

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: ✓
Date: 5th October 2021 Signature: _____	

CASE NO: A5004/2021

In the matter between:

LOUGOT PROPERTY INVESTMENTS (PTY) LIMITED

Appellant

and

GROUP FIVE COASTAL (PTY) LIMITED

Respondent

Coram: Matojane J, Adams J et Nichols AJ

Heard: 18 August 2021 – The 'virtual hearing' of the Full Court Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 5 October 2021 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 5 October 2021.

Summary: Company – Winding-up – Debtor company disputing liability for debt relied on – Creditor relying on s 345 (1) (a) (i) of Act 61 of 1973 – Debtor company entitled to dismissal of liquidation proceedings if dispute *bona fide* – debtor must establish the grounds which they advance for the company's disputing the Creditor's claim are not unreasonable –

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Dosio AJ sitting as Court of first instance):

- (1) The applicant's appeal against the order of the court *a quo* is dismissed with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of Senior Counsel.
 - (2) The order of the court *a quo* is confirmed.
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JUDGMENT

Adams J (Matojane J et Nichols AJ concurring):

[1] The appellant¹ appeals against the Court *a quo*'s dismissal of an application for the final liquidation of the respondent². The appellant also seeks that this Court grants a final liquidation of the respondent. The respondent's defence is that the debt relied on is disputed on *bona fide* and reasonable grounds. Reliance is therefore placed by the respondent on the so-called *Badenhorst* rule, derived from *Badenhorst v Northern Construction Enterprises Limited*³, to the effect that an application for liquidation is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed on reasonable grounds.

[2] The source of the indebtedness claimed is the costs portion of an arbitration award, handed down on 16 November 2018, in favour of the appellant against the respondent for payment of the sum of R878 196.21, being the costs of the reference awarded on the party and party High Court scale. The arbitrator's

¹ Applicant in the Court *a quo*.

² Also respondent in the Court *a quo*.

³ *Badenhorst v Northern Construction Enterprises Limited* 1956 (2) SA 346 (T).

award was made an Order of the Western Cape Division of the High Court, Cape Town, on 22 January 2019.

[3] The appellant's cause of action in the arbitration was based on a written Principal Building Agreement ('the agreement'), which, according to the appellant, was concluded between it (the appellant), as the employer, and the respondent, as the contractor. It is however the respondent's contention that the contractor was in fact a company related to the respondent, namely Group Five Construction (Pty) Limited ('the Construction Company'), and that in all its dealings with the appellant, including in the arbitration, the respondent was merely acting as an agent on behalf of the Construction Company. And therein lies the crux of the dispute between the parties, which, according to the respondent is a *bona fide* dispute based on reasonable grounds.

[4] The appellant denies the respondent's claim that it was not a party to the agreement. The appellant also persists with its contention that the award by the arbitrator and the subsequent court order based on that award was in fact against the respondent, and not against the Construction Company, as claimed by the respondent. This, so the appellant submits, is evidenced by the fact that the capital amount of the award and other ancillary charges, amounting to a total sum in excess of R8 million, was paid without demur. The respondent's case is, however, that this amount was in fact paid by the Construction Company and not by it.

[5] Moreover, in support of their cause, the respondent lays emphasis on the fact that the arbitrator was appointed to determine a dispute between the appellant and the respondent, 'as agent for Group Five Construction (Pty) Ltd'. This fact is undisputed and unchallenged and it is confirmed by a written communiqué from the arbitrator dated 28 May 2018, in which the arbitrator confirmed in as many words that the arbitration which had been referred to him was between the appellant and 'Group Five Coastal (Pty) Limited acting as Agents for Group Five Construction (Pty) Limited'.

[6] There is merit in the respondent's contention in that regard. That is the contextual basis on which the arbitrator was nominated and accepted his

appointment to determine a dispute between the aforementioned parties. His jurisdiction and the ambit of authority was prescribed by that fact. This then means, as argued on behalf of the respondent, that the respondent was not a party to the agreement or to the arbitration, in any capacity other than as agent.

[7] Moreover, so the respondent contends, its capacity as agent of the Construction Company is common cause as between all the parties including the legal representatives for the appellant who were present at the preliminary meeting with the arbitrator. The appellant was fully aware of that fact since it had caused its bank to issue a payment guarantee in favour the respondent but as agent for the Construction Company.

[8] The case against the respondent is that it is deemed not to be able to pay its debts, because it did not do so despite receipt of a letter duly dispatched in terms of section 345 of the 1973 Companies Act. Section 345 (1) (a) provides as follows:

‘345 When company deemed unable to pay its debts

- (1) 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;’

[9] The respondent denies liability in any amount. As already indicated, it raises the defence that it acted as an agent for the Construction Company when it concluded the agreement as well as the arbitration agreement. This is so despite the fact that the agreement, as well as the arbitration agreement, expressly provide that same were concluded between the appellant and the

respondent and no reference in any of these written instruments are made to the respondent acting as agent for and on behalf of the Construction Company. Therefore, so the argument on behalf of the respondent goes, the arbitration award was against the Construction Company, which is the entity owing the debt to the appellant.

[10] The appellant argues that the respondent is the entity that owes it the amount of the referral costs as it was the defendant in the arbitration against whom the award was made. The Principal Building Agreement was expressly entered into between the appellant and the Contractor which is described in the agreement as 'Group Five Coastal (Pty) Limited', which is in fact the respondent. Additionally, following a dispute arising between the contracting parties, the Arbitration proceedings were instituted against Respondent, which, after the evidence and the arguments were completed before the Arbitrator, was ordered to pay *inter alia* the costs of the reference to be taxed. It is these taxed costs that form the subject matter of the appellant's claim in the application for the winding-up of the respondent.

[11] The appellant does not accept that the defence raised by the respondent to the winding-up application is *bona fide*. The said defence, so the appellant contends, is an unmeritorious afterthought, because in the pleadings in the Arbitration the respondent formally admitted that the agreement was concluded between the appellant and the respondent. The respondent did not plead that it acted as an agent for the Construction Company. The appellant does not accept as plausible the respondent's explanation for such admission in its answering affidavit in the winding up application, which reads as follows:

'The dispute proceeded to arbitration and in the applicant's statement of claim the defendant was cited as [the respondent]. There was no cause for concern, as the respondent could be cited as the defendant in those proceedings and could act in its own name, given the recorded agency known between the parties. If needs be this is an issue to be tested by oral evidence (unfortunately to include that of the legal representatives)'.

[12] The appellant also points out that, prior to the conclusion of the arbitration and subsequent thereto, there has been no attempt by respondent to withdraw the admission. What is more, so the appellant contends, when it (the appellant)

brought an application for the Arbitration Award to be made a Court Order, the respondent did not oppose such application and the Arbitration Award was duly made a Court Order on 22 January 2019.

[13] It was only on 28 August 2019 (shortly before the taxation of the costs award on 27 September 2019) that the respondent's attorney – for the first time, so the appellant contends – addressed a letter to the arbitrator requesting him to change the citation of the defendant to reflect the Construction Company as the defendant. The purpose of this request was to rectify and correct the award on the basis that the respondent had in fact been acting as agent for the Construction Company. The Arbitrator declined the request and on 7 November 2019 the respondent formally brought an application to the Arbitrator to rectify the Award. The application was unsuccessful, because the Arbitrator was of the view that the award could not be amended as it had by then already been made an Order of Court.

[14] The net effect of the sum total of all of the foregoing, so the appellant argued, is that the respondent is indebted to the appellant in the amount claimed, namely R878 196.21, and that the respondent had neglected to pay same. Therefore, so the argument on behalf of the appellant is concluded, the Court *a quo* ought to have found that there were no valid and *bona fide* factual disputes.

[15] To my mind, the defence raised by the respondent to the claim is such that it cannot be said to be unreasonable.

[16] It seems to me that the one reference in the documents to the fact that the respondent was acting as an agent for and on behalf of the Construction Company, makes the claim by the respondent very plausible. That reference is contained in a letter from the Arbitrator even before the commencement of the arbitration proceedings. So how can it be said that the respondent's version is an afterthought when it was acknowledged a long time before it became necessary for the respondent to place reliance on that fact.

[17] The respondent also confirms that the capital amounts and the related costs were in fact paid by the Construction Company. In all events, the contention by the respondent that its version is very probable is not without merit.

[18] The proper approach to be taken by a court when it evaluates whether a debt is *bona fide* disputed on reasonable grounds was set out in *Hulse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)*⁴, where the court held:

'I think it is important to bear in mind exactly what 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 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 claim. They do not ... have to prove the company's defence in such proceedings. All they have to satisfy me of is 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 ... to allege facts which, if proved at trial, would constitute a good defence to the claims made against the company.'

[19] Generally, if a defence is reasonable, it is likely to have been raised in good faith. That, in my view, is the case in this matter. As I indicated above, the explanation of the respondent for them not raising the defence earlier than they did, is a plausible one.

[20] The defence in issue is raised in good faith and is arguable.

[21] For all of these reasons the appeal must fail.

Costs of Appeal

[22] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*⁵.

[23] I can think of no reason to deviate from the general rule. The appellant should therefore pay the respondent's costs of the appeal.

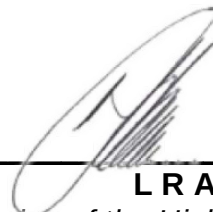
⁴ *Hulse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998(2) SA 208 (C) at 219E- 220A.

⁵ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

Order

[24] In the result, the following order is made: -

- (1) The appellant's appeal against the order of the court *a quo* is dismissed, with costs, including the costs of the application for leave to appeal.
- (2) The order of the court *a quo* is confirmed.



L R ADAMS

*Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON:	18 th August 2021 – in a ‘virtual hearing’ during a videoconference on the <i>Microsoft Teams</i> .
JUDGMENT DATE:	5 October 2021 – judgment handed down electronically
FOR THE APPELLANT:	Advocate J L Kaplan
INSTRUCTED BY:	Ian Levitt Attorneys, Sandton
FOR THE RESPONDENT:	Advocate Indhrasen Pillay SC
INSTRUCTED BY:	Cox Yeats Attorneys, Umhlanga Ridge