



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

Appeal Case No: **A253/2022**

Case No: Court a quo: **7620/2021**

(1) REPORTABLE: YES/NO	(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED	
	 07 FEBRUARY 2024.....
SIGNATURE	DATE

In the matter between:

UNIQUON WONINGS (PTY) LIMITED

Appellant

(Registration No: 1999/01441/07)

and

**BROOKLYN AND EASTERN AREAS CITIZEN
ASSOCIATION**

Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 07 February 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This appeal lies against the whole judgment and order handed down by His Lordship Van Der Westhuizen on 26 November 2021 [Court *a quo*], in which he refused the winding-up order against the Respondent, a voluntary association.

[2] Leave to this Court was granted by the Supreme Court of Appeal [SCA] on 31 August 2022.

[3] In its judgment, the Court *a quo* found that the winding-up procedure was an abuse of process and as a result, Van Der Westhuizen J stated “-I exercise my discretion against the granting of a winding-up order, whether a sequestration or liquidation, final or provisional”. The Appellant’s inability to nail its colours to the mast on whether, to sequestrate or liquidate the Respondent, is evident in the papers. The reason for the Appellant seeking an amendment to cater for alternate relief becomes clearer.

[4] Of significance then, the common cause fact relied on by the Appellant, in its heads of argument, that the Respondent is a *universitas personarum* which falls to be liquidated and not sequestered. In the absence of argument to the contrary by the Respondent, this Court deals with the matter on that basis.

[5] In so doing, and to bring context to the term “winding-up”, the term is not defined in the Insolvency Act 24 of 1936 [Insolvency Act] nor, for that matter in the Companies Act 71 of 2008 [2008 Act]. The phrase “winding-up order” however, is defined in the Companies Act of 61 of 1973 [1973 Act]. The 1973 Act definition refers to the winding-up of “a company” incorporated in terms of Chapter IV only. Notwithstanding the same, Chapter XIV which deals with winding up of companies, specifically extends the definition to include any incorporated body. The Respondent to be wound-up in terms of the provisions of Chapter XIV of the 1973 Act.

[6] Central to this appeal then, is whether the Court *a quo*, correctly found that the winding up procedure against the Respondent was an abuse of process, predicated on reasons other than on *bona fide* grounds, when it exercised its discretion to refuse the relief.

[7] To concisely frame the Appellant's grounds of appeal, the Appellant contends that the Court *a quo* exercised its discretion in the absence of facts and that a disconnect between the facts and the conclusions existed. The Appellant in argument amplified its grounds by contending that the Respondent had failed, in answer, to discharge its onus under the circumstances.

[8] It is for this reason, that the background facts remain a pivotal source in determining whether facts and a disconnect exists. Having said that, this Court first highlights the applicable legal principles governing the issue.

APPLICABLE LEGAL PRINCIPLES

[9] While courts are entitled to prevent any abuse of process, it is a power that should be exercised sparingly.¹ This advice was voiced by the Supreme Court of Appeal [SCA] when Wallis JA in the Mostert and Others v Nash & Another matter² stated that the starting point is the constitutional guarantee of the right of courts in section 34 of the Constitution. However, as important as this right is in the adjudication of justiciable disputes, where a procedure is being used to achieve a purpose other than intended, that amounts to abuse of process.

[10] Hiemstra AJ in the Badenhorst matter³ warned that because liquidation of a company affects all the creditors and shareholders, an order should not lightly be granted by a single creditor. He further went on and stated that: "*a winding-up*

¹ ***Mostert and Others v Nash & Another*** (604/2017 and 597 (2017) [2018] ZASCA 62 (21 May 2018), ***L.F. Boshoff Investments (Pty) Ltd v Cape Town Municipality: Cape Town Municipality v L.F. Boshoff Investments (Pty) Ltd*** 1969 (2) SA 256 (C) at 275B-D (Boshoff Investments).

² *Supra*.

³ ***Badenhorst v Northern Construction Enterprises (Pty) Limited*** 1956 (2) SA 346 (T) at 346 G-H and at 348 A-B.

petition is not a legitimate means of seeking 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 the Court.” [Badenhorst rule].

[11] The SCA applied the Badenhorst rule in Imobrite (Pty) v DTL Boerdery CC⁴ when, Molemela JA stated that a winding-up order will not be granted where the sole or predominant motive or purpose is not the *bona fide* bringing about of a company’s liquidation and that, an abuse of process would occur when an attempt to enforce payment of the debt was a motive to oppress or to frustrate the rights of the company.⁵ No dispute arose between the parties as the applicability of this rule to the facts before the Court *a quo*.

[12] The Appellant’s Counsel invited this Court to consider what Wallis JA stated in the Afgri Operations Limited v Mamba Fleet (Pty) matter,⁶ when he stated that generally speaking, an unpaid creditor has an *ex debito justitiae* right to a winding-up order against a company that has not discharged its debt and that, in practice, a court will rarely exercise its narrow discretion. Such discretion to be exercised in special and unusual circumstances only. The debtor bearing the onus in support thereof.

[13] Both Counsel correctly pointed out that the Court *a quo*’s discretion was narrow and that the powers of this Court to interfere in the exercise of the Court *a quo*’s discretion has been aptly set out by the SCA, “A court of appeal is not entitled to set the decision of a lower court granted in the exercise of a strong or a true discretion (*ie. a discretion in the strict or narrow sense*) merely because the court of appeal would, itself on the facts of the matter before the lower court, have come to

⁴ (1007/20) [2022] ZASCA 67 (May 2022) at para 15.

⁵ *Supra* footnote 4, Henochsberg on the Companies Act issue 23 at 694 and Henochsberg in the Companies Act 71 of 2008 Volume 2 APP1-46; and see **Re Surrey Garden Village Trust, Limited** (1964) 3 All E.R. 962

⁶ **Afgri Operations Limited v Hamba Fleet (Pty) Ltd** [2017] ZASCA 24; 2022 (1) SA 91 (SCA) para 12-13.

*a different conclusion. The court of appeal may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection of the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”*⁷ This general principle reaffirmed by the Constitutional Court in the National Coalition for Gay and Lesbian Equality & Others v the Minister of Home Affairs and Others⁸.

[14] Against these legal principles, the facts.

THE FACTS

[15] The relationship between the Appellant and the Respondent is unusual. It does not arise, as one would expect, from a conventional debtor/creditor transactional relationship. This is so because the Appellant is a profit driven property developer, developing residential property in Brooklyn, Pretoria [Brooklyn]. Whilst the Respondent is a non-profit association of ordinary residents, whose main objective, as the members, is to be a watchdog over developments in the Brooklyn and Eastern area of Pretoria [suburb].

[16] The Respondent's constitution, *inter alia*, empowers its members to oppose rezoning applications brought by parties in its suburb. Objections against the Appellant's rezoning applications by the Respondent have occurred in the past, on numerous occasions.

[17] Logically objections delay anticipated developments. A fact demonstrated on the papers by the Appellant. Delays attract conflict. Such conflict echoed in the judgment of Ellis AJ, an annexure to the Appellant's founding papers, depicting a history of the parties being embroiled in lengthy acrimonious litigation. In fact, the indebtedness relied on in the winding-up proceedings before the Court *a quo*, was for the recovery of taxed costs awarded by Ellis AJ on 4 July 2018, duly taxed some

⁷ Supra at par 11.

⁸ 2000 (2) SA 1 (CC) para 11.

2 (two) years later on the 9 July 2020. The taxed costs amounted to R 322 794.64 [the debt].

[18] Delayed developments and the Appellant's frustration as a result of it spilled over into the founding papers when the deponent, a director of the Appellant, stated the following in paragraph 36: *"In addition to the aforesaid it is evident that the respondent acts to the detriment of, for instance, developers like the applicant and the structure of a so-called 'Citizens Association' is abused to delay, prevent and frustrate development"*.

[19] It is a common cause that the winding-up application was brought after the Respondent had formally lodged an objection to the Appellant's latest rezoning application in the Brooklyn area. Chronologically, the Respondent's formal objection was lodged on 25 November 2020 and the application issued on 15 February 2021 [the objection]. This objection was the trigger event relied on by the Respondent as the predominate motive for setting the winding up proceedings into motion.

[20] To consider the alleged trigger event in isolation is a futile exercise. Every application is preceded by a process, a paper trail giving rise to reasons and support to necessary allegations.

[21] On the facts, the Appellant was aware of the Respondent's intention to object to the new proposed development a year before the formal objection was lodged. This is so, as in February 2020 Prof Wegelin, a retired professor in architecture and a member of the Respondent, attended a meeting with the Appellant, during which, he pointed out that the new proposed development offended the Provincial Heritage Resources Authority of Gauteng. Thereafter, National Lockdown, as a result of the Coronavirus, followed.

[22] On the 22 June 2020 the Respondent received its first warning from the Appellant [June letter]. The Appellant in this letter, warned of an intended action for damages against the Respondent and to its members personally arising from the delays caused as a result of previous objections. The June letter was not only

marked for the attention of and sent to the Respondent's Chairperson but, to Prof Wegelin personally.

[23] In the June letter, the Appellant called for the personal particulars, contact details of the Respondent managing members (period 1 June 2015 to 9 November 2018) and minutes of meetings pertaining to any objections lodged or decisions taken in anticipation of or pursuant to any litigation against the Appellant [furnished information].

[24] The Appellant attached the June letter to its founding papers and relied on the Respondents refusal to furnish the information by insisting, under the heading: "INABILITY TO PAY AND REFUSAL TO FURNISH INFORMATION" that the Court *a quo*, over and above the Respondent's inability to pay the debt, also take the Respondent's conduct into account. This insistence was coupled with a warning of the likelihood of further proceedings against the Respondent emanating from such conduct. This the appellant set out in paragraph 38 of its founding papers: "*The aforesaid conduct of the Respondent must, (inability to pay and refusal to furnish information-own emphasis) therefore be considered and taken into account in the matrix and context of this application pursuant to which proceedings will, in all likelihood, emanate". (own emphasis)*

[25] The June letter did not mention the Appellant's intention to recover the debt. As mentioned the costs were only taxed in July 2020, a date after the Respondent failed to provide the furnished information.

[26] On the 30 July 2020, the Appellant demanded payment of the debt from the Respondent for the first and the last time [July letter]. The time period expressed in the July letter does not comply with the 3 (three) week statutory period provided for in section 345 of the 1973 Act. The Respondent was only afforded 7 (seven) days, and was warned that default of payment within such 7 (seven) days would cause a writ to be issued and executed.

[27] Notably the Appellant's attorney in the July letter and at paragraph 6 states that: "*We will, obviously, pursue an application for sequestration of the association*

should we be instructed to do so". A further warning given without an expressed mandate at that time to do so.

[28] On 24 August 2020, a writ of execution was issued. The Sheriff, on 14 September 2020 issued a *nulla bona* return. Section 345(1)(b) of 1973 Act provides that the Sheriff must state that he/she could not find sufficient disposable property to satisfy the judgment, namely, to satisfy the recoverable taxed costs in the amount of R 322 794.64.

[29] The Respondent's inability to satisfy the the debt, as set out by the Sheriff, remained undisturbed on the papers, this is even having regard to the new evidence. As a matter of fact, Ms JJ De Villiers, the pensioner who, in her capacity as the secretary of the Respondent, stated as much in the answering affidavit. Reading the evidence as a whole, including the specific paragraphs relied on by the Appellant in the new evidence, she simply stated that the Appellant would not be in a position to recover its debt by means of winding-up procedures as the Respondent is an association which does not operate for gain nor possesses assets of value which could satisfy the debt.

[30] The new evidence referred to, arose as a result of an email which indicated that as at 31 October 2022 the Respondent still had R50 000.00 in its bank account. The Appellant argued, *inter alia*, that this email, illustrated that the Respondent's allegations in its answering affidavit to the affect that, it possessed no assets, was untrue. A fact it wished to highlight by re-opening the case moving for a punitive cost order against the author of the e-mail, the Chairperson of the Respondent, a Senior Counsel of this Division. An unfortunate event as, at best, the new evidence was a neutral factor for the reasons already explained and one which did not advance the Appellant's case, the Respondent could still not pay the debt. Conversely it is an illustration of its own motive and purpose.

[31] So what was the motive if the evidence did not advance the Appellant's main application? The motive appears to be an attempt to introduce the common law principle of the doctrine of unclean hands. The Appellant's Counsel advanced it in argument.

[32] The doctrine of unclean hands means that a party seeking relief cannot have acted unethically or unjust in its own matter. The Chairperson's email hardly illustrates that the Respondent was untruthful in its answer when it stated that it, at that time, did not have assets of value to satisfy the amount of R 322 794.64 this is having regard to the R 50 000. A fact which remained undisturbed in October 2022. The necessity to introduce the doctrine of unclean hands, the manner of its introduction and the call for a punitive cost order are themselves factors for consideration.

VALUATION OF THE EVIDENCE

[33] In considering the Appellants argument of an apparent disconnect between the facts and conclusions, and lack of factual foundation from which the Court *a quo's* could exercise its discretion, this Court turns to the evidence.

[34] The thrust of the Respondent's case is that the actions employed by the Appellant is to intimate and deter them from their objectives. These actions it advances, demonstrates a motive other than the *bona fide* bringing about of their liquidation. The trigger event, the possibility of yet another objection which could cause another delay. In so doing, the Respondent in their answering affidavit, from paragraphs 2-23, set out the Appellant's actions and reasons upon which they relied.

[35] The Appellant, instead of explaining their actions to demonstrate a contrary conclusion, simply replied: "*paragraphs 2-23 of the answering affidavit do not assist the Respondent in the issues for determination by this Court and the content of those paragraphs are not only irrelevant but also denied.*"

[36] Astoundingly, the bare denial of material facts was then bolstered by asserting yet a further possible threat to the individual members of the Respondent stating in paragraphs 9 and 10: "*Even though the Respondent might not have any money (which Applicant disputes because the Respondent failed to provide a full and frank financial disclosure of its bank statement and financial statement) the*

individuals responsible for the dispositions can ultimately be held liable in terms of the body of law relating to insolvency. The aforementioned aspect is important since the Respondent appears to be run by a few individuals who seek refuge behind the “legal persona” of the Respondent to avoid personal obligations”. (own-emphasis).

No real dispute of fact was raised on the papers and the relevance of such facts in the determination of the Respondent’s case, are indeed self-evident and material.

[37] Having regard to the evidence, little doubt exists that special and unusual circumstances referred to by Wallis JA⁹ exist. The actions taken by the Appellant from the time of its gained knowledge in February 2020 of a possible objection to, when the objection was finally lodged in 2021 culminated, with the repeated warnings to the Appellant in their papers against the Respondent, its members and Chairperson, all in support of winding-up application demonstrate a predominant motive and purposes other than a *bona fide* bringing about of the Respondent’s liquidation. The predominant motive is to oppress and to intimidate the Respondent and its members. The Court *a quo* correctly found that the winding-up procedure was an abuse of process.

[38] Furthermore, the founding papers in support of compliance of the 1973 Act were not cured in reply by simply requesting to replace the word “sequestration” where it appeared with the phrase “winding-up or sequestration”. This resulted in a confusing and careless disconnect between the evidence relied on and the material allegations required to sustain a winding-up order in compliance of the 1973 Act in the Appellant’s founding papers.

[39] The Court *a quo* correctly considered all the evidence, a factual basis existed from which it could exercise its discretion and no disconnect between the facts and the conclusions drawn are apparent. The conclusions drawn were well founded and reasoned.

[40] In consequence, this Court will not interfere in the exercise of the Court *a quo*’s discretion and it follows that the appeal must fail.

⁹ See para. [12].

[41] There appears no reason why the costs should not follow the result.

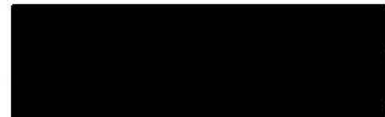
[42] The following order is made:

1. Appeal is dismissed with costs, inclusive of two Counsel.



L.A. RETIEF
Judge of the High Court
Gauteng Division, Pretoria

I agree,



NYATHI J
Judge of the High Court
Gauteng Division, Pretoria

I agree,



KOOVERJIE J
Judge of the High Court
Gauteng Division, Pretoria

Appearances:

For the appellant:

Adv. KW Lüderitz SC

Cell: 0682 492 4459

Email: wluderitz@maisels.co.za

Adv. H P Wessels

Cell: 060 528 6860

Email: hpwessels@group33advocates.com

Instructed by attorneys:

Van Der Merwe & Associates

Tel: 087 654 0209

Email: simone@vdmass.co.zalegal2@vdmass.co.za

Ref: GT Van Der Merwe/st/U193

For the respondent:

Adv. M P van Der Merwe SC

Cell: 082 920 4228

Email: mp@lawcircle.co.za

Adv. P Eilers

Cell: 076 024 0359

Email: paul.eilers@lawcircle.co.za

Instructed by attorneys:

JV Rensburg Kinsella Inc Attorneys

Tel: (012) 346 1278

Email: sean@jvrkinc.co.za

Date of hearing:

22 November 2023

Date judgment delivered:

07 February 2024