



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
DATE: 21/01/2020 SIGNATURE: [Signature]	

CASE No 2013/2016

In the matter between:

SHANE JOHN FRANCIS
MARTIN CONLAN DOYLE
WILLIAM MURPHY
EMER MARY FOLEY
CHRISTOPHER SMITH
RICHARD PATRICK COOGAN
STEPHEN O'SHEA
TOMAS O'SHEA
MICHAEL WILLIAM McGREAL

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant
Eighth Applicant
Ninth Applicant

And

SOUTHERN SKY HOTEL AND LEISURE(PTY) LTD
(Registration Number 2006/005152/07) trading as
HANS MERENSKY HOTEL & SPA

Respondent

JUDGMENT

LEDWABA AJ

Introduction

[1] Shane John Francis and the other eight applicants (the applicants/ the Irish Investors) apply for the final winding-up of the respondent. The application is based on the allegation that the respondent is unable to pay its debts , that it is factually and commercially insolvent as envisaged in section 344(f) read with 345(1)(c) of the Companies Act 61 of 1973(the Companies Act).

[2] The applicants' case is that the respondent is indebted to them in respect of the debt which arises from the terms of the rental pool agreements (the agreements) ¹ entered into by the parties. The applicants submit that the said debt is due, owing and payable and the respondent is unable to settle it.

[3] The applicants have served on the respondent the letter demanding payment of the debt ². Other statutory requirements have been complied with.

¹The rental pool agreement can loosely be described as an agreement in terms of which the parties to the agreement share equally in the generated rental income. In this agreement, while the respondent was to benefit from the balance, all properties involved in the rental pool agreement shared equally in the generated rental income.

² The demand is a statutory requirement in terms of section 345 of the Companies Act.

- [4] On the basis that the agreements are allegedly against the public policy and unenforceable, the respondent is resisting the liquidation application. It submits that as the agreements are allegedly unenforceable, there is no liability that is due and payable by the respondent to the applicants. The respondent alleges that the alleged debt is disputed on *bona fide* and reasonable grounds. It submits that this liquidation application cannot be used for the disputed debt and deserves to be dismissed with costs.

The background

- [5] In 1967, the Phalaborwa Mining Company established the Hans Merensky golf course. The golf course and the surrounding land were purchased by the Hans Merensky Country Club (Pty) Ltd (the club) from the Phalaborwa Mining Company and developed it into a golf estate.
- [6] The respondent bought the golf course and the hotel from the club and developed it into the Hans Merensky Hotel and Spa. This offers to the members of the public facilities such as hospitality, golfing, lodging, conferencing, weddings, wellness, restaurant, a club house and others. The purchase excluded immovable properties bought by each of the applicants.
- [7] Each of the applicants purchased immovable property from the club. The properties are improved with furnished dwellings known as the bush lodges.

[8] The respondent's hotel and spa are on the same property from which each of the applicants purchased their immovable properties.

[9] In terms of the agreements entered into between the applicants on the one hand and the club on the other, the club obtained the right to lease out the applicants' bush lodges to the members of the public subject to the applicants receiving certain agreed upon returns (the rental pool income).³ An example of the agreement is attached to the application as annexure D.

[10] The respondent took over the management of the agreements from the club. It is these agreements that are the subject of the dispute.

Applicant's case

[11] To a certain extent and until around 2012, the respondent paid to the applicants the rental pool income.

[12] Following the respondent's failure to pay to the applicants the rental pool income of more than R2 Million, the applicants issued out of the North Gauteng High Court the first liquidation application. The respondent raised a jurisdictional point. The applicants withdrew the application and issued it in this division.

[13] In reaction to the applicants' letter of demand, the respondent did not

³The respondent guaranteed a 6% per annum return to the applicants calculated in relation to the purchase price paid by the applicants for the properties. The agreement was entered into with the club in 2003.

deny the liability. It expressed a willingness to meet with the applicants for the discussions. The applicants accepted the respondent's discussion invitation on condition that its attorneys were involved in the discussions. Although the respondent was unwilling to have the applicants' attorneys involved in the discussions, after some communications, the discussions took place in the presence of the applicants' attorneys. The communications and discussions did not lead to the resolution of the dispute.

[14] The respondent placed itself under business rescue. The applicants voted against the business rescue plan. The respondent failed to set aside the applicants' vote against the business rescue plan. The business rescue proceedings were set aside.

[15] The respondent did not dispute its liabilities to the applicants. The respondent's "defence" of avoiding the consequence of the rental pool agreement was raised for the first time before Tuchten J in 2018 when the business rescue related application was dealt with. Until then, it was common cause that the respondent was unable to pay its debts as and when they became due.

[16] The respondent has access to the applicants' bush lodges which are generating income. The respondent has not paid the applicant any rental pool income since around 2012.

- [17] The *Botha* case⁴ relied on by the respondent does not assist its case. The circumstances of these two cases are vastly different. The latest authority on the subject matter is the *Oregon* case.⁵
- [18] The respondent's argument is effectively that the principle of *pacta sunt servanda*⁶ ought to be abandoned in the current circumstances.
- [19] The respondent cannot argue that the agreements are repugnant to the constitutional principles such as *Ubuntu* and fairness.
- [20] The applicants have proved that the respondent is unable to pay its debts when called upon to do so.
- [21] The respondent's "defence" must fail. The applicants' final winding-up application must succeed at the respondent's costs.

Respondent's case

- [22] The respondent and associated companies have invested substantial sums of money in the acquisition, development and operation of the golf course the hotel and spa.
- [23] The respondent has taken over the management of the agreements

⁴*Botha & Another v Rich N.O. & Others* 2014(4) ZACC 11; 2014(4) SA 124(CC) (Botha). As indicated in paragraph 74 below, this case deals with the principles of reciprocity in the contract, the disproportionate in the contract and the interpretation of section 27 of the Alienation of Land Act 68 of 1981 in line with section 39(2) of the Constitution.

⁵*The Trustee for the time being of the Oregon Trust v Beadica* 231 CC & Others (74/2018) (2019) ZASCA 29; 2019(4) SA 517(SCA) (28 March 2019) (Oregon). This case deals with the enforcement of the lease agreement in relation to public policy.

⁶Latin loose translation for the agreements must be honoured.

from the club in 2006. The agreements are ones sided, oppressive and unfair. Among others, the terms of the agreements are:

- (a) the respondent is the applicants' agent in the running of the bush lodges to generate income for the applicants for twenty years, with the applicants having the right to cancel the agreements and sell the bush lodges ,
- (b) for the first three years the applicants are guaranteed 6% income based on the properties purchase price, fifty percent of which payable in the South African Rands and the other fifty percent at the rand to euro exchange rate,
- (c) from the fourth year, and every third anniversary thereafter, the base cost of the purchase price would be adjusted only upwards and the respondent is obliged to pay the applicants the higher of the rent contractually payable or the open market rental,
- (d) the respondent is responsible to maintain the lodges at its costs , pay services and keep them up to the standard of the hotel,
- (e) the applicants are entitled to occupy and use the lodges for five weeks per year without any payment and ,
- (f) the respondent is entitled to retain the access money only after honouring the terms of the agreement.

[24] Between 2003 and 2008 and while the rand as against the euro depreciated by 40%, the base cost of the lodges was adjusted upwards. The effect was that rental payable to the applicants more than doubled

from about R534 600.00 in 2003 to about R1 080 000.00 in 2008.

Between 2007 and 2017 the rental increased by about 300%.

[25] The situation was that:

- (a) the values of the lodges were adjusted upwards,
- (b) the rand depreciated as against the euro,
- (c) the lodges maintenance costs increased while
- (d) the revenue dwindled due to the decline in the bookings.

[26] Except during the 2010 world cup, the respondent never generated more revenue than the guaranteed payments and never profited from the agreements.

[27] The agreements structure is such that the applicant benefits irrespective of the market performance. The applicants are guaranteed the higher returns, being the highest between the contractual amount or the market related amount. This can only work if the respondent is able to rent out the bush lodges at a higher rental than the guaranteed rentals.

[28] Between 2007 and 2013, the respondent paid the applicants R6 Million.

[29] It was not within the parties' contemplation when they entered into the

agreements that the respondent would continue making guaranteed annual payments irrespective of the factors beyond its control. The parties contemplated that the agreement would benefit both parties, with the applicants receiving the guaranteed return and the respondent renting out the lodges at a higher rate to cover the guaranteed returns.

[30] The applicants rejected an offer to renegotiate the terms of agreement in line with the prevailing circumstances. In 2013, the applicants attempted to liquidate the respondent. Faced with this liquidation application, the respondent's board of directors decided to commence with the business rescue proceedings. The applicant voted against the adoption of the business rescue plan, preferring to proceed with this liquidation.

[31] The respondent's financial position has improved to the level that it has settled some of its liabilities and is able to service some of its debts. Between March and August 2019, it has made an income of R6 920 419.03 with expenses of R5 900 260.56. The net profit was R1 020 158.47.⁷

[32] The respondent should be allowed to continue trading without being liquidated. The liquidation may result in the liquidators cancelling the agreements, which is not in the interest of the parties.

[33] Because the agreements are bilateral and reciprocal, they require co-

⁷⁷ Paragraph 7 of the respondent's supplementary affidavit.

operation between the parties and performance by each in order to benefit both. They are subject to constitutional control and accord with the constitutional notions of good faith, fairness, justice, equity, dignity, freedom, equal worth of respective worth, reasonableness and the traditional African value of *Ubuntu*.. They must also accord with the public policy and the interest of the community.

[33] The applicants are not entitled to pursue their self-interest without regard to the interested and affected parties such the respondent, the employees and the shareholders. The applicants rejected all attempts to resolve the matter.

[34] Sections 346 and 347 of the Companies Act gives the court a discretion whether to grant or refuse the winding-up application, even if the grounds on which application is brought is established.

[35] The court should consider the enforceability of the agreements and refuse to enforce them. The court should find that the debts relied upon have not been established.

[36] The respondent has been honouring the terms of the agreements because it was not advised by its previous legal team that it was not obliged to do so.

[37] The court should use its discretion against the granting of a winding-up order and dismiss the application with costs.

Analysis

- [38] An applicant to the company winding-up application is required to prove one or more of circumstances set out in section 344 of the Companies Act and that it is a creditor of a respondent in the amount of not less than R100. The debt must be due and payable and a respondent be unable to pay it. There must also be compliant with the statutory requirements.
- [39] The applicants and the respondent entered into the agreements in terms of which the applicants' bush lodges were placed into the agreements managed by the respondent in return for certain agreed returns to the applicants. The respondent does not deny that as at the time of the issuing of this application in 2016, it had not paid to the applicants an amount of more than R2 Million and that the figure has since increased. Since the respondent is not disputing the figure as stated in the applicants' founding affidavit and that it has not paid the amount when the demand was made and unless it rebuts the deeming provisions of the Companies Act, that should be the end of the winding up proceedings. Not according to the respondent.
- [40] It is not the respondent's case that it is able but unwilling to pay the applicants' debts. The respondent has formulated its "defence" beyond the *Badenhorst*⁸ principle that says winding-up proceedings should not be resorted to as a means of enforcing payment of a debt the existence

⁸ *Badenhorst v Northern Construction Enterprises(Pty) Ltd* 1956(2) SA 345(T)(*Badenhorst*)

of which is *bona fide* disputed on reasonable grounds. It is attacking the terms of the agreements on various grounds, including that they are contrary to Constitutional values, the Bill of Rights and the public policy. The respondent submits that the agreements are unenforceable. The respondent has also raised dispute of facts.

[41] Where a respondent shows on a balance of probability that its indebtedness to an applicant is disputed on *bona fide* and reasonable grounds, the court will refuse a winding-up order. The onus on a respondent is not to show that it is not indebted to an applicant. It is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds.⁹

[42] The *Badenhorst* rule is conventionally formulated as requiring a respondent to satisfy the court of two things, its *bona fides* and the reasonableness of its grounds for disputing the claim.¹⁰ The existence of the debt must *bona fide* be disputed on reasonable grounds. A respondent is required to be *bona fide* and provide reasonable grounds for disputing a claim.

[43] A finding that a respondent is not *bona fide* in disputing a claim would usually go hand in hand with a finding that a claim is being disputed solely for the purpose of delay, and such purpose would often support an inference that a respondent is unable to pay its debts and militate

⁹ Desert Star Trading 145 (PTY) LTD & Another v Flamboyant Edleen & Another 2011(2)SA 266(SCA)(Desert Star Trading)

¹⁰ Orestisolve (Pty) Ltd t/a Essa v NDF Investments Holdings (Pty)Ltd & Namakwaland Diamond Fund Trust: Case Number 18414/2014(Western Cape High Court)(Orestisolve) - paragraph 67

against the exercise of a discretion in its favour.¹¹

[44] At issue is whether on the balance of probabilities, the respondent is *bona fide* in its dispute of the applicants' claims and that the dispute is based on reasonable grounds for this court to exercise its discretion in favour of the refusal or the granting of the applicants' winding-up application.

[45] The respondent is not *bona fide* in the dispute of the applicants' debts. It does not dispute that it has not paid to the applicants its contractual obligations of what it has collected from the applicants' bush lodges bookings. While it disputes the enforcement of the agreements on the basis of public policy, there is no application to declare the agreements to be unenforceable and the prayer that the agreements be cancelled. There is no offer from the respondent to surrender the right to collect booking monies from the applicants' bush lodges. There is no offer to open its books for the applicants to satisfy themselves that the bush lodges bookings have declined and the extent of such decline. Simple justice between man and man does not allow that the respondent continues to collect bookings income and not hand over to the applicants what is due to them in terms of the agreements.

[46] While it is not in dispute that the respondent has not paid the applicants incomes, the respondent submits that because the

¹¹ Orestisolve – paragraph 68

agreements are unenforceable, it is not obliged to pay the applicants the rental income. Instead of setting aside the agreements, the respondent is only praying for the dismissal of the liquidation application. While the respondent claims it retains the right to collect money from the bush lodges bookings in terms of the agreements, it accepts no obligation to pay over any money to the applicants in terms of the terms of the same agreements.

- [47] The fact that the applicants are now owed more than R8 Million is not because from the start the respondent held back rental pool income on its belief that the agreements are unenforceable. The applicants rightly pointed out that the respondent is not paying even what it is able to pay to the applicants. The respondent's board of directors instituted the business rescue proceedings not because they believed the agreements are against the public policy.¹² It is because the respondent's board *bona fide* believed that the respondent was in financial distress or the board is not *bona fide* in the opposition of this application. The previous winding-up application did not proceed not because the respondent raised the unenforceability of the agreements. The unfulfilled offers were made not because of ill-advice. This new proposition emerged with the new legal team employed by the respondent in the middle of the dispute where the validity and the enforceability of the agreements were never questioned before. This is

¹² Section 128 of the new Companies Act 7 of 2008 defines a business rescue as proceedings to facilitate the rehabilitation of a company that is in financial stress.

not a sign of *bona fide* on the part of the respondent.

The sanctity of contract and public policy

[48] Agreements which are clearly inimical to the interest of the community, whether on the basis of being contrary to law or morality, or run counter to social or economic expedience will on the grounds of public policy not be enforced.¹³

[49] While the court should not shrink from its duty of declaring a contract to be contrary to public policy when the occasion so demands, the power to do so should be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts results from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.

Although the power of the court to invalidate bargains of parties on the ground of public policy is unquestionable and necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power of declaring a contract to be contrary to public policy.¹⁴

[50] Generally, public policy favours the utmost freedom of contract and

¹³ Sasfin(Pty) Ltd) v Beukes 1989(1) SA 1(A)(Sasfin)- page 8

¹⁴ Sasfin- page 9

requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. Public policy should take into account the doing of simple justice between man and man.¹⁵ The applicants acquired bush lodges to generate income and this was incorporated in the agreements. It is on the respondent to prove that on the balance of probabilities, it is against the public policy to enforce these agreed terms of the agreements.

[51] In the *Sasfin* matter, it was common cause that if the interpretation of clauses 3.4 and 3.14 of the agreement was the correct one, they were contrary to public policy.¹⁶ The court held that because certain materials were non-severable and contrary to public policy, the deed of cession was invalid and unenforceable.¹⁷

[52] While interpretation of a contract may be a mixed question of fact and law, in this case there is no dispute of fact that since around 2012, the respondent has not paid the applicants' income as per the agreements.¹⁸

[53] The principles governing private contracts and public policy underpinned by the Constitution were summarised as follows:¹⁹

- (i) Public policy demands that contracts freely and consciously entered into must be honoured;

¹⁵ *Sasfin* - page 9

¹⁶ *Sasfin*- page 14

¹⁷ *Sasfin* - page 18

¹⁸ *Orestisolve*- paragraph 65

¹⁹ *AB & Another v Pridwin Preparatory School & Others* (2018) ZASCA 150; 2019(1)SA 327(SCA) – paragraph 27

- (ii) A court will declare invalid a contract that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy;
- (iii) Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
- (iv) The party who attacks the contract or its enforcement bear the onus to establish the facts;
- (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inference of a few judicial minds and
- (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

[54] There is the need for commercial certainty. The notion that a sanction for breach or failure to comply with the agreed terms of the contract is disproportionate and therefore unenforceable is entirely alien to South African contract law. To recognise it would be to undermine the principle of legality. That does not mean that a sanction that is contrary to public

policy, or that is unconscionable in the circumstances is to be enforced. The question is the one that centres on policy-the community legal conviction rooted in the Constitution.²⁰

[55] No consideration of public policy permits the making of contracts for the parties by a court ²¹. It is difficult to conceive how a court, in a pure business transaction, can rely on "*ubuntu*" to import a term that was not intended by the parties, to deny the other party the right to rely on the terms of the contract to terminate it.²² This will be contrary to the right of the parties to freely enter into valid and enforceable agreements. Calculated risks expected, the parties contract on the basis and expectations of certainty rather than surprises.

[56] The fact that a term of a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy.²³

Dispute of facts

[56] The respondent's case appears to be that there are serious dispute of facts as contemplated in Rule 6(5)(g) of Uniform Rules²⁴ of this court

²⁰ Oregon- paragraph 38

²¹ Oregon – paragraph 42, Mohamed's Leisure Holdings (Pty)Ltd v Southern Sun Hotel Interests(Pty)Ltd (2017) ZASCA 176; 2018(2) SA 314(SCA(- paragraph 32(Mohamed)

²² Roazar CC v Falls Supermarket CC(2017) ZASCA 166; (2018) 1 All SA 438(SCA) ; 2018(3) SA 76(SCA)- paragraph 24

²³ Mohamed (- Paragraph 30

²⁴ Rule 6(5)(g) provides that where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seem meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing , it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear

that the dispute deserves to be referred for oral evidence.

[57] If there are genuine dispute of facts regarding the existence of the applicant's claim at the final stage, the applicant will fail on the ordinary principles unless it can persuade the court to refer the matter to oral evidence.²⁵ There must be real and genuine dispute of facts.

[58] A court will dismiss an application if an applicant should have realised when launching its application that a serious dispute of facts, incapable of resolution on papers, was about to develop.²⁶

[59] There is no genuine dispute that as a matter of fact, the respondent is not paying the applicants the agreed income which the applicants believe are due and payable to them. The respondent's case is that due to its view that the agreements are legally unenforceable, there is no liability that is due and payable to the applicants.

[60] The respondent's opposition to the winding-up application is not based on factual dispute. It is common cause that as a matter of fact the respondent is not paying the applicant the agreed rental incomes. The respondent is not paying the money because in its view and based on its position that the agreements are unenforceable, the rental pool income is not legally due and payable. It is not the respondent's case that it is able to pay the admitted amount.

personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined....

²⁵ Orestisolve- paragraph 10

²⁶ Room Hire Co(Pty)Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1153(T) at 1162

[61] Whether the agreements entered into by the parties are enforceable is not a matter of facts that needs the leading of oral evidence to resolve. This is not the kind of dispute that should be referred for oral evidence to be addressed by way of witness evidence. Matters of disputes of facts are dealt in terms of Rule 6(5)(g) of the Uniform Rules of this court. Such disputes are referred for oral evidence for the parties' evidence to be tested.

[62] An application to refer a matter for oral evidence should be made at the outset and not after argument on merits.²⁷ The respondent is not applying that the matter be referred for oral evidence. Although its counsel indicated from the bar that the respondent is not opposed to the matter being referred to oral evidence, this is not part of its prayers. The applicant's counsel indicated that because their clients are based in Ireland, the applicants' legal team is not in position to obtain such instruction.

[63] I do not understand the *Badenehorst* principle to apply to pure legal disputes²⁸. Legal disputes to be resolved by way of evidence will be rare, if any.

[64] In *Sasfin* case and on the basis that the contract was contrary to public policy and virtually made the applicant a slave, the prayer was to set it aside. In *Desert Star Trading* case, the respondent filed a counterclaim

²⁷ Kalil paragraph 78

²⁸ Oristisolve- paragraph 12

to set aside the reckless credit agreement. There is no prayer to declare the agreements (or their portions) to be contrary to public policy, invalid and that they be set aside. The prayer is only that the liquidation application be dismissed. From the bar, the respondent's counsel responded that this would pave the way for the matter to be dealt with on the basis of disputed facts. This is not the respondent's prayer and if the winding-up application is dismissed and the applicants were to approach the court on action proceedings, nothing will prevent the respondent from raising the plea that the matter has been dealt with. The other implication of just dismissing the winding-up application and leaving the agreements as they are will mean that despite the fact that the respondent will be entitled to use the bush lodges and collect the bookings income, it will not be obliged to pay the applicants what is due to them in terms of the agreements from the money collected from their lodges' bookings.

Winding-up proceedings.

- [65] In terms of section 346 of the Companies Act, winding-up proceedings are by way of an application. It will defeat the purpose if the existence of a dispute which cannot be described as real and genuine will result in the winding-up application proceedings be kicked out to be proceeded with by way of action proceedings.

[66] Winding-up proceedings are not designed to enforce payment of debt, especially where a debt is *bona fide* disputed on reasonable grounds. These proceedings are meant to liquidate a respondent company which is unable to pay its debt, among others circumstances. In this case the existence of debt is a matter of fact, which is not disputed on *bona fide* grounds. In providing clarity why the respondent is not even paying what is able to pay the applicants, the respondent's counsel respondent that the payment to the applicants is withheld on policy considerations. This does not appear from the respondent's opposing papers. What is denied is the enforceability of the agreements on the basis of alleged public policy. The authorities relied on by the respondent do not support the notion that winding-up proceedings should be dismissed because the factually existing debt which the respondent is unable to pay is delayed on the basis that the contract between the parties is contrary to public policy.

[67] Rather than the fact that it is unable to pay the amount claimed by the applicants, the respondent is disputing the enforcement of the agreements. Nowhere is the respondent saying it is able to pay the claimed amount. By not setting aside the agreements aside, the respondent is by implication saying the agreements should be used only for the purpose of collecting monies from the bookings without the respondent's obligation to pay the applicants as their agent in terms of the same agreements.

- [68] There is the difference between resisting the winding-up application on the basis of the *bona fide* denial of liability on reasonable grounds and the resistance of the winding-up proceedings because the enforcement of the founding agreement between the parties is resisted on public policy consideration. The respondent is relying on the latter, which is not sustainable in these proceedings.
- [69] I do not regard the alleged unenforceability of the agreements on the basis of public policy as a genuine dispute of fact which needs to be resolved by way of oral evidence. This cannot be used to dismiss the winding-up application where the figures as set out in the founding affidavit are not disputed and it is common cause that the respondent is not in a position to settle the figures.
- [70] I do not understand the respondent's case to be that rental pool agreements are generally unenforceable. Its submission is that the agreement between the parties is subject to constitutional control and must accord with the constitutional notions of good faith, fairness, justice, equity and reasonableness as well as the traditional African value of *Ubuntu*. The respondent further states that constitutional values include the reciprocal recognition of the dignity, freedom and equal worth of inter alia respective contracting parties.
- [71] It is correct that the general principle that agreements must be honoured cannot apply to immoral agreements which violate public

policy.²⁹

[72] It is also true that the reason for the continued application of the principle embodied in the maxim *pacta servanda sunt* is the need for certainty in commerce. This means that unless they are against public policy or their enforcement would be unconscionable, the parties will know what their contract means and that they are entitled to rely on their terms.³⁰

[73] The respondent submits that it was not within the parties' contemplation that a combination of factors such as the weakening of rand exchange rate, the decline in the bookings of the bush lodges and increased maintenance costs will affect its ability to meet its contractual obligations. These are commercial contracts which involve the taking of risks and where the failure to comply with the agreed terms has consequences.

[74] The principle of reciprocity as dealt with in the *Botha* case³¹ does not arise in this matter. In terms of their obligations, the applicants have placed their bush lodges at the respondent's disposal subject to the agreed terms. While in the *Botha* case section 27 of the Alienation of Land Act 68 of 1981 was interpreted in line with the provisions of section 39(2) of the Constitution, this is not the case with the agreements. To an extent that the winding-up proceedings are focused

²⁹ *Barkhuizen v Napier* (2007) ZACC 5; 2007(5)SA 323(CC);2007(7) BCLR 691(CC) –paragraph 87

³⁰ *Oregon* – paragraph 26

³¹ *Botha*- paragraphs 45 and 46

on the respondent's ability to pay its liabilities, the alleged proportionality of the agreements does not arise.³²

[75] It can thus not be said that the claims are disputed on genuine disputed facts and on reasonable grounds.

[76] The figures stated in the founding affidavit are not disputed. The respondent submits that the amounts are not due and payable.

[77] If I am wrong that the winding proceedings should be decided on whether the respondent is able to pay its debts as and when called upon to do so and that I should decide whether the agreements are unenforceable on public policy consideration, I align myself with the principle that the declaration that an agreement is contrary to public policy should be made in the clearest cases. This is not such a case. Just because the respondent feels that the terms of the agreements require it to do more compared to the applicants does not render the agreements to be contrary to public policy. If the respondent's view is that the terms of the agreement are disproportionate, the remedy is not to dismiss the winding-up application. I am not called upon to make the validity declaration in respect of the agreements.

[78] I agree that the proposition that on the basis of notions such as *Ubuntu* and equal worth, the company must be permitted to decline to perform in terms of commercial contract is subversive of the very foundation of our

³² Botha- paragraph 49

commercial law.³³

[79] The applicants have proved that on the balance of probabilities, the respondent is unable to pay their claim. The respondent is not *bon fide* in its "defence" and has provided no reasonable ground for resisting the payment and the granting of the final winding-up application.

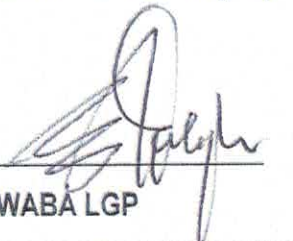
[80] Even if I am wrong that the respondent is factually insolvent, the circumstances are that the respondent is commercially insolvent and that it is just and equitable that it be wound up.

[81] I find that the respondent is unable to pay the applicants' debts. It is just and equitable that the respondent be wound -up

Order

[82] The respondent is placed under the final winding-up.

[83] The costs of this application shall be costs in the winding-up.


LEDWABA LGP
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION : POLOKWANE

³³ Shamira Rinderknecht & Others v Southern Sky Hotel and Leisure (Pty) Ltd & Others Case number 64129/2017- North Gauteng High Court decided on the 18h October 2018(Unreported) - Paragraph 19

APPEARANCES

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Heard on: 25th November 2019

Judgement delivered on: