



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: **8287/2018**

In the matter between:

DEON WAYNE PREÜSS

Applicant

(Identity Number: [...])

and

SILVER LAKE TRADING 36 (PTY) LTD

Respondent

(Registration Number: 2003/029142/07)

J U D G M E N T:
HANDED DOWN ON WEDNESDAY, 26 SEPTEMBER 2018

MACWILLIAM AJ:

[1] The Applicant applies for an order that the Respondent be provisionally wound up.

- [2] In his Founding Affidavit, the Applicant alleged in paragraph 5 thereof that:

*“The Respondent is truly and lawfully indebted to the Applicant in the amount of **R1 000 000,00** (One Million Rand).”*

- [3] In paragraph 6 of his Founding Affidavit, the Applicant alleged baldly that:

*“6. On the **1st** and the **4th** **December 2009** the Applicant entered into an agreement [with]¹ [**the Respondent**] and **Wayne Allan Bengston** (hereinafter referred to as ‘Bengston’)”*

- [4] That agreement, with irrelevant words deleted, provides as follows:

“MEMORANDUM

OF

AGREEMENT

Between:

WAYNE ALLAN BENGSTON [i.e. the deponent to the Answering Affidavit]

...

and

DEON WAYNE PREÜSS [i.e. the Applicant]

...

WHEREAS:

¹ The “*with*” was omitted in the affidavit, presumably in error.

1. *Both parties are the only shareholders of the Companies Roo-Bok Developments CC, Registration Number 2006/191573/23 and [the Respondent] in either their own names or their representative capacities as trustees of their family trusts.*

2. *Roo-Bok Developments CC has acquired the following property, being a farm in Wellington and such property cannot be sub-divided:*

...

3. *Preüss improved the property as mentioned above by renovating the farm stead at his own expense and is not able to obtain notable security.*

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

- (a) *Should the farm as mentioned in 2. above being sold either by consent or forcefully at a foreclosure or otherwise the free residue to a maximum of R2 000 000.00 (Two Million Rand) after settling of this bond obligation of the property in 2. above, related Rates and Taxes, related VAT and transferring attorney cost related to this property, will be paid to Preüss or his nominated beneficiary. Should this residue funds be applied to any other obligation of Roo-Bok Developments CC, Preüss shall be entitled to 100 % compensation from Roo-Bok Developments CC to the value of not more than R2,000,000 (Two Million Rand).*

(b) [The Respondent] and or the 5B Trust and or Bengston shall within 90 days from (a) above, release a further amount of R1 000 000,00 (One Million Rand) as final settlement towards Preüss or his nominated beneficiary on condition that written confirmation has been received from the auditor Bruce Matthews that the share exchange between Five B Trust, The Deon Wayne Preuss Trust and the Prema Trust regarding shares in Roo-Bok Property Investments (Proprietary) Limited and [the Respondent] has been finalized.

(c) These payments as in (a) and (b) above will in full and final settlement for private investment Preüss has done with renovation as referred to in clause 3 in preamble above.

...

THUS DONE AND SIGNED AT CAPE TOWN ON THIS 4TH DAY OF DECEMBER 2009

AS WITNESSES:

1. (Unknown signature).

2. (Signature)
BENGSTON

THUS DONE AND SIGNED AT WELLINGTON ON THIS 1ST DAY OF DECEMBER 2009

AS WITNESSES:

1. (Unknown signature).

2. (Signature)
PREÜSS"

[5] The Applicant further alleged in his Founding Affidavit that:

- “7. Both the Applicant and **Bengston** entered into the agreement in their capacities as the only members/shareholders of **Roo-Bok Developments CC Reg No: 2006/191573/23** and [the Respondent] respectively.
8. Both the Applicant and Bengston also entered the agreement in their representative capacities as trustees of their family trusts.
9. Shortly hereafter all the shares that the Applicant held in the Respondent was transferred to **Bengston’s** nominee the **5B Trust**. I no longer hold any shareholding nor am I a director of the Respondent. I am therefore not conversant with the financial position of the Respondent.
10. In terms of **paragraph (b)** of the agreement, [the Respondent] and/or **5B Trust** and/or **Wayne Allan Bengston** are liable to pay the amount of **R1 000 000,00** (One Million Rand) as the final settlement towards the Applicant within **90 days** from the farm (Remainder of **Erf 10568** Wellington) being sold either by consent, forcefully at foreclosure or otherwise. The farm was sold at the sale in execution on **27 July 2015** and finally transferred on **10 August 2015** to **CPH developments Pty Ltd**.
11. Having received no payment after the **90 days** had transpired Applicant caused to be sent a demand in terms of

*section 345(a)(i) of the Act, ('the letter of demand') which demand was dispatched to the **Respondent** at its main place of business, and registered address (as well as all alternatives the Respondent are using or used in the past) the **5B Trust** at its address, and **Bengston** at his residential address at [...], **B. Road, Western Cape**, by way of registered post for payment by them of the said sum of **R1 000 000,00** (One Million Rand) and the Respondent has for three weeks thereafter neglected to pay the sum, or to secure or to compound for it to my reasonable satisfaction.
... .”*

- [6] Of particular relevance is the fact that nowhere in the Founding Affidavit was it alleged:
- [a] that Bengston, Preüss or anyone else, were the directors of the Respondent;
 - [b] how or why the Respondent had been bound in terms of the agreement to pay the R1 million, save for the allegation that the Applicant and Bengston entered into the agreement in their capacities as the only shareholders of the Respondent;
 - [c] that the condition contained in the latter portion of paragraph (b) was satisfied, save for the allegation made in paragraph 9 of the Founding Affidavit which is set out above;

- [d] insofar as the trigger event which had to occur in order to bring paragraph (b) into operation, being “90 days from (a) above”, the Applicant relied only on the sale of the farm (and possibly the transfer of the farm) as alleged in paragraph 10 of the Founding Affidavit.
- [7] Apart from the terms of the agreement itself, the Applicant placed no context before the Court² in its Founding Affidavit and relied only on the express wording of the agreement for the interpretation which it placed on the agreement and the existence of the debt allegedly owed to him by the Respondent. He did this in circumstances when only Bengston and the Applicant are stated to be the parties to the agreement and their signatures are not qualified in any way.
- [8] The Applicant’s problem regard was compounded by the fact that in his Answering Affidavit, Bengston states that he signed the agreement in his personal capacity only.
- [9] While this statement may be opportunistic, as the agreement refers to a number of entities, including the Respondent and further records that the Applicant and Bengston are the Respondent’s only shareholders (either in their own names or as trustees of their family trusts), the manner in which the Respondents allegedly became obliged to pay the debt of R1 million to the Applicant is not

² cf Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18]

addressed further in the Founding Affidavit. On the contrary, it is possible to conclude (based on the wording of the agreement), that the obligations created in terms thereof were only personal obligations, in terms of which, for example, the signatories undertook to cause the Respondents to act in a particular way. Without more, it is not possible to conclude that the Respondent was itself bound by the agreement.

[10] In argument, the Applicant relied, in particular, on paragraph 1 of the agreement, but that paragraph records only that both parties are the shareholders of the Respondent, either in their own names or their representative capacities as trustees of their family trusts.

[11] As set out above, the Applicant refined this allegation in paragraph 7 of his Founding Affidavit by alleging that the Applicant and Bengston entered into the agreement in their capacities as the only shareholders of the Respondent.

[12] However, according to the Respondent's share certificate dated 1 August 2009 (which was attached to the Respondent's Answering Affidavit), the 5B Trust was at that time the registered holder of 100 shares of R1,00 each in the Respondent (its issued share capital being reflected in its 2017 and 2018 financial statements as R200,00). The trust deed in respect of the 5B Trust does not form part of the papers and the authority and capacity of the trustees of the 5B Trust's to bind the Trust, let alone the Respondent, was not dealt with in the Applicant's affidavits, save for the bald allegation

that the Applicant and Bengston entered into the agreement in their representative capacities as trustees of their family trusts.

[13] In the circumstances, the Applicant failed to make out a case in its founding papers that in terms of the agreement the Respondent was obliged to “*release*” (in itself an unusual word for which context should have been provided) a “*further*” amount of R1 million. Furthermore, if clause (b) is to be construed as an undertaking to pay by the Respondent, that undertaking was itself qualified by the words “*and or the 5B Trust and or Bengston*”. The reason for the inclusion of these further words and whether or not the 5B Trust and/or Bengston had made payment, are also not dealt with in the Founding Affidavit.

[14] The situation is compounded by the fact that the condition recorded in paragraph (b) is not addressed in the Founding Affidavit, save for the statement that all the shares which the Applicant held in the Respondent had been transferred to Bengston’s nominee, the 5B Trust.

[15] The Respondent in its Opposing Affidavit, in addition to denying that the Respondent owed the Applicant the amount of R1 million, alleged expressly that Bengston concluded the agreement in his personal capacity only. Although this bald allegation is curious, bearing in mind the references to the other entities in the agreement, it is not possible to disregard it in the light of the paucity of the allegations made in the Founding Affidavit.

[16] The fact remains that it was for the Applicant to make out its cause of action in its Founding Affidavit and it failed to do this.

[17] The Applicant attempted to salvage the situation by alleging in its Replying Affidavit, *inter alia*, that -

“Ex facie the Agreement ..., the Agreement was entered into between ... Bengston and ... [the Applicant] in their capacities as the only shareholders and directors of ... [the Respondent]. ... As both shareholders and only directors this renders a resolution obsolete.”

[18] The most striking difficulty with this statement is that “*ex facie the agreement*”, the Applicant and Bengston did not conclude the agreement in their capacity as directors of the Respondent.

[19] Not only that, but no documents to substantiate that the Applicant and Bengston were the only directors of the Respondent was attached to the Replying Affidavit.

[20] In the course of his argument in reply, the Applicant’s counsel handed up a document which he stated was a print-out from the CPICC reflecting the accurate position with regard to the Respondent’s directors.

[21] However, this document, which was handed up at the last minute and not under cover of an explanatory affidavit, contains contradictory allegations, for example:

- [a] the Applicant is referred to twice as a “*resigned director*”, the first entry reflecting that he was appointed on 11 March 2005 and resigned on 26 March 2010, whereas the second entry records that he was appointed on 13 July 2006 (when he had apparently already been a director for more than a year), and resigned on 12 September 2016; and
- [b] Bengston is referred to as being the active director, having been appointed on 11 March 2005, but under the heading of “**DIRECTOR 4 OF 7**”, his resignation date is referred to as being 18 November 2003.
- [22] While the entries appear *prima facie* to point to the fact that both Bengston and the Applicant were the Respondent's only directors when the agreement was concluded in December 2009, the Applicant placed no facts before the Court in support of his bald allegation that as both shareholders and only directors of the Respondent, this rendered “*a resolution obsolete*”.
- [23] In this regard, the Applicant called in aid Aussenkehr Farms (Pty) Limited v Trio Transport CC³ and Clifton Dunes Investments 100 Limited and Another v City SA Property Holdings Limited.⁴ However, in these cases, the Supreme Court of Appeal held that a party to a contract cannot in law, after the fact, avoid the consequences of a contractual term, the meaning of which they had

³ 2002 (4) SA 483 (SCA) at para [25]

⁴ (169/14) [2015] ZASCA 12 (16 March 2015) at para [11]

agreed upon where both parties have acted on that agreed meaning. In the present case, the Applicant has simply failed to make out such a case.⁵

[24] Over and above the foregoing, the Applicant alleged only, with regard to compliance with the trigger event which is provided for in paragraph (a) of the agreement, that the payment only had to be made “*within 90 days from the farm ... being sold either by consent, forcefully at foreclosure or otherwise*”.

[25] As it transpired from the facts set out in the answering affidavit, the farm had indeed been sold “*by consent*”. However, if this was the relevant date, then by the time that the application was launched, the claim had probably prescribed.

[26] Furthermore, after the sale by consent fell through, the farm was not sold “*at foreclosure*”, nor was it sold “*at a sale in execution on 27 July 2015*” as alleged in the Founding Affidavit. The farm was in fact sold by the liquidator of Roo-Bok Developments CC after that corporation had been placed in liquidation.

[27] Accordingly, in its Replying Affidavit and in the course of oral argument, the Applicant was now constrained to argue that the 90 days referred to in clause (b) of the agreement, only commenced

⁵ The Applicant did not attach to its affidavits a copy of the Respondent's then Articles or Memorandum of Association and did not refer the Court to the case of Gohlke & Schneider v Westies Minerale Beperk 1970 (2) SA 685 (AD) at 692E-693A or the cases in which the principles set out therein were applied. In any event, the Applicant failed to make out a case on this basis either.

to run, not only after the property had been sold, but after all of the obligations owed in respect of the property had been settled and a free residue, if any, had been determined. While this interpretation may be a valid interpretation, this interpretation was only advanced in reply.

[28] It is trite that an applicant must make out his cause of action in his founding affidavit. In this matter, the Applicant simply failed to do this.

[29] No argument was addressed to me as to why the Applicant should be allowed to make out his cause of action in his Replying Affidavit, even if it could be said that he had done this.

[30] There is a further problem which the Applicant faces.

[31] Both counsel referred to and relied upon two judgments of Rogers J in this division, the one being One Stop Financial Services (Pty) Limited v Neffensaam Ontwikkelings (Pty) Limited and Another, an unreported judgment handed down on 17 June 2015 under case number 2002/28/14, and the other Orestisolve v NDFT Holdings.⁶ In both cases the judge laid down the following relevant legal principles (and I quote from the second case):

“[7] In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a

⁶ 2015 (4) SA 449 (WC)

prima facie basis, meaning that the applicant must show that the balance of probabilities on the affidavits is in its favour (Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 975J-979F). This would include the existence of the applicant's claim where such is disputed. (I need not concern myself with the circumstances in which oral evidence will be permitted where the applicant cannot establish a prima facie case.)

- [8] *Even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of a broader principle that the court's processes should not be abused. In the context of liquidation proceedings the rule is generally known as the Badenhorst rule, from the leading eponymous case on the subject, Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347H-348C, and is generally now treated as an independent rule, not dependent on proof of actual abuse of process (Blackman et al Commentary on the Companies Act vol 3 at 14-82 to 14-83). A distinction must thus be drawn between factual 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 applicant's*

claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim is bona fide disputed on reasonable 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 and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 218D-219C)” (emphasis added).⁷

[32] In the present matter it is simply not possible to conclude that the claim is not disputed on reasonable grounds. The Applicant failed to make out its case in its Founding Affidavit and I cannot conclude that the disputes raised in the Answering Affidavits are not unreasonable in the circumstances of this case. Not only that, but the fact that the Applicant attempted to resolve some of his difficulties in his Replying Affidavit, meant that the Respondent had no right to reply thereto.

[33] In these circumstances, there is no need to consider the various defences raised by the Respondent, save to comment that they appear to be of doubtful validity.

⁷ *Orestisolve supra* at paragraphs [7] and [8]

[34] In the circumstances, the application is dismissed with costs.

MACWILLIAM AJ

DATE OF HEARING: 13 September 2018

APPEARANCES

For the Applicant:	Adv. M Basson
Instructed by:	De Waal Incorporated, Durbanville
For the Respondent:	Adv. T Benadé
Instructed by:	Anton Posthumus Attorneys, Cape Town