

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO'S.: 43756/2016; 43734/2016
43755/2016; 43757/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

19/12/2018

In the matter between:

EMVEST AGRICULTURAL CORPORATION
(MAURITIUS) LTD

Applicant

and

SUPERIOR MACADAMIAS (PTY) LTD
(Registration number: 2010/001094/07)

Respondent

EMVEST EVERGREEN (PTY) LYD
(Case no.: 43734/2016)

Respondent

EMVEST FOODS (PTY) LTD
(Case no.: 43755/2016)

Respondent

EMVEST BARVALE (PTY) LTD
(Case no.: 43757/2016)

Respondent

JUDGMENT

VAN DER WESTHUIZEN, J

- [1] The applicant applies for a provisional liquidation order against each of the respondents under separate case numbers. The respondents oppose the relief sought on the premises that a *bona fide* dispute exists in respect of each of the alleged debts on reasonable grounds. In that regard, the respondents bear the onus.¹ The respondents filed initial answering affidavits and in terms of an order by Khumalo, J., the respondents were allowed to file supplementary answering affidavits. The applicant responded by filing an initial replying affidavit and consequently a supplementary replying affidavit in each matter.
- [2] The applicant and the respondents were previously companies within the same group. During 2013, the respondents were sold off to a Canadian Company.
- [3] For the sake of convenience, the parties agreed that one case be argued and the order to be granted would be in respect of each of the other matters. The parties agree that the same issues arise in each of the matters thereby obviating the necessity of arguing each matter separately. The matters are similar if not identical with minor factual differences in each matter, however, the principles applicable are identical in each matter. The material facts are identical in each matter.
- [4] The parties agreed that a consolidated judgment be delivered.
- [5] In the founding affidavits, the applicant sets out the claim it has against the respective respondents. In that regard, the written contract between the applicant on the one part and the relevant respondent on the other, is attached. It is further explained that services were rendered by the applicant to the respective respondent and the relevant invoices are

¹ *Hülse-Reutter et al v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO (Intervening))* 1998(2) SA 208 (C) at 218D-219C

attached. Furthermore, the applicant stated that incomplete payment of the invoices was received from each of the respondents.

- [6] The applicant addressed letters of demand in each case in terms of the provisions of section 345(1)(a)(i) of the Companies Act, 1973, which provisions still apply in terms of the new Companies Act, 71 of 2008. Receipt of the said letters of demand are admitted. However, no response thereto was forthcoming from any of the respondents. The alleged debts remain unpaid. The applicant holds no security in respect of each of the respondents' debts to the applicant.

- [7] It is to be noted that the deponent to the applicant's founding affidavits, Ms Payne, was at all times prior to the selling off of the respective respondents, a director of each of the respondents. She is presently a director of the applicant. On the other hand, the deponent to the respective answering affidavits, only came on board after the respective selling off of the respondents.

- [8] It is stated that the applicant's deponent has personal knowledge of the relevant facts pertaining to the alleged debts of the respective respondents and the underlying factual issues in respect of the debts.

- [9] In *Legh v Nungu Trading 353 (Pty) Ltd*² the general principle was confirmed that an unpaid creditor has a right *ex debito iustitiae* to a winding up order against a company that is unable to pay its debts. However, the court retains a narrow discretion to refuse the relief sought.³

- [10] In the present instances the respondents have merely denied the existence of the debt. I shall refer to the basis of this denial later. It is

² 2008(2) SA 1 (SCA) at [18]

³ *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd* 1962(3) SA 424 (T) at 428D-G; see also *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd et al* 1993(4) SA 436 (C) at 440J-441A

further to be noted that none of the respondents have alleged that the relevant respondent is otherwise solvent and is in fact still trading. The absence of such statement is not to be ignored.⁴ From the return of service at the principle place of business, it appears that the respondents have closed down and no business is conducted therefrom.

- [11] The respondents raise two defences. The first defence is a special defence of prescription. This defence can summarily be dealt with. The respondents allege that should it be found that the debt claimed in fact exists, a large part thereof has prescribed. It is implicit in that statement that a certain portion of the debt is still owing. The respondents thus admit to an amount being owed to the applicant. In the absence of a claim of solvency, *caedit quastio*. The applicant would be entitled to a provisional winding up order.
- [12] The main defence put forward by each of the respondents amounts to a reliance on the so-called Badenhorst-rule.⁵ That rule entails that a winding-up order should not be granted to enforce payment of a debt which existence is *bona fide* disputed on reasonable grounds.
- [13] In respect of the existence of the debt, the respondents allege:
- (a) That no service level agreement was entered into. The said agreement was not disclosed prior to the applications and the books and records of the respondents do not indicate the conclusion of such agreement;
 - (b) The invoice attached to the founding papers is not an invoice in the proper sense;

⁴ *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* (542/2016) [2007] ZSCA 24 (24 March 2017) at [4]

⁵ *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956(2) SA 346 (T) at 347H-348C

- (c) No services were rendered to the respondents and hence no amount is owing to the applicant;
 - (d) The financial statements of the respondents for the year ending March 2012 do not reflect the debt;
- [14] The respondents contend that the foregoing allegations constitute a *bona fide* dispute on reasonable grounds.
- [15] The aforementioned allegations are to be considered against the following:
- (a) The applicant's deponent was a director of each of the respondents. This is common cause;
 - (b) It is also common cause that the applicant's deponent would have personal knowledge of the businesses of the respective respondents;
 - (c) A Due Diligence of each respondent was undertaken prior to the acquisition of the respondents. Such Due Diligence would in all probability have included an investigation into all the books and records of the respective respondent and in particular to its financial history since its inception;
 - (d) When the relevant invoice was received, there appears to have been no protestation by any of the respondents in that regard;
 - (e) Similarly, when the demand in terms of section 345 was received, none of the respondents appear to have contested that demand;
 - (f) The financial statements of the respective respondents for the year 2011, attached to the respective replying affidavits, do reflect the

existence of the respective debts owing to the applicant as explained by Ms Payne. No gainsaying evidence is proffered by the respondents;

(g) The invoice relied upon in each instance indicates part payment of the amounts due and owing. The allegation of incomplete payment of the respective debts is simply not dealt with by the respondents.

[16] I would assume that in all probability, had the Due Diligence revealed none of the said agreements or any debts to the applicant and the part payment thereof, the respondents would most certainly have stated that in no uncertain terms. They do not. A mere denial of the existence of the said agreements and the debts is proffered. The denial is made by a deponent who was not part of the respective respondent in the face of the direct evidence by Ms Payne in that regard.

[17] It being common cause that the applicant's deponent was a director of each of the respondents and that she would have personal knowledge of the businesses of the respective respondents. The absence of any facts to indicate that Ms Payne is mistaken or untruthful in that regard, her statements under oath to the existence of the respective agreements and the debts owing to the applicant in that respect is to be accepted. Further in that regard, Ms Payne's uncontested evidence, but for a bare denial, that the services under the agreements were in fact rendered, is to be accepted.

[18] In respect of the respondents' statements, having regard to the string of emails relied upon, and in view of the financial statements for the 2012 year, there is no indication of the existence of the alleged debts. To this Ms Payne has replied that the string of emails relied upon only reflect the initial figures available that were supplied during the initial stages of negotiations. Subsequently, further figures were made available and also the financial statements for the 2012 year. In the

latter regard, Ms Payne states unequivocally that those financial statements do contain the debts to the applicant and has explained where in the financial statements it so appears. That evidence by Ms Payne is not disputed. It is submitted on behalf of the respondents that Ms Payne's evidence is unconvincing. In the absence of any gainsaying factual statements, Ms Payne's evidence is to be accepted.

[19] In my view, the respondents have not shown that a *bona fide* dispute exists in respect of the debt on reasonable grounds. The Badenhorst-rule thus cannot avail the respondents.

[20] It follows that the applicant has, in each matter, on a balance of probability proven a *prima facie* case of unpaid debts and consequently is entitled to a provisional liquidation order.

I grant the following orders;

In case no.: 43756/2016

- (a) That the respondent be placed under provisional winding-up and that a rule *nisi* with return date 6 March 2019 be issued calling on all interested parties to show cause why the respondent shall not be placed under final winding-up;
- (b) That a copy of this order be forthwith served on the respondent at its registered office and be published once in the Government Gazette and in the daily newspaper, The Citizen;
- (c) That the costs of the application be costs in the liquidation.

In case no.: 43734/2016

- (a) That the respondent be placed under provisional winding-up and that a rule *nisi* with return date 6 March 2019 be issued calling on all interested parties to show cause why the respondent shall not be placed under final winding-up;
- (b) That a copy of this order be forthwith served on the respondent at its registered office and be published once in the Government Gazette and in the daily newspaper, The Citizen;
- (c) That the costs of the application be costs in the liquidation.

In case no.; 43755/2016

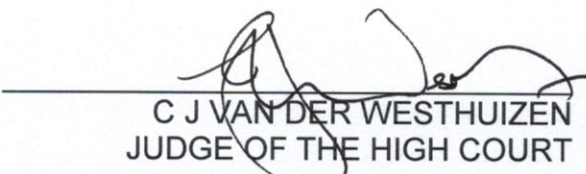
- (a) That the respondent be placed under provisional winding-up and that a rule *nisi* with return date 6 March 2019 be issued calling on all interested parties to show cause why the respondent shall not be placed under final winding-up;
- (b) That a copy of this order be forthwith served on the respondent at its registered office and be published once in the Government Gazette and in the daily newspaper, The Citizen;
- (c) That the costs of the application be costs in the liquidation.

In case no.: 43757/2016

- (a) That the respondent be placed under provisional winding-up and that a rule *nisi* with return date 6 March 2019 be issued calling on all interested parties to show cause why the respondent shall not be placed under final winding-up;

(b) That a copy of this order be forthwith served on the respondent at its registered office and be published once in the Government Gazette and in the daily newspaper, The Citizen;

(c) That the costs of the application be costs in the liquidation.



C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of Applicant: S D Wagner SC
Instructed by: Weavind & Weavind Inc.

On behalf of Respondent: A J Louw SC
CB Ellis
Instructed by: Bernadt Vukic Potash & getz Inc.