THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1030/2015

In the matter between:

FRESHVEST INVESTMENTS (PROPRIETARY) LIMITED **APPELLANT**

and

MARABENG (PROPRIETARY) LIMITED **RESPONDENT**

Neutral citation: *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016)

Coram: Shongwe, Leach and Willis JJA and Fourie and Nicholls AJJA

Heard: 15 November 2016

Delivered: 24 November 2016

Summary: Winding-up application: respondent disputing debt on bona fide and reasonable grounds: court a quo referring matter to oral evidence: winding-up proceedings not designed for the enforcement of disputed debts.

ORDER

On appeal from: Free State Division of the High Court of South Africa, Bloemfontein (Jordaan J sitting as court of first instance):

1 The appeal is upheld and the order of the court a quo is set aside and substituted with the following:

'The application for the winding-up of the respondent is postponed sine die, with costs to date to be costs in the cause.'

2 The costs of the appeal, including the costs of two counsel, where applicable, are to be costs in the cause in the winding-up application.

3 Should the appellant be successful in the action that has been instituted ('the pending action') in establishing a claim of not less than R100 against the respondent, it may then set the winding-up application down for hearing on the same papers, duly amplified as needs be.

4 Should the appellant fail to establish a claim of not less than R100 against the respondent in the pending action, or fail to prosecute the pending action to its final conclusion, then the winding-up application will be deemed to have been dismissed with costs, including the costs of two counsel, where applicable.

JUDGMENT

Fourie AJA (Shongwe, Leach and Willis JJA and Nicholls AJA concurring):

[1] This is an appeal, with the leave of the court a quo, against the dismissal of an application for the winding-up of the respondent, Marabeng (Pty) Ltd. In essence, the matter 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. This has become known as the 'Badenhorst rule' after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at

347-348. See also *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 980B-D, as well as the authorities referred to in *Kalil* at 980D-F. A collection of more recent authorities on the application of the Badenhorst rule is found in P M Meskin et al *Henochsberg on the Companies Act* 5 ed Vol 1 at 693-694.

[2] The application for the winding-up of the respondent was brought at the instance of the appellant, Freshvest Investments (Pty) Ltd, a company which conducts business by, inter alia, providing finance facilities to entities active in the agricultural sector. It is common cause that the appellant, represented by Mr P Van As Le Roux (Le Roux) and the respondent, represented by Mr J H Naudé (Naudé Jnr), concluded three loan agreements during 2012, in terms of which it was recorded that the appellant lent and advanced various amounts to the respondent. It is further common cause that the respondent failed to repay the loans in terms of the agreements, with the result that as at 28 July 2014, an amount of R9 171 298,84 was due and owing to the appellant. On the strength of this indebtedness, the appellant approached the court a quo for the winding-up of the respondent.

[3] The respondent filed an extensive affidavit in opposition to the application, in which it placed the validity of the appellant's claim in issue. The main contentions raised by the respondent in disputing the appellant's claim were the following:

(a) Naudé Jnr had no authority to represent the respondent in concluding the three loan agreements with the appellant. In addition, the appellant's representative, Le Roux, was aware of Naudé Jnr's lack of authority.

(b) Both Naudé Jnr and Le Roux were aware that the loans were not for the benefit of the respondent, but were advanced for the sole benefit of Naudé Jnr's personal farming activities. The loan agreements were the product of the fraudulent and unlawful collusion between Le Roux, representing the appellant, and Naudé Jnr, to obtain the loans for the benefit of Naudé Jnr.

(c) Although the three loan agreements recorded that the appellant and the respondent were the parties thereto, the true parties to the agreements were the appellant and Naudé Jnr. In fact, the loans were not utilised by the respondent, but by Naudé Jnr for his personal farming activities.

(d) The three loan agreements were accordingly void ab initio and unenforceable against the respondent.

[4] In its replying affidavit the appellant put these averments of the respondent in issue. In the event, the matter was heard by Lekale J, who, after hearing argument, delivered a written judgment. It appears from the judgment that Lekale J was alive to the implications of the Badenhorst rule, as well as the nature of the onus resting on a respondent who disputes its alleged indebtedness to an applicant in winding-up proceedings. In *Kalil* at 980C-D this onus was described as follows:

'Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds.'

[5] The guidelines laid down in *Kalil* as to how factual disputes regarding the respondent's indebtedness in an application such as the present should be approached, were stated thus by Brand J in *Payslip Investment Holdings CC v Y2K Tec Limited* 2001 (4) SA 781 (C) at 783H-I:

'With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general.'

[6] In *Hülse-Reutter & another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998 (2) SA 208 (C) at 219E-220A, Thring J commented as follows on the nature and the extent of this onus:

'I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they dispute the applicants' claims, and do so bona fide, . . . what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, . . . have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable . . . It seems to me to

be sufficient for the trustees in the present application, as long as they do so bona fide, . . . to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company.'

[7] In applying these principles to the facts of the instant matter, Lekale J held as follows:

'I am, therefore, persuaded by common cause facts in the present matter that the respondent disputes the debt on bona fide and reasonable grounds.'

In the light of the principles set out above, and bearing in mind the low threshold test that the respondent had to satisfy in order to discharge its onus, that should have been the end of the matter. Lekale J ought thereupon to have dismissed the application. However, he came to the following conclusion:

'In the light of the need for speedy finalisation of a matter of the present nature, the nature and extent of the dispute involved as well as the fact that the dispute was not foreseeable on the part of the applicant [the appellant], I am convinced that the parties are correct, in their alternative submissions, that the correct course to follow is for the issue concerning the respondent's liability to the applicant to be referred to oral evidence.'

[8] The consequences of this referral were unfortunate. As recorded earlier, there was no need in these proceedings for a finding whether or not the respondent is indebted to the appellant, as the respondent does not have to prove its defence. All that was required of the respondent, was to show that the appellant's claims were disputed on bona fide and reasonable grounds. This Lekale J held it had done.

[9] The application was then, in the temporary absence of Lekale J, referred to Jordaan J for the hearing of oral evidence. He heard the evidence of Mr FJ Rossouw (Rossouw), the deponent to the opposing affidavit of the respondent, as well as that of Le Roux. Upon conclusion of the evidence, Jordaan J delivered a judgment in which he dismissed the winding-up application with costs.

[10] It is apparent from the judgment of Jordaan J, that he was rather surprised by the fact that, although Lekale J had held that the respondent disputed its indebtedness on bona fide and reasonable grounds, the matter had been referred to

oral evidence on the issue of the respondent's liability to the appellant. He put it as follows at para 10 of his judgment:

'The irony of the matter is that my brother held that the debt was disputed on bona fide and reasonable grounds. However, I accept that this finding was obiter, otherwise there would have been no reason to refer the matter for oral evidence to have the same issue decided.' (My translation of the learned judge's Afrikaans.)

[11] The finding of Lekale J was not obiter. As recorded above, he had expressly held that, on the common cause facts, the respondent disputed the debt on bona fide and reasonable grounds. In view thereof, Jordaan J ought to have held that it was unnecessary to hear oral evidence. See *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263H. The dismissal of the application ought then to have followed without incurring further costs and delay.

[12] The irony is that, after hearing evidence for three days, Jordaan J came to exactly the same conclusion as Lekale J, namely that the respondent disputed the debt on bona fide and reasonable grounds. This conclusion was based on the relevant documentation as well as the evidence of Rossouw and Le Roux, and after making credibility findings, in particular, that the appellant's witness, Le Roux, was an extremely poor witness.

[13] This court is now faced with an appeal arising from proceedings before Jordaan J which were unwarranted and irrelevant. Lekale J had already held that the debt was disputed on bona fide and reasonable grounds. This finding was no doubt correct, as, on the papers (particularly the extensive answering affidavit), a defence was raised which was not unreasonable – on the contrary, the facts raised in opposition, if proved at a trial, would no doubt constitute a good defence. Further, a lack of bona fides cannot readily be inferred from the papers. Therefore, the matter ought to have ended with this finding of Lekale J and the appellant ought then to have instituted action to prove its disputed claim in the normal course. As recorded earlier, Lekale J compounded the confusion by referring the matter to oral evidence on the issue as to whether or not the debt was, in fact, due. Jordaan J then, contrary to the order of Lekale J, decided the issue as to whether or not the debt was disputed on bona fide and reasonable grounds. This issue had, however, not only

already been decided, but was an issue that had to be decided on the papers and not with the aid of oral evidence. How does this court now unscramble the egg?

[14] What is clear from the above, is that the winding-up application could not have succeeded. But, should the appeal against the order of Jordaan J now simply be dismissed? Although one may at first blush be inclined to follow this route, I believe that, for the reasons set out hereinafter, the appeal ought not to be dismissed.

[15] The appellant's counsel forcefully argued that should this court find that the respondent has in fact discharged its onus, the appeal should not be dismissed, but it should be ordered that the winding-up application be postponed sine die to enable the appellant in the meantime to proceed against the respondent with its action for payment of its claim. We have been informed that action proceedings have already been instituted by the appellant for the recovery of the full amount allegedly due to it by the respondent.

[16] Counsel for the appellant further submitted that, in the hearing before Jordaan J, the respondent had changed its stance by contending that the relevant loan agreements were simulated transactions and not, as initially alleged in the answering affidavit, the result of fraudulent and unlawful collusion between the appellant and Naudé Jnr. Counsel contended that it was apparent from the evidence of Rossouw, the respondent's witness, that an amount of at least R600 000 of the funds advanced by the appellant in terms of the agreements, was paid to the respondent's creditor and not to Naudé Jnr. Therefore, counsel argued, there was a reasonable possibility that the appellant will have some success in its action against the respondent.

[17] Whilst it is not necessary to delve into the evidence tendered before Jordaan J, I believe that there is merit in counsel's submission that allowance should be made for the possibility that the appellant may in the main action obtain an order recovering some portion of the debt allegedly owing and on which the winding-up application is based. However, I hasten to add that I make no definite finding in this regard. Therefore it appears to be just and equitable at this stage not to finally dispose of the winding-up application, but rather to postpone it sine die, thereby awaiting the finalisation of the action proceedings.

[18] In arriving at this conclusion, I have also taken account of the fact that both of the parties were instrumental in having the matter referred to oral evidence by Lekale J. As appears from his judgment, the parties put this forward as an alternative route to follow and then actively participated in the hearing before Jordaan J, notwithstanding the prior finding made by Lekale J that the respondent disputed the debt on bona fide and reasonable grounds.

[19] In making this order, it has been helpful to refer to the order made by Griesel J in *Investec Bank Limited v Lewis* 2002 (2) SA 111 (C) at 121A-C.

[20] It is ordered that:

1 The appeal is upheld and the order of the court a quo is set aside and substituted with the following:

'The application for the winding-up of the respondent is postponed sine die, with costs to date to be costs in the cause.'

2 The costs of the appeal, including the costs of two counsel, where applicable, are to be costs in the cause in the winding-up application.

3 Should the appellant be successful in the action that has been instituted ('the pending action') in establishing a claim of not less than R100 against the respondent, it may then set the winding-up application down for hearing on the same papers, duly amplified as needs be.

4 Should the appellant fail to establish a claim of not less than R100 against the respondent in the pending action, or fail to prosecute the pending action to its final conclusion, then the winding-up application will be deemed to have been dismissed with costs, including the costs of two counsel, where applicable.

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P B Fourie

Acting Judge of Appeal

APPEARANCES:

Counsel for Appellant:	L M Buikman SC
	Instructed by:
	Cluver Markotter Inc., Stellenbosch
	McIntyre & van der Post, Bloemfontein
Counsel for Respondent:	P J Greyling (with him J J Potgieter)
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