IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

5/12/2014
DATE

SIGNATURE

CASE NUMBER: 31048 /14
DATE: 19 ~~November~~ Dec 2014

NEDBANK LIMITED

Applicant

V

APPLEMINT PROPERTIES 22 (PTY) LTD
(Reg. No.: 2005/030863/07)

First Respondent

JUDGMENT

STRYDOM AJ:

Introductory remarks

[1] The applicant seeks the winding-up of the respondent on two primarily grounds:

1.1 That it will be just and equitable to wind-up the respondent as contemplated by section 81(1)(c)(ii) of the Companies Act, 2008[1]

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[1] See: Record page 6 para's 8-9.

1.2 Alternatively, that the respondent is unable to pay its debts as contemplated by section 345(1)(a) of the Companies Act, 1973.

[2] A certain JM Killian filed heads of argument on behalf of the applicant, which consisted of 1 page and 4 paragraphs. This constituted conclusions only, which is consistent with the applicant's notice of motion. At the hearing of the matter, Adv. Aucamp appeared on behalf of the applicant. The respondent was represented by a senior and junior counsel, Adv. ARG Mundell, SC and Adv. MD Kohn. They filed proper heads of argument. Adv. Aucamp submitted no heads of argument, and indicated that he very lately became involved in the matter, and will address the court on the papers filed, without submitting any heads of argument. I warned the applicant that this might be to his detriment because the full ambit of his arguments is not contained in heads of argument and I will, for purposes of judgment, rely on my notes which will be taken when he make his submissions on behalf of the applicant. Counsel for the applicant conceded that the applicant ran this risk. Adv. Aucamp however later attempted to seek permission to file heads of argument on a later date. This was opposed by the respondent's counsel, who was in full right. I ruled that such heads will not be permitted.

Application for admission of supplementary answering affidavit

[3] At the outset of the hearing the respondent sought leave to introduce a supplementary answering affidavit, in terms of a notice of motion, which was served on the applicant on 1 October 2014, to which there were no opposition.[2]

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2 See: Record page 226 – 235.

[4] The purpose of the additional affidavit was to demonstrate the respondent's liquidity. The respondent presented a performance guarantee issued by Absa Bank Ltd in favour of the respondent, dated 12 September 2014.[3] In terms of the guarantee Absa Bank Ltd undertook to pay the respondent (without any reservation) the sum of R372, 462.61 on first written demand and in the event that any entity called Copasize (Pty) Ltd fails to pay the sum to the respondent on demand. In the result, and were the applicant eventually successful to obtain judgment against the respondent in the amounts it claimed to be due and payable to it in the winding-up application, the sum would be settled by Copasize (Pty) Ltd, *alternatively* by the respondent through the means of the *"without reservation guarantee"* furnished by Absa Bank Ltd.

[6] Counsel for the parties submitted that I should provisionally admit the additional affidavit because both parties intended to argue on the substance of the guarantee, and the nature and extent thereof. Accordingly I provisionally admitted the affidavit, as evidence. In judgment, I now admit the supplementary affidavit, the reasons in respect of which will appear hereunder.

[7] Counsel for the applicant initially indicated that he will only take about an hour to argue the case of the applicant. His argument was however closely to 4 hours. Adv. Mundell, SC, argued the case for the respondent in the span of a little over 20 minutes.

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[3] See: Annexure S1, p 234 of the record.

[8] After making his submissions, Adv. Aucamp for the applicant, indicated that the applicant relies, for its claim for winding-up of the respondent, solely on the deem provision contained in terms of section 345(1)(a) and the facts submitted by the applicant, being that the respondent is not able to pay its debts. He indicated further that he do not abandon the *alternative ground* which the applicant relies upon, being that it will be just and equitable for the respondent to be liquidated. Adv Aucamp presented no argument in support of the latter ground for liquidation of the applicant. This came as no surprise, because the submission that it will be *just and equitable* to wind-up the respondent was postulated on the traditional grounds for just and equitability to wind-up a company.[4] It is self-evident that the applicant seeks two inconsistent grounds for the winding-up of the respondent: In order for a company to be wind-up in terms of either section 80 or 81 of the Companies Act, 2008, it must be commercially solvent. A commercially solvent company (whether factually solvent or insolvent) may only be wind-up in terms of the new act. A solvent company cannot be wind-up in terms of the Companies Act, 1973.[5] In view of the latter consideration, and with reference to the argument of the applicant, the applicant failed to make out any case that it is just and equitable to wind-up the respondent. In fact the applicant only made one, unsubstantiated, allegation[6] in this regard. The allegation amounts to nothing more than a complaint that the respondent has consistently breached its undertakings towards the applicant, and displayed a total disregard of the applicant's

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4 See: Herman and Another vs Set: MAK Civils CC 2013(1) SA 386 (FB) at para 15; Scania Finance South Africa (Pty) Ltd vs Thomi, Gee Road Carriers CC 2013(2) SA 439 (FB) at para 22.

5 See: Boschpoort Ondernemings (Pty) Ltd vs Absa Bank Ltd 2014(2) SA 518 (SCA) at para's 20-24.

6 See: para 23, page 18 of the record.

rights. Those allegations, in my view, do not support the relief sought by the applicant in this regard.

[9] In view of the above consideration the applicant's only cause of action for winding-up the respondent is the notice he delivered on the respondent in terms of section 345(1)(c) of the Companies Act, 1973, on 24 March 2014.[7] This section contains a deem provision, as contemplated in section 344(f) read with section 345(1)(c), that a company upon which such notice was delivered by a party, is deemed not to be able to pay its debts. This deemed provision is obviously rebuttable by a respondent.

Debt relied upon by the applicant

[10] Despite the applicant's long recordal of the history of the relationship between the parties, emphatically emphasized by counsel for the applicant, it is clear from the evidence that the computation of the applicant's claim, upon which it relied for its *locus standi* to bring this winding-up application, aroused from the following facts evidenced, *inter alia* by the correspondence between the parties:

10.1 On 28 January 2014[8] the respondent indicated in a letter to the applicant that it deny liability towards the applicant in the capital sum of R447,462.61 which were demanded by the applicant in a prior letter, dated 8 January 2014;

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7 See: record annexure N12, pp 83-84
8 See: record p67, annexure N14

10.2 The respondent indicated to the applicant, in the latter letter, that an accountant had recalculated its indebtedness to the applicant, and had concluded that the amount outstanding as at 28 January 2014, towards the applicant amounted to R344, 900.63;

10.3 The latter amount was tendered by the respondent in full and final settlement of its indebtedness towards the applicant;

10.4 On 4 February 2014 the respondent again address a letter to the applicant,[9] wherein the respondent made the following proposal to the applicant:

10.4.1 Payment of the amount of R344, 900.63 in full and final settlement of the capital;

10.4.2 A contribution of R125, 000.00 towards the applicant's legal costs.

10.5 On 5 February 2014 the applicant accepted the respondent's proposal[10] but unilaterally imposed a further requirement, that should those payments not be timeously effected, the original claim amounts would become due and payable.

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9 See: record p69, annexure "N15".

10 See: record pp70-71, annexure "N16".

10.6 On 7 February 2014 the respondent addressed a further letter to the applicant[11] wherein the respondent reiterated its undertaking to pay the amounts of R344, 900.63 and the amount of R125, 000.00 respectively.

10.7 On 10 February 2014 the applicant furnished a purported acceptance of the respondent's offer, to the respondent.[12] Once again, in paragraph 3 thereof, the applicant sought to unilaterally impose a term, that were those amounts not paid on the due dates by the respondent, the original amounts claimed by it would become due and payable.

10.8 The following payments were made by the respondent to the applicant:

10.8.1 R125, 000.00, on 11 February 2014, ostensibly as a contribution towards costs;

10.8.2 R200, 000.00 on 14 February 2014, ostensibly as payments towards the capital.

10.10 The latter payments by the respondent to the applicant solicited a letter from the applicant to the respondent, dated 26 February 2014[13] wherein the applicant demanded payment of the balance of R144, 000.00, as against the outstanding capital, by no later than 27 February 2014. The respondent did not pay the latter sum as a consequence to which the applicant, on 4 March

11 See: record p 74.
12 See: pp77-77?? of the record.
13 See: record pp77-78.

2014 demanded payment of the reconstituted, alleged capital sum and claim of legal fees, less the amounts already paid by the respondent.

10.11 On 24 March 2014, and prior to the application for the liquidation of the respondent, the respondent addressed a letter to the applicant which contained the following paragraph:[14]

> *"6. The amount of R325, 000.00 paid to your client on 11 and 14 February 2014 was paid in full and final settlement only in order to bring this long protected dispute to an end and not as a result of your company's conviction that the amount is in fact outstanding or as a result of your threads."*

10.12 On 25 March 2014 the applicant again threatened to bring a winding-up application of the respondent.[15]

Applicant's claim

[11] It is evident from the history of the relationship between the applicant and the respondent, as appears from the evidence presented in the affidavits on behalf of the parties, that a dispute concerning the actual amount owned by the respondent to the applicant consisted between the parties as long ago as 15 February 2010.[16]

[12] The applicant *accommodated (or entertained) this dispute of the respondent.* The sum required by the applicant to settle the outstanding bond of the respondent was

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14 See: record p83, annexure N21.
15 See: record p85.
16 See: record pp32 – 36, chronology of the dispute between the parties as set out by the applicant.

R7 750,000.00, which was paid to the applicant by the respondent on 10 December 2013. In the cause of the latter transfer, a further dispute arose between the parties concerning a shortfall of R102, 081.34.[17]

[13] The applicant admitted that, despite it having agreed to the bond cancellation, the figures it had provided to the transferring attorney left an allege shortfall owing by the respondent to the applicant.[18]

[14] The respondent avers in its supplementary affidavit that the offer contained in its letter of 7 February 2014[19] was erroneously made and that the subsequent calculations by the respondent's auditors had concluded that the capital sum offered of R344, 000.00 was incorrect.[20]

[15] It is not for me to decide which amount the respondent is indebted to the applicant, *because I am not faced with a money claim*, but, to decide whether the respondent is able to pay its debts or not. Two questions arise in this regard:

15.1 Has the applicant demonstrated indebtedness on the part of the respondent to which affords it the right to claim liquidation of the respondent;

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17 See: record p100, para 20.
18 See: record p213, para 7.1 of the applicant's replying affidavit.
19 See: record p74, annexure N17 of the founding affidavit.
20 See: record p231.

15.2 Has the applicant demonstrated an inability on the part of the respondent to pay its debts, as contemplated by application of the provisions of section 345, of the Companies Act, 1973.

Applicable legal principles

[16] In the context of an alleged inability to pay its debts, the following considerations are relevant. In *Badenhorst v Northern Construction Enterprise Ltd*, [21] (*"hereafter Badenhorst rule"*) Hiemstra, J, referred with approval to the following extract from Buckley's on Companies:[22]

> *"A winding-up petition is not a legitimate means of setting to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, off course, if the debt is not disputed on some substantial ground, the court may decide it on petition and make the order."*

[17] A summary of the rational underlying the Badenhorst rule, is to be found in the words of Gotley LJ, in *Stonegate Securities Ltd v Gregory*:[23]

> *"The whole doctrine of the part of our law is based on the view that winding-up proceedings are not suitable proceedings in which to*

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21 1956(2) SA 346 (T).
22 16th Edition at p357.
23 1980(1) ALL ER 241 at 249(CA).

determine a genuine dispute about whether the company does or not owe the sum in question."[24]

[18] In *Absa Bank Ltd v Erf 1252, Marine Drive (Pty) Ltd and Another*[25] Binns-Ward J made the following remarks in the context of the ambit of the rule constituted in the Badenhorst rule:[26]

"I am hesitant to accept the motion that the Badenhorst rule goes to standing. After all, as Corbett JA observed the Kalil v Decotex, supra, at 980, it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent's company in winding-up proceedings, while the respondent would have establish, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The Badenhorst rule would thus seem to constitute a self-standing (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is bona fide disputed. Availment of the procedure in circumstances in which the Badenhorst rule applied can be abuse of process. It is so, however, only where the creditor knew, or reasonably should have foreseen that the debt was disputed on bona fide and reasonable grounds at the time of the institution of the proceedings."

[19] In the matter of *Porter Straat 69 Eiendomme v PA Venter Worchester*[27] Davis J remarked, in consideration of the Badenhorst rule as follows:

"... it is not for this court to decide the merits of this dispute. As Mr. Muller submitted, respondent discharges the onus if it can show merely that the dispute was a bona fide one based on reasonable grounds. As Thring J said in Hülse-Reuter ... respondent's case

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24 See also: Kalil v Decotex (Pty) Ltd and Another 1988(1) SA 943 (AD) at 980.
25 See: [2012] ZAWC8C43 (15 May 2012).
26 See: Judgment at para [43]; see also: VATX, Fuller v Shepherd and Shepherd 1984(3) SA 48 (W) at 53 F-G.
27 2000(4) SA (C) at 606 B to 607 E.

must be adjudged by the specific onus applicable to such dispute. Great care must be taken by a court not to shut the doors of the court to a respondent who may well, on the basis of evidence placed before the appropriate court, convert a bona fide dispute in 21 which is clearly compelling and successful."

[20] In considering the evidentiary benefit of a notice in terms of section 345(1)(a)(i) note should be taken of the remarks of Megarry J in the matter of *In re: Lympne Investments*:[28]

***"I do not see how it can be said that the person "neglects" to do [an]** act if the reason for not doing it is a genuine and strenuous contention, based on the substantial grounds, that the person is not liable to do the act at all. If there is a liability, failure to discharge the liability may well be "neglect" ... but a challenge to liability is a challenge to the foundation on which any contention of "neglect" in relation to an obligation must rest."*

[21] Once it has been established, on the evidence, that a *genuine dispute exists regarding the indebtedness of a respondent*, allegedly owing (including a dispute as to the quantum of the indebtedness) and whether or not such debt is presently due and payable, a court will not make the inference that the failure to pay the indebtedness, is due to an inability to pay the amount due and payable. This stands obviously directly opposed to the unwillingness of a party to pay the amount.[29]

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[28] See: [1972] 2 ALL ER 385 (Ca) at p389.

[29] Compare the matter of Payslip Investment Holding CC v Y2KTec Ltd 2001(4) SA 781 (C) at 788 B-C.

Conclusion

[22] It appears from the evidence before me that this is clearly a matter where the respondent refuses to make payment to the applicant, rather than being unable to do so.

[23] My view is fortified by the supplementary affidavit of the respondent, which I admitted, as indicated above. It is clear from the supplementary affidavit that the respondent is commercially solvent and that its failure to pay the amount claimed by the applicant is a consequence of the refusal rather than an inability to pay.[30] The refusal of the respondent arises from the fact that the respondent disputes the claim advanced by the applicant, as indicated above.

[24] In the context of the aforesaid considerations it appears:

24.1 That the debt claimed by the applicant is disputed by the respondent on *bona fide grounds* and, accordingly the Badenhorst rule and the principles advanced therein finds direct application;

24.2 The applicant failed to demonstrate that the respondent is commercially insolvent[31] being that the respondent is unable to pay its debts from available resources. The draft financial statements submitted by the

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30 See: Record p 231.

31 Compare Kalil v Decotex (Pty) Ltd and Another, supra at 979 to 980.

respondent,[32] and the Absa Bank guarantee leads to the necessary conclusion that the respondent has not, *on a balance of probability* shown to be *unable to pay its debts*, as advanced by the applicant.[33]

24.3 There can be little doubt that the applicant knew, prior to instituting the proceedings against the respondent, that the respondent vehemently disputed the applicant's claim on *bona fide* and reasonable grounds.

[25] In the circumstances this application amounts to an abuse of process and should accordingly be dismissed.

ORDER

After having heard counsel and after having considered the evidence presented by the parties, with due reference to the above considerations and findings, the following order is made:

1. The application for winding-up of the respondent is dismissed;

2. The applicant is ordered to pay the costs of the respondent, including the costs of two counsel.

J.S. STRYDOM
ACTING JUDGE OF THE HIGH COURT

32 Compare record p 113.
33 See: Kalil v Decotex (Pty) Ltd and Another, supra at 979-980.

Appearances:

Counsel for the Applicant:	*Adv. Aucamp*
Instructed by:	*Baloyi Swart & Associates Inc*
Counsel for the respondent:	*Adv. ARG Mundell (SC)*
	Adv. MD Kohn
Instructed by:	*Etta Szyndralewicz Inc*
Date Heard:	*20 November 2014*
Date of Judgment:	*19 ~~Nov~~ Dec ember 2014*