weiglhofer, Mr Krambeck and Onicaflex which was not countered by prima facie evidence to the contrary. Lyconet Austria, in seeking to assert a defence of prescription, provided insufficient facts and particularity[18] to reach the low threshold set by the Badenhorst rule. [19]

[24] Furthermore, in Hülse-Reutter, Thring J reminded that despite the low threshold there is a proviso that allegations of fact asserting a defence in winding-up proceedings may not be set out baldly and have to be put up with adequate particularity. In my view another court is also unlikely to hold that the applicant met the requisites of the Hülse-Reutter proviso.

The other grounds for asking leave to appeal

[25] Lyconet Austria raised several other grounds which similarly do not convince of a rationale for a different outcome before another court.

[26] In his affidavit resisting Lyconet Austria’s rescission of the Van Nieuwenhuizen AJ urgent winding-up order, Mr Krambeck provided context to Lyconet SA’s taking over of the undertaking made under the Promise as follows:

“76. Grobler was present at the conference when the undertaking to pay the first and third [respondents] and myself was made. Allan confirms that this undertaking was taken over [by] Lyconet SA in 2019 and that payment was acknowledged and deferred to a time to be determined by Freidl. Allan confirms the indebtedness and as recent as March 2023 this indebtedness was acknowledged by Lyconet SA but, it was not in a position to make payment.

77. The claim that Lyconet SA settled with Lin and her husband is based on exactly the same Promise. I refer to paragraph ... in the Lin application. Significantly her claim was settled by Lyconet SA. Grobler confirms that Freidl instructed him and his attorney, Small Smith, to settle this claim from funds sitting in the account of Lyconet SA on behalf of Lyconet SA.
78. Freidl made it clear that this was a South African issue and had to be settled by the South African company and ... should not prejudice these (sic) global operation.”
- [27] Although Mr Allan, as managing director, corroborated that the indebtedness under the Promise was taken over by Lyconet SA, his evidence that “I accept that on instructions of the overseas operations, Lyconet SA had taken over the indebtedness of the first to third respondents and Lyconet SA was not in a position to honour these financial obligations” was not the only evidence on the issue. Lyconet Austria is incorrect when it says that Mr Allan’s evidence was the only evidence before the Court that Lyconet SA assumed the obligation.
- [28] The terms of the Promise made by Mr Freidl were quoted in the first person in the affidavit deposed to by Mr Krambeck. Mr Weiglhofer also set the Promise out in detail in the respondents’ founding affidavit, wherein they made a USB device containing a recording of Mr Freidl’s presentation available. The USB device was seemingly not obtained or considered by the applicant. It was however apparent from his answering affidavit that Mr Vitoshevich did not see or hear the presentation. It is clear that he did not pursue the opportunity to do so, and yet seeks to deny the terms of the Promise.
- [29] In their founding affidavit the respondents referred to hundreds of South African subscribers who pay monthly subscriptions to Lyconet SA. They stated that all marketers and members had to pay subscription fees to inter alia render them ‘income entitled’ and to be afforded access and use of the group’s ‘Back Office’. This was also mentioned in Mr Small-Smith’s 13 September 2023 letter addressed to Mr Vitoshevich stating that the then pending urgent winding-up proceedings brought against Lyconet SA would be permitted to run its course. Whether subscription fees were paid and received in conflict with the business model and underlying agreements as explained by Mr Vitoshevich is not the point. With evidence of subscription fees paid, and an absence of evidence that it was not paid, the applicant’s complaint is misplaced. Even if a different conclusion was to be reached on whether subscription fees were collected by Lyconet SA, it does not in my view move the applicant’s prospects on appeal.

- [30] In the founding affidavit Mr Weiglhofer explained that the respondents were under pressure from marketers within their Lifelines to receive their share of the €4,000,000 due in terms of the Promise. Lyconet Austria incorrectly complained that there was no evidence presented by the respondents of “obligations towards other members in their lifelines.”
- [31] Another complaint by Lyconet Austria relates to the finding that Lyconet SA, on instruction of Mr Freidl, settled the Lin dispute in the sum of R76,000,000. Mr Krambeck, in addition to his evidence referenced in paragraph [26] above, stated that “Lyconet SA settled the matter of Lin on the instructions of [Mr] Freidl and did what was in the interests of the South African company to attempt to regularise its operations.” This was corroborated by Mr Allan and Mr Grobler.
- [32] The applicant’s next complaint relates to Mr Small-Smith’s status with reference to Lyconet SA. Mr Ian Small-Smith was the attorney for Lyconet SA until it was placed in final winding-up by Van Nieuwenhuizen AJ. The payment of funds into Mr Small-Smith’s trust account indeed occurred after the winding-up of Lyconet SA at a time when he no longer represented the entity. Mr Allan and Mr Grobler caused the funds to be paid into trust because they recognised the risk that those funds may be transferred to Lyconet Austria to the detriment of creditors and other stakeholders. The applicant is strictly speaking correct that Mr Small-Smith did not hold the funds “on behalf of” Lyconet SA in a representative capacity as its attorney. He held the funds for Lyconet SA’s benefit. In his 13 October 2023 letter Mr Small-Smith advised that he held the monies in trust “for the benefit of the companies” – which included Lyconet SA, and advised that he would only release the funds upon a court order or legitimate instruction. Mr Small-Smith in his letter stated that he had informed the liquidators of Lyconet SA that he held the funds in trust. This complaint does not in my view alter the applicant’s prospects before another court.
- [33] In its notice for leave to appeal the applicant inter alia asserts that “[t]here is no allegation anywhere that [Mr] Freidl instructed [Mr] Small-Smith”. With several references in the evidence to Mr Small-Smith acting on behalf of Lyconet SA, and receiving instructions to settle the Lin claim, this complaint is unfounded. Mr Krambeck, in his answering affidavit to Lyconet Austria’s rescission application, confirmed by Mr Allan and Mr Grobler, referred to the settlement of the Lin claim and Mr Grobler’s confirmation that Mr Freidl instructed him and Mr Small-Smith to settle the Lin claim.
- [34] The applicant raised a further complaint regarding the finding that Mr Vitoshevich denied knowledge of the Lin application. In his founding affidavit in Lyconet Austria’s rescission application, Mr Vitoshevich referred to “an alleged application brought against Lyconet SA in 2022”. He said, “the intervening applicant [Lyconet Austria] has never previously seen any alleged application or action proceedings issued against it by a certain Jianliu Lin”. Mr Vitoshevich, in his replying affidavit in the rescission application placed in issue that “such an application was actually issued and prosecuted”. He further denied that “any settlement monies were paid to Lin”. The finding that Mr Vitoshevich denied any knowledge of the Lin application is underscored by what Mr Vitoshevich said in his founding affidavit in Lyconet

Austria's rescission application. There is no merit in this complaint.

[35] The confirmatory affidavits to Mr Krambeck's 11 October 2023 affidavit were deposed to by Mr John Allan, Mr Wim Grobler, and Mr Etienne Stander. These confirmatory affidavits all refer to Mr Krambeck's affidavit as a 'founding affidavit'. It is plainly apparent that Mr Allan, Mr Grobler and Mr Stander, in their affidavits, similarly deposed to on 11 October 2023, referred to and confirmed Mr Krambeck's 11 October 2023 affidavit. To have disregarded their confirmatory evidence which could only have related to Mr Krambeck's affidavit, would in my view have been unjust. Their affidavits plainly corroborated the evidence of Mr Krambeck. I do not consider the applicant's complaint about Mr Stander's corroboration of Lyconet SA's insolvency to merit leave to appeal. Lyconet SA's insolvency was also confirmed by the first respondent, Mr Weiglhofer. The rationale for Lyconet SA not opposing the winding-up proceedings, as was explained by Mr Willem Grobler, included his view that it was by then considered factually and commercially insolvent.

Order

[36] Having considered the points advanced on behalf of the applicant, I am not convinced that the applicant has a reasonable prospect of success on appeal or that there is some other compelling reason why it should be heard.

[37] The SCA's reminder in Dexgroup[20] that leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit seems apposite.

[38] In the result, the following order is made:

1. Leave to appeal is refused.
2. The costs of this application shall be costs in the administration of Lyconet South Africa (Pty) Limited (in liquidation) on a party and party scale with the costs of two counsel taxable on scale C.

Acting Judge of the High Court

27 September 2024

For the Applicant / Intervening Party: Instructed by: HC Bothma SC WJ Bezuidenhout S Mathe P Smith and G Meyer of SKV Attorneys Inc For the First to Third Respondents: Instructed by: E Theron SC L Acker M Kets and L Botha of Magda Kets Attorneys

[1] Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956

(2) SA 346 (T) at 347H – 348B

[2] The test under the Superior Courts Act is heightened from the threshold that previously applied under the Supreme Court Act. *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) at [6] *Daantjie Community v Crocodile Valley Citrus Company (Pty) Ltd* 2015 JDR 1534 (LCC) at [3]

[2] The test under the Superior Courts Act is heightened from the threshold that previously applied under the Supreme Court Act.

Mont Chevaux Trust v Goosen 2014 JDR 2325 (LCC) at [6]

Daantjie Community v Crocodile Valley Citrus Company (Pty) Ltd 2015 JDR 1534 (LCC) at [3]

[3] Superior Courts Act 10 of 2013

[4] Superior Courts Act: S17(1)(a)(i)

[5] Superior Courts Act: S17(1)(a)(ii)

[6] *Mont Chevaux supra*

[7] *Mont Chevaux supra*

[8] *S v Notshokovu* 2016 JDR 1647 (SCA) at [2]

[9] *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at [17] *Four Wheel Drive Accessory Distributors CC v Rattan* NO 2019

(3) SA 451 (SCA) at [34] *Zuma v Democratic Alliance and Another* 2021

(5) SA 189 (SCA) at [2]

[9] *MEC for Health, Eastern Cape v Mkhitha* 2016 JDR 2214 (SCA) at [17]

Four Wheel Drive Accessory Distributors CC v Rattan NO 2019

(3) SA 451 (SCA) at [34]

Zuma v Democratic Alliance and Another 2021

(5) SA 189 (SCA) at [2]

[10] *Mkhitha* at [17]

[11] *Badenhorst* at 347H – 348B

[12] *Lipschitz v Dechamps Textiles GmbH* 1978

(4) SA 427 (C) 431A-F

[13] *Gericke v Sack* 1978 (1) SA 821 (A)

[14] *Gericke* at 827 in fin – 828A

[15] *Badenhorst infra*

[16] Gericke *infra*

[17] Badenhorst *infra*

[18] See also: *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening)* 1998 (2) SA 208 (C) at 220A

[19] Badenhorst 347H – 348B

[20] *Dexgroup (Pty) Ltd v Trustco Group Intl (Pty) Ltd* 2013

(6) SA 520 (SCA) at [24]

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