THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 865/2022

In the matter between:

SUPERIOR MACADAMIAS (PTY) LTD	**FIRST APPELLANT**
EMVEST EVERGREEN (PTY) LTD	**SECOND APPELLANT**
EMVEST FOODS (PTY) LTD	**THIRD APPELLANT**
EMVEST BARVALE (PTY) LTD	**FOURTH APPELLANT**
KWIKBUILD CORPORATION LTD	**FIFTH APPELLANT**

and

EMVEST AGRICULTURAL CORPORATION (MAURITIUS) LTD	**FIRST RESPONDENT**
EMVEST FOOD PRODUCTS (MAURITIUS) LTD	**SECOND RESPONDENT**

Neutral citation: *Superior Macadamias (Pty) Ltd and Others v Emvest Agricultural Corporation (Mauritius) Ltd and Another* (865/2022) [2024] ZASCA 182 (24 December 2024)

Coram: ZONDI DP and MBATHA, MABINDLA-BOQWANA and WEINER JJA and GORVEN AJA

Heard: 11 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 24 December 2024.

Summary: Winding up – *locus standi* – creditor – failure to prove indebtedness of respondent.

Winding up – shareholder – just and equitable – dormant company and companies whose non-resident directors wilfully disregard provisions of the Companies Act 61 of 1973, the Companies Act 71 of 2008 and the Insolvency Act 24 of 1936.

Appeal – lapsing – reinstatement – good cause for condonation to be shown – prospects of success decisive.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Nyathi J, sitting as court of first instance):

In respect of the first appellant:

1 The application for condonation is granted and the appeal is reinstated.

2 The appeal is upheld with the costs to be paid jointly and severally by the first and second respondents.

3 The order of the Gauteng Division of the High Court, Pretoria under Case No. 43576/2016 is set aside and substituted with an order discharging the provisional winding up order with the costs to be paid jointly and severally by the first and second applicants.

In respect of the second, third and fourth appellants:

1 The applications for condonation are dismissed.

2 The fifth appellant is directed to pay the costs of the condonation applications, as also the costs of the applications for leave to appeal.

JUDGMENT

Gorven AJA (Zondi DP and Mbatha, Mabindla-Boqwana and Weiner JJA concurring):

[1] Four applications for liquidations were heard by Nyathi J in the Gauteng Division of the High Court, Pretoria (the high court). They were launched by the first respondent, Emvest Agricultural Corporation (Mauritius) Ltd (Agricultural) against

each of the first four appellants: Superior Macadamias (Pty) Ltd (Superior), Emvest Evergreen (Pty) Ltd (Evergreen), Emvest Foods (Pty) Ltd (Foods) and Emvest Barvale (Pty) Ltd (B arvale). Emvest Food Products (Mauritius) Ltd (Products) was granted leave to intervene as an applicant in the applications against Evergreen, Foods and Barvale. The fifth appellant, Kwikbuild Corporation Ltd, intervened to oppose the applications but was itself not in the firing line of the respondents. Unless it is necessary to specifically refer to the fifth appellant, reference to the appellants hereafter shall be to the first four appellants.

[2] Agricultural founded its application on the provisions of s 344*(f)* read with s 345(1)*(a)* of the Companies Act (the old Act).[1] Section 344*(f)* provides:

'A company may be wound up by the Court if-

. . .

(f) the company is unable to pay its debts as described in section 345'.

And s 345(1)*(a)* provides:

'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 at its registered office, a demand requiring the company to pay the sum so 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 . . .'

[1] Companies Act 61 of 1973, which, in terms of subitem 9(1) of the Companies Act 71 of 2008 (the new Act) still governs liquidations of insolvent companies.

It was not seriously disputed that the requisite demand was served on the first four appellants nor that they had not paid what was demanded. The only issue, which was and is contested, was whether Agricultural was a creditor of the appellants. I shall refer to these as the creditor applications. The indebtedness of each appellant to Agricultural was said to arise from services provided by it pursuant to service level agreements.

[3] Agricultural launched the creditor applications against the first four appellants in June 2016. Provisional winding up orders were granted against each appellant on 19 December 2018.

[4] Products was a 49 percent shareholder in each of Evergreen, Foods and Barvale. The basis of the order sought by Products was that it was just and equitable for those companies to be wound up. The *locus standi* of Products as a shareholder was not contested although something was made of its percentage shareholding. Nothing turns on this. I shall refer to these as the shareholder applications.

[5] The ground that a court may order a company to be wound up at the instance of a shareholder if it is just and equitable to do so applies regardless of whether the company in question is solvent or insolvent. As regards insolvent companies, s 344*(h)* of the old Act provides:

'A company may be wound up by the Court if –

. . .

(h) it appears to the Court that it is just and equitable that the company should be wound up.'

As was made clear by this court in *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd*:

'Subitem 9(2) [of Schedule 5 of the new Act] provides that s 344 of the old Act shall not apply to the liquidation of "solvent" companies, "except to the extent necessary to give full effect to the provisions of Part G of Chapter 2". Part G of chapter two of the new Act, more particularly ss 79 to 81 thereof, relates to the winding-up of solvent companies.'[2]

As regards solvent companies, the provisions of s 81(1)*(d)*(iii) of the new Act provides:

'A court may order a solvent company to be wound up if –

. . .

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –

. . .

(iii) it is otherwise just and equitable for the company to be wound up'.

[6] Although there were four discreet applications before the high court, the parties agreed to argue the matters in the high court on the papers relating only to Barvale, apart from the respective amounts which Agricultural claimed to be due from each. At the stage of a final winding up order, proof on a balance of probabilities is required.[3] The first four appellants were placed in final liquidation by the high court on 24 May 2022. All of the appellants applied for leave to appeal in respect of the orders granted in the respective applications. Leave to appeal was granted by the high court on 1 August 2022. The substantive part of the order granting leave to appeal simply stated, 'The application for leave to appeal is granted to the Supreme Court of Appeal.' It is thus clear that leave was sought and granted in respect of the orders in all of the applications.

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[2] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* [2013] ZASCA 173; 2014 (2) SA 518 (SCA); [2014] 1 All SA 507 (SCA) para 20.

[3] *Cuninghame and Another v First Ready Development 249 (Association incorporated in terms of section 21)* [2009] ZASCA 120; 2010 (5) SA 325 (SCA); [2010] 1 All SA 473 (SCA) (*Cuninghame*) para 1.

[7] The registrar of this Court took the view that the order did not make clear to whom leave had been granted and declined to accept the order as one granting leave to each of the appellants. The appellants then approached the judge who granted the final winding up orders and he amended the order in chambers to state, 'The Respondents' and intervening Respondent's application for leave to appeal is granted to the Supreme Court of Appeal.' Applications for condonation and the concomitant reinstatement of the appeal relying on the amended order were brought by the appellants. This elicited immediate and strenuous opposition from the respondents. They took the point that Uniform rule 42[4] does not give a judge in chambers jurisdiction to amend orders. That is correct. This resulted in the appellants approaching the Gauteng Division of the High Court, Pretoria, and an order was granted declaring that the amended order was a nullity and that the original order granting leave related to all five appellants. Once this had been obtained, the application for condonation was supplemented with this information. The opposition to condonation continued on the basis that a fresh application, based on the original order, should have been brought and that, in any event, the application had not dealt with the prospects of success on appeal.

[8] Ultimately, the issue of condonation was argued before us. In the view I take of the applications, the prospects of success will determine the outcome of the

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[4] Uniform rule 42 provides as follows:
'42 Variation and Rescission of Orders
(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –
(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.
(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.'

condonation applications. This is so especially since the registrar of this court was presented with the correct order and did not accept it. Technically accurate though some of the opposition by the respondents may have been, it was clear from the outset that the failure of the registrar to accept the order was the reason so many futile steps were taken. I point out that the outcome of the applications for condonation may differ from appellant to appellant depending on the prospects of success of that appellant. I turn to deal with the prospects of success next. This requires a consideration of the merits of the appeals.

[9] Some background facts will place the matters in context. Superior was previously named Emvest Nuts (Pty) Ltd. The appellants and respondents were part of the same suite of companies. During 2013, negotiations took place for the sale of shares in the appellants. At the time, Products held 100 percent of the shares in each of the appellants. Pursuant to the negotiations, due diligence investigations were undertaken between April and November 2013. Central to the due diligence investigations were the audited Annual Financial Statements (AFS) of each of the appellants dated 31 March 2013 (the 2013 AFS). Other documentation, including the management accounts, was also made available.

[10] The negotiations led to share transactions involving all four appellants. By agreement concluded on 3 November 2013, Products disposed of 51 percent of its shareholding in the second to fourth appellants to Craven House Capital PLC. By agreement concluded on 21 January 2014, Products disposed of all of its shareholding in Superior to Desmond Investments Ltd. I shall refer to these jointly as the share transactions.

[11] Ms Payne remains a director of Agricultural and Products. She was the deponent to the affidavits of Agricultural and Products and had knowledge of what took place prior to and at the time of the negotiations for the share transactions. It is common ground that the present directors of the four appellants had no involvement in the management of any of the companies prior to negotiations for the share transactions. Their knowledge of what took place prior thereto derives purely from documents provided to them during the due diligence processes and thereafter. As such, they have no personal knowledge of any of the events giving rise to the formulation of the 2013 AFS.

[12] I deal first with the condonation application by Superior. As regards the merits of the appeal itself, it is confronted with only the creditor application. This is because Products sold 100 percent of the shareholding and so has no *locus standi* as a shareholder. Its *locus standi* in the creditor application was based on s 345(1)*(a)* of the old Act.

[13] The conclusion of the service level agreement between Superior and Agricultural was conceded, as was the fact that services were provided to Superior. The only issue was whether Superior remained indebted to Agricultural. In this regard, s 345(1)*(a)* is clear. It provides that 'a creditor . . . to whom the company is indebted' may send a letter of demand for payment of the debt. If the debtor does not pay or 'secure or compound for it to the reasonable satisfaction of the creditor' within three weeks after delivery of the letter, the debtor is 'deemed to be unable to pay its debts'. The words 'creditor' and 'debtor' admit of no ambiguity. The only party entitled to invoke this section is a creditor. In order to obtain the *locus standi* to do so, Agricultural was required to prove an outstanding indebtedness by Superior. Proof on a balance of probabilities was required.

[14] Agricultural relied heavily on the 2013 AFS as regards the Barvale application. Much debate was generated as to whether this document disclosed indebtedness arising from the service level agreement. Ms Payne testified that, although not identifying the specific creditor, an entry under the heading 'Trade payables' disclosed the indebtedness by Barvale to Agricultural. For reasons which follow, I do not find it necessary to determine the indebtedness or otherwise of Evergreen, Foods or Barvale to Agricultural. What was correctly conceded by Agricultural is that there was no such entry in the 2013 AFS relating to Superior.

[15] The only remaining document relied upon in argument by Agricultural was an email sent to Ms Payne by one Ronnie Sarkar on 30 May 2014 headed 'Invoicing and Payment History Re African Entities'. It set out a list of figures between 2009 and 2012 with headings for, inter alia, Superior, under the name 'Nuts'. There is an insurmountable difficulty with reliance on this document. The person who sent the email did not depose to an affidavit and, accordingly, the email was inadmissible as regards the truth of its contents. In addition, even if it had been admissible, it did not extend to the date of the share transaction, so cannot be relied on to prove indebtedness at that date. The final document relied on was an invoice dated 17 June 2014 sent by Ms Payne, claiming an amount due. But she gave no evidence as to the source documents which informed the invoice and, being at odds with the 2013 AFS, it certainly could not have originated there. During argument, Agricultural candidly and correctly conceded that it could not rely on those documents to prove indebtedness on the part of Superior. The final nail in the coffin was found in the share transaction agreement. It was stated that the only liabilities of Superior were listed in Schedule 'C' to the agreement. No liability to Agricultural appears in that Schedule.

[16] In the result, I can see no basis on which the high court found that the *locus standi* of Agricultural to apply for the liquidation of Superior was established. Agricultural bore the onus to prove indebtedness to it by Superior on a balance of probabilities.[5] Nyathi J erred in requiring proof on a balance of probabilities by Superior that it was not indebted to Agricultural. That was simply wrong in law. That being the case, the deeming provision did not come into effect and the requirements of s 345(1)*(a)* were not met. This means ineluctably that the prospects of success in the appeal of Superior are overwhelming. In the result, condonation must be granted to Superior and the appeal reinstated. The matter was argued on the basis that, if condonation was granted, the appeal should be dealt with. Since Agricultural had no *locus standi* to bring the application, the appeal of Superior must succeed with costs.

[17] I turn now to consider the prospects of success of Evergreen, Foods and Barvale. In doing so, I shall evaluate the shareholder application. As indicated, the *locus standi* of Products to bring the applications was not contested since it is common cause that it is a shareholder in each of those appellant companies.

[18] The appellants submitted that:

'As the Emvest appellants are not commercially insolvent, a necessary precondition to wind them up on the just and equitable basis in terms of the Companies Act, 1973 is absent. This is fatal to the second respondent's application.'

This appears to presuppose that this ground was based on s 344*(h)* of the old Act and not on s 81(1)*(d)*(iii) of the new Act. There are problems with that submission. In the first place, the application of Products was not in terms based on the provisions of s 344*(h)*. Secondly, although the averment was made by the three companies that they

[5] *Cuninghame* para 1.

were solvent, they did not pertinently take the point that only s 344*(h)* could be relied upon. The pleadings accordingly were not limited to an application based on s 344*(h)*. Thirdly there is, in any event, no distinction in the language of the old and new Acts. It would be to place form over substance to non-suit Products on that basis since the issue of whether it was just and equitable to wind the companies up was squarely raised, fully canvassed in the papers and fully argued. It was thus appropriate that the above submission was neither developed nor pressed in argument before us. As a result, the merits of whether it was shown to be just and equitable to finally wind up the three companies must determine the matter.

[19] This Court has explained the approach to an application contending that it is just and equitable that a company be wound up:

'As has often been said about the only remaining winding-up ground persisted in by the appellants, namely, that of "just and equitable" – it postulates not facts but a broad conclusion of law, justice and equity.'[6]

Although our courts have 'evolved broad categories of circumstances in which they would grant a winding-up order on the just and equitable ground . . . these categories do not constitute a complete and closed list'.[7] The facts of each case must be considered.

[20] The first of these appellants to be considered is Evergreen. Evergreen did not contest the evidence that it was not trading and that no assets could be located. Since at least 2016, it had failed to submit annual returns to the Companies and Intellectual Property Commission (CIPC) as required by s 33 of the new Act. The CIPC has commenced deregistration of Evergreen as provided for in s 82(3)*(a)*(i) of the new

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[6] *Cuninghame* para 3.
[7] Ibid para 14.

Act. Since Evergreen is dormant and has no substratum, it is just and equitable that it be finally wound up. The high court was correct to so order. Evergreen accordingly has no prospects of success. Its application for condonation and reinstatement of its appeal must fail. As a result, the final liquidation order granted by the high court will stand, despite the high court having erred in its reasons for granting the order.

[21] The next of these appellants to be considered is Foods. It is common cause that Foods owns an immovable property located at Erf 1010, Clayville Extension 11, Midrand. This was occupied at the time by Railpro (Pty) Ltd (Railpro). On 30 January 2019, the provisional liquidators demanded that Railpro provide a copy of any lease, proof that rentals had been paid over the previous 12 months and that future rentals be paid to the liquidators. This elicited a response that the attorneys representing Railpro would only liaise with the provisional liquidators once a final liquidation order had been granted. There was a bond of R3 430 000 over the property which had been ceded to the fifth appellant, but no evidence was tendered that the bond was being serviced. Foods was also indebted to the fifth appellant under an omnibus suretyship agreement.

[22] In breach of s 363(2) of the old Act, the director of Foods, Mr Battles, has failed to provide the provisional liquidators with any information or documents relating to Foods, including the lease. He resides outside South Africa. He testified that Foods had not received any rentals from the lease. This begs the question whether the lease is being enforced. There is no evidence that Foods is trading at all and no indication that it has an office or presence in South Africa from which to do so. It is my view that it would be just and equitable for Foods to be finally wound up. Accordingly, the application for condonation has no prospects of success. As is the case with

Evergreen, the final winding up order must stand, despite the erroneous reasoning of the high court in arriving at such conclusion.

[23] The final appellant is Barvale. Barvale owned an immovable property at the time the liquidation application was launched. Despite this, it purported to sell that property. That constituted a sale during liquidation which is prohibited under the insolvency laws. Products complained that, even if the sale was valid, it, as shareholder, had not been consulted as was obligatory under the new Act since the sole asset of Barvale was being disposed of. The only response from Barvale was that shareholder meetings had been held. No particularity was provided and, in the face of specific provisions of the new Act, it was incumbent on Barvale to demonstrate compliance. Its assertion to this effect must be treated as a bare denial since it was in its power to specify dates, prove notice of these meetings and put up resultant resolutions. The words in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* apply equally here:

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'[8]

[24] Not only was there a failure to comply with s 112 of the new Act, but, when the provisional liquidators requested payment of the proceeds of the sale, the director failed to comply or to provide any information at all concerning Barvale. The deponent to the affidavit claimed that the proceeds were being held in its attorney's trust account. The document put up to confirm this, without a covering affidavit by

[8] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 para 13.

the attorney concerned, simply stated that ‘the total amount until 30/06/2021 is R4 175 524.88.’ This did not confirm that those funds were the proceeds of the sale, nor that they were being held on behalf of Barvale. Once again, the director refused to comply with the provisions of s 363(2) of the old Act. What is clear is that, as with Foods, the director dealt with company property whilst it was in liquidation to the exclusion of the provisional liquidators and in breach of the provisions of the insolvency laws. It was thus just and equitable that Barvale was finally wound up. That being the case, there are no prospects of success on appeal and the condonation application must fail. Once again, this means that, despite the high court having taken an erroneous approach to the matter, the final winding up order was appropriate and should stand.

[25] A strong and common factor in the shareholder applications is that the directors of the second to fourth appellants refused to co-operate with the provisional liquidators. They failed to hand over control of the companies and relevant documents to them, despite being obliged in law to do so. The directors clearly and wilfully failed to comply with the old and new Acts as well as the insolvency laws. There was clear obfuscation in order to disguise the true state of affairs. Their conduct, in and of itself, constitutes a ground for it being just and equitable that they be wound up.

[26] The fifth appellant intervened in order to oppose the applications. It prosecuted the appeals along with the other appellants and supported the condonation applications. It is an associated company and held omnibus suretyships granted to it by the first four appellants. It is not itself subject to liquidation. It does not seem appropriate that the costs of the condonation applications, which, in this instance, turn on the merits of the prospects of success in the appeals, should form part of the costs

of administration in the liquidations. That is also so of the applications for leave to appeal. The fifth appellant should bear those costs.

[27] In the result, the following orders issue:

In respect of the first appellant:

1 The application for condonation is granted and the appeal is reinstated.

2 The appeal is upheld with the costs to be paid jointly and severally by the first and second respondents.

3 The order of the Gauteng Division of the High Court, Pretoria under Case No. 43576/2016 is set aside and substituted with an order discharging the provisional winding up order with the costs to be paid jointly and severally by the first and second applicants.

In respect of the second, third and fourth appellants:

1 The applications for condonation are dismissed.

2 The fifth appellant is directed to pay the costs of the condonation applications, as also the costs of the applications for leave to appeal.

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T R GORVEN

ACTING JUDGE OF APPEAL

Appearances

For the appellants:	S Miller SC
Instructed by:	Bernardt Vukic Potash & Getz Incorporated, Cape Town
	Honey and Partners Incorporated, Bloemfontein
For the respondents:	S D Wagener SC
Instructed by:	Weavind and Weavind Incorporated, Pretoria
	MM Hattingh Attorneys, Bloemfontein.