THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 542/2016

In the matter between:

AFGRI OPERATIONS LIMITED **APPELLANT**

and

HAMBA FLEET (PTY) LIMITED **RESPONDENT**

Neutral citation: *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017)

Coram: Leach, Theron, Petse, Willis and Dambuza JJA

Heard: 10 March 2017

Delivered: 24 March 2017

Summary: Company law : application for a final order of liquidation : underlying debt admitted by the respondent : no allegation that respondent solvent : respondent not trading or conducting any business : respondent's indebtedness prima facie established : onus on respondent to show that indebtedness disputed on bona fide and reasonable grounds : a counterclaim not in itself a reason for refusing an order for the winding up of the respondent : final order winding-up the respondent granted.

ORDER

On appeal from: The Gauteng Division, Pretoria (Mabuse J sitting as the court of first instance).

(a) The appeal is upheld.

(b) The order of the High Court is set aside and replaced with the following:

'The respondent is placed under a final winding-up order in the hands of the Master.'

(c) The appellant's costs in the appeal and in the application before the High Court are to be costs in the liquidation of the respondent.

JUDGMENT

Willis JA (Leach, Theron, Petse and Dambuza JJA concurring):

[1] The appellant, the applicant in the court a quo, applied for a final order of liquidation of the respondent. That court (Mabuse J) dismissed the application with costs but granted leave to appeal to this court.

[2] The appellant had obtained a judgment for costs against the respondent on 4 February 2014. These costs were, by agreement between consultants employed by the parties, taxed in an amount of R156 796.64. The respondent failed to discharge this debt owed to the appellant. The appellant then brought an application to wind up the respondent on the basis that the respondent was unable to pay its debts within the meaning of s 345(1)*(a)*, read with s 344*(f)* of the Companies Act 61 of 1973 (the old Companies Act). Other than to present a bald denial that it is insolvent, the respondent did not dispute the underlying debt and that it had failed to pay it. In addition, the issues of whether demand had been given by the appellant to the

respondent in terms of s 345 of the old Companies Act and the failure of the respondent to satisfy that demand, were not in dispute.

[3] The court a quo dismissed the application for the winding-up of the respondent solely on the basis that it had a counterclaim against the appellant. The counterclaim arises from allegedly unlawful transfers in an amount in excess of R22 million that the appellant had made from the respondent's bank account during the period 12 November 2003 to 22 March 2006. These transfers were alleged to have taken place while the appellant had been managing the affairs of the respondent in terms of a 'Management Agreement'. The summons in respect of this claim had been issued on 10 March 2009 but had not been pursued by the respondent. Not only is the claim illiquid but also the summons was not even attached to the respondent's answering affidavit.

[4] The respondent made no allegation that it was either factually or commercially solvent. It is common cause that the respondent was not trading or conducting any business at the time of the application for its winding-up. The respondent also admits that it has no assets but places the blame for this on the appellant. Most significantly, as previously mentioned, the underlying debt, giving rise to the application for the winding-up of the respondent, was not in dispute. Indeed, it was admitted by the respondent.

[5] In dismissing the application for the winding-up of the respondent, the court a quo relied upon the exercise of its discretion. In its judgment it said:

'To conclude on this point I accept that in South African law, as in English law, the power of the Court to grant a winding-up order is discretionary, irrespective of the grounds on which such order is sought.'

A little later on, it said:

'Quite clearly the applicant has a number of concerns against the respondent's action. I have noted those concerns but under the circumstances *this Court is not at liberty to deal with them or the respondent's claims at this stage* and in this proceedings.' (Emphasis added.)

The questions that therefore arise in this appeal are: (a) may this court interfere with the exercise of its discretion and, if so (b) should it do so?

[6] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds.[1] This is known as the so-called 'Badenhorst rule'.[2] Where, however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.[3]

[7] The existence of a counterclaim which, if established, would result in a discharge by set-off of an applicant's claim for a liquidation order is not, in itself, a reason for refusing to grant an order for the winding-up of the respondent but it may, however, be a factor to be taken into account in exercising the court's discretion as to whether to grant the order or not.[4]

[8] The court a quo was much influenced by a series of English cases in which it has been held that a 'genuine' cross-claim, the equivalent of our counterclaim, is a matter which may justify the exercise of a discretion against making a winding-up order. It relied, in particular, on *Re: Portman Provincial Cinemas Ltd*[5] and *Re: Bay Oil Seawind Tankers Corp v Bay Oil SA*[6] and the authorities therein cited. The difficulty is, of course, encapsulated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*[7] with which every lawyer must be familiar: how does one decide

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[1] See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348 and *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 980D.

[2] Ibid. See also 'Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt.' P M Meskin et al; *Henochsberg on the Companies* Act 5 ed Vol 1 at 693-694.

[3] See for example *Kalil v Decotex* (*supra*) at 980C; *Meyer NO v Bree Holdings (Pty) Ltd* 1972 (3) SA 353 (T) at 354-355; *Badenhorst v Northern Construction Enterprises (Pty) Ltd* (*supra*) at 348B; *Machanick Steel & Fencing v Wesrhodan (Pty) Ltd; Machanick Steel & Fencing v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265 (W) at 269B; *Kyle v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T) at 226; *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV & another v Honig* 2012 (1) SA 247 (SCA) at para 11 and *Ricoh South Africa (Pty) Ltd v Bula Document Solutions (Pty) Ltd* (31095/2012) [2014] ZAGPPHC 187 (2 April 2014) para 22.

[4] See *Re: LHF Woods Ltd* [1970] Ch 27 (CA); [1969] 3 All ER 882 (CA); *Ter Beek v United Resources CC & another* 1997 (3) SA 315 (C) at 333H and *Ricoh v Bula Document Solutions* (*supra*) para 25.

[5] *Re: Portman Provincial Cinemas Ltd* (1964) 108 SJ 581, CA.

[6] *Re: Bay Oil Seawind Tankers Corp v Bay Oil SA* (1969) 3 All ER 882.

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635. See also *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55; *Thint (Pty) Ltd v National Director of Public Prosecutions & others; Zuma v National Director Public Prosecutions & others* 2009 (1) SA (CC) paras 8 to 10; *Zuma National Director of Public Prosecutions* 2009 (2) SA 277 (SCA) para 26.

whether a disputed counterclaim is 'genuine', when applications for winding-up are, in the ordinary course, brought by way of motion proceedings?[8]

[9] Indeed, it is precisely by reason of the fact that a court may first make a provisional order of liquidation that in *Kalil v Decotex (Pty) Ltd*,[9] a different test was applied from that in *Plascon-Evans* when setting out the circumstances that would be sufficient to justify the making of such an order of liquidation.[10] It is that the affidavits must demonstrate a prima facie case in favour of the applicant.[11] It may bear repeating that *Plascon-Evans* is the locus classicus as to the test in the factual enquiry before a *final* order can be made in motion proceedings.[12]

[10] Ms Stein, who appeared for the appellant, submitted that *Portman Provincial Cinemas* had been wrongly decided (in the sense that it did not correctly reflect the position in English law) and that, in any event, it would be incorrect for a South African court to apply the English law in the matter, as our law is already clear in this regard. It is unnecessary, in the present case, to decide either point because the respondent does not even get past the post: its desultory pursuit of its counterclaim has the consequence that is has failed to discharge the onus of satisfying the court of the 'genuineness' thereof.

[11] As to the general principles concerning the exercise of a discretion by a court, the Constitutional Court's judgment in *National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs & others* has made it clear that an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles or a misdirection of the facts or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.[13] The court a quo was mindful of the fact that its discretion must be 'exercised on judicial grounds'.

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[8] See also *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) para 4.
[9] *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A).
[10] At 979.
[11] Ibid.
[12] At 634H-I.
[13] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11.

[12] Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt.[14] Different considerations may apply where business rescue proceedings are being considered in terms of Part A of chapter six of the new Companies Act 71 of 2008.[15] Those considerations are not relevant to these proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and in special or unusual circumstances only.[16]

[13] As mentioned above, mere recourse to a counterclaim will not, in itself, enable a respondent successfully to resist an application for its winding-up. Moreover, as set out above, the discretion to refuse a winding-up order where it is common cause that the respondent has not paid an admitted debt is, notwithstanding a counterclaim, a narrow and not a broad one. In these respects the court a quo applied 'the wrong principle[s]'. There must be no room for any misunderstanding: the onus is not discharged by the respondent merely by claiming the existence of a counterclaim. The principles of which the court a quo lost sight are: (a) as set out in *Badenhorst* and *Kalil*, once the respondent's indebtedness has prima facie been established, the onus is on it to show that this indebtedness is disputed on bona fide and reasonable grounds and (b) the discretion of a court not to grant a winding-up order upon the application of an unpaid creditor is narrow and not wide.

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[14] See *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733; *Service Trade Supplies ltd v Dasco & Sons Ltd* 1962 (3) SA 424 (T) at 428B-D, to which reference was made, with approval, by this court in *Sammel & others v President Brand Gold Mining Company Ltd* 1969 (3) SA 629 (A) at 662F. *Ex debito justitiae* means 'as a right arising out of the justice of the matter'. As Rogers J said in *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd & another* 2015 (4) SA 449 (WCC) para 18, a court 'does not sit under a palm tree' - per Warner J in *Re Cade & Son Ltd* [1992] BCLC 213 at 227.

[15] See for example *Absa Bank Ltd v New City Group (Pty) Ltd* (45670/2011); *Cohen v New City Group (Pty) Ltd and Another* (28615/2012) [2013] 3 All SA 146 (GSJ) . See also *Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA). *Safari Thatching Lowveld CC v Misty Mountain* Trading 2 (Pty) Ltd 2016 (3) SA 209 (GP) at para 16; *Standard Bank of South Africa v A-Team Trading CC* 2016 (1) SA 503 (KZP) para 14.

[16] See for example *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428B; *First Rand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) para 28; *Orestisolve* (*supra*) para 18 and *Victory Parade Trading 74 (Pty) Ltd t/a Agri-Best Sa v Tropical Paradise 93 (Pty) Ltd t/a Vari Foods* (13641/2006) [2007] ZAWCHC 32; *[*2007] JOL 200096 (C) para 28.

[14] Mr Omar, who appeared for the respondent, accepted that this was a correct statement of the law. In other words, he accepted that once the appellant had demonstrated that the respondent was prima facie indebted to it, it was for the respondent to establish that it disputed that indebtedness on bona fide and reasonable grounds. He also accepted that, once the respondent's indebtedness to the appellant had been shown, the discretion to refuse a winding-up order was a narrow one. He submitted, however, that by reason of the Bill of Rights in the Constitution and, in particular s 22 (the right to trade) and s 34 (the right to a fair hearing before a court) contained therein, it would be 'unconstitutional' for a court to apply a narrow discretion, rather than a broad one, when it comes to deciding whether or not to grant a final order of liquidation. For the reasons that follow it is unnecessary to reach a decision on the issue.

[15] There may indeed be cogent reasons for the doors of the courts to be wide open when it comes to any matter affecting human rights. One searches the respondent's affidavit in vain, however, for any human right that may be adversely affected by the grant of a final order for its liquidation. It does not appear to be trading. There is not even an allegation that jobs will be lost as a result of its liquidation. Indeed, in its answering affidavit, the respondent did not assert any of the rights contained in the Bill of Rights.

[16] In coming to its conclusion, the court a quo was influenced by *Ter Beek v United Resources CC & another*.[17] In that case, the court affirmed that the applicant bore the onus of showing that the respondent was indebted to it and that the respondent bears the onus of demonstrating that the indebtedness was disputed on bona fide and reasonable grounds.[18] It then went on to find that it was not satisfied that the applicant had discharged the onus of showing that the respondent should be wound up on the basis that it was just and equitable but nevertheless granted a final order of liquidation.[19] To the extent that *Ter Beek* is inconsistent with the reasoning in this judgment, it should not be followed.

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[17] *Ter Beek v United Resources CC & another* 1997 (3) SA 315 (C).
[18] At 337I-J.
[19] At 341C-D.

[17] The question of onus is indeed critically relevant in a case such as this. It bears repeating that once the respondent's indebtedness to the applicant for a winding-up order has, prima facie, been established, the onus is on it, the respondent, to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.[20] If one accepts the test set out in the English cases upon which the respondent has relied, the respondent would have to show that its counterclaim was 'genuine'.

[18] As mentioned earlier, in this particular case the inertia of the respondent in pursuing its right of action alleged in the counterclaim generates a considerable sense of unease about the genuineness of its contestation. There are other relevant factors too: the illiquidity of the claim, the failure even to attach the summons, the failure to respond to the s 345 demand, the lack of any indication that the respondent may be solvent and the fact that the respondent does not appear to be trading. It has therefore failed to discharge the onus of demonstrating that its indebtedness to the appellant has indeed been disputed on bona fide and reasonable grounds. This court is therefore entitled to interfere with the discretion exercised by the court a quo. The correct order would have been to have placed the respondent in liquidation.

[19] There was a short debate before us as to whether it would have been the better exercise of its discretion for the high court to have preceded the making of a final order of liquidation with a provisional one. Incontestably, the appellant had established a prima facie case for the liquidation of the respondent and therefore a right to a provisional order. As to the extent to which the courts will incline to taking the precaution of first granting a provisional order of liquidation, rather than a final one, it would seem that there is some degree of regional variance and that the matter is perhaps even affected by the individual preferences among judges.[21] The passage of time since the original hearing of this matter and the full ventilation of the issues that has since taken place render it inappropriate for this court now to substitute the order of the high court with a provisional order. Above all, the appellant has satisfied the requirements for the grant of a final order of liquidation, which was

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[20] See, for example, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* (*supra*) at 347-348 *Kalil v Decotex* (*supra*) at 980B-C.
[21] See *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) para 9.

the relief that it had sought in the first instance. Following *Johnson v Hirotec (Pty) Ltd*,[22] it will be appropriate for this court to direct the issue of a final order.

[20] Ms Stein asked that the costs of two counsel be allowed, in the event that the appeal was successful. The matter is not complex. The record is short. The amount in question is not particularly large. A fair exercise of the discretion in regard to costs would not be to allow the costs of two counsel.

[21] The following order is made:

(a) The appeal is upheld.

(b) The order of the High Court is set aside and replaced with the following:

'The respondent is placed under a final winding-up order in the hands of the Master.'

(c) The appellant's costs in the appeal and in the application before the High Court are to be costs in the liquidation of the respondent.

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N P WILLIS
Judge of Appeal

[22] *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) para 9. See also *Kalil v Decotex* (*supra*) at 976A-B.

APPEARANCES:

For Appellant:	S Stein SC (with her L Sisilana) Instructed by: Fluxmans Inc, Johannesburg Lovius Block, Bloemfontein
For Respondent:	Mr Z Omar Instructed by: Zehir Omar Attorneys, c/o Liebenberg Malan Liezel Horn Inc, Pretoria EG Cooper Majiedt Attorneys, Bloemfontein