**REPUBLIC OF SOUTH AFRICA**

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

CASE NO: **26849/17**
CASE NO: **26850/17**

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
26/11/2018 RKeightley
DATE SIGNATURE

In the matter between:

**FITZGERALD, CRAIG ALAN** Applicant

**and**

**FILTER FOCUS (SA) (PTY) LTD** Respondent

**REGISTRATION NUMBER: 2003/005816/07**

**AND**

**FITZGERALD, CRAIG ALAN** Applicant

**and**

**INTEGRATED FLUID TECHNOLOGIES (PTY) LTD** Respondent
**Registration number:( 2005/042995/07)**

**JUDGMENT**

KEIGHTLEY J

1. This judgment deals with two, interrelated applications for winding up. Mr Fitzgerald is the applicant in both. In the first application, he seeks the winding up of Filter Focus

(SA) (Pty) Ltd ("Filter Focus"), and in the second, he seeks the winding up of Integrated Fluid Technologies (Pty) Ltd ("IFT"). Save for an alleged counterclaim in the Filter Focus application, and some factual differences regarding the amounts of the respondents' alleged indebtedness, the issues in dispute in both applications are the same.

2. Most of the material background facts are common cause. Mr Fitzgerald is effectively a shareholder (through his shares in a holding company) of both respondents. He was also a director of both respondent companies until his resignation in 2017. It is unnecessary to go into many details about what predicated his resignation as a director, but it is safe to say that his departure from the companies was not in amicable circumstances. Mr Fitzgerald had advanced a shareholder's loan to each respondent company in May 2016: in respect of Filter Focus, the amount was R290 000. 00, and in respect of IFT it was R464 409. 47. These amounts were advanced to the companies to allow them to meet their obligations to creditors. The amounts are reflected in Mr Fitzgerald's loan accounts with the companies.

3. After Mr Fitzgerald resigned from the companies, he called up his loan accounts. In May 2017 his attorney delivered a notice to each of the respondent companies in terms of s345(1)(a) of the Companies Act of 1973. The companies failed to meet the demand in the letters for the payment of Mr Fitzgerald's loan accounts within the 21 day period provided. Consequently, Mr Fitzgerald applied for the winding up of the respondent companies on the primary basis that they were deemed to be unable to pay their debts.

4. The respondent companies do not dispute the existence or (in the main) the amount of the debts. However, they contend that:

(a) The debt is not due and payable, for reasons I will discuss in more detail below.

(b) As regards Filter Focus, it says it has a counterclaim against Mr Fitzgerald which, it says, will more than cover the amount claimed by him, and which thus constitutes a defence to his claim for the payment of his loan account.

(c) The financial position of the companies has improved significantly since Mr Fitzgerald's departure, and they argue that this is a matter that I should take into account in exercising my discretion whether or not to grant the order.

5. As regards the issues raised in paragraphs (a) and (b) above, the respondents rely on what is generally referred to as the Badenhorst principle[1]. The principle, which is well established in the case law[2] lays down that winding-up proceedings ought not to be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, as winding-up proceedings are not designed for the resolution of disputes as to the existence or not of a debt.

6. It has been held further that:

> "The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds."[3]

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[1] From the judgment in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-8

[2] See, for example, Kalil v Decotex (Pty) Ltd & Another 1988 (1) SA 943 (A); *Feshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* [2016] ZASCA 168 (24 November 2016); *Trinity Asset Management (Pty) Ltd v Grindstone Investments* 132 (Pty) Ltd 2018 (1) SA 94 (CC)

[3] *Kalil* at 980D-F, cited in, among others, *Feshvest Investments (Pty) Ltd* at [4]

And:

> "(The respondents) do not, ... have to prove the company's defence in any such proceedings. All they have to satisfy me of is that 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 *bona fide* ... to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company."[4]

7. It has been suggested[5] that where the Badenhorst principle is found to be applicable, and a respondent satisfies the court that its defence raises a *bona fide* and reasonable dispute in relation to the debt, the winding-up application will be refused for two reasons: first, because winding up is an inappropriate mechanism to recover a disputed debt and, second, because where a debt is disputed, the creditor lacks *locus standi*.

8. It stands to reason, therefore, that I should begin by considering the crisp issue of whether the respondents can show that they have a *bona fide* and reasonable defence to Mr Fitzgerald's claim for payment of his loan account debts. I will first consider the defence common to both applications, and then separately consider the issue of whether Filter Focus' counterclaim provides it with a defence that gives rise to a *bona fide* and reasonable dispute as regards the debt.

THE COMMON DEFENCE

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[4] *Hulse-Reutter & another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998 (2) SA 208 (C) at 219E-20A, cited in *Freshvest Investments*, above, at [6]

[5] See Henochsberg on the Companies Act, 71 of 2008 [Issue 15] Vol 2 APPI-48

9. As I indicated earlier, the gist of the respondent companies' defence is that although they are indebted to Mr Fiztgerald for the amounts reflected in his loan accounts, these debts are not yet due and payable. In each application the companies filed an answering affidavit by Maria Sly ("Ms Sly"), who deposed that she was a co-director of the respondent companies. She also appears to be a shareholder in the companies. Much of the answering affidavit is devoted to allegations of various forms of misconduct and mismanagement by Mr Fitzgerald when he was the director. It is not necessary to deal with these allegations, or with Mr Fitzgerald's responses to them, as neither party sought to rely on the issues raised by the allegations and responses when the matter came before me.

10. On the pertinent issue of the disputed debt, Ms Sly avers as follows:

    (a) During May 2016 Craig Pretorius (one of the shareholders) met with Mr Fitzgerald in Johannesburg to discuss the financial position of the companies, as at that stage they had started to run into cash difficulties.

    (b) It was discussed between them that the companies were in need of a cash flow injection.

    (c) It was then verbally resolved between them that an amount proportionate to their shareholding's in the companies was to be invested.

    (d) Ms Sly was informed of this and she agreed. The payments were then made.

    (e) Ms Sly stated that:

    "*It was always and at any given stage the understanding between ourselves that the loans would only be repayable if and when the respondent was in a position to do so. Thus logically after the financial year end, if funds would be available it would be repaid to the parties proportionate to their respective loans. This would*

*also be done only if and when a repayment was requested and agreed upon by the directors."*

(f) For ease of reference I will use the term "the understanding" as a shorthand term for the agreement alleged by Ms Sly.

(g) The simple reason for the manner of repayment was to safeguard the companies' capital base.

(h) Apart from Mr Fitzgerald, none of the other shareholders have demanded repayment of their loan accounts due to their understanding of the terms regarding repayment.

(i) The loans are reflected in the companies' financials as being unsecured and no payment date is recorded.

(j) On the basis of the understanding, the loans could be equated to being subordinate in nature, in that "*it was always the understanding between the respective directors and shareholders that made loans ... that the loan would be repayable if, and when the company will be in a position to do so*".

11. As regards the companies' financial position, in the answering affidavits Ms Sly averred that since Mr Fitzgerald's departure from the companies, they had turned around the financial situation. For the months of May to August 2017, the companies showed a profit. The respondent companies were now in a proper financial position and were able to deal with their day-to-day liabilities when they became due. It was in a "*healthy financial position*".

12. Mr Fitzgerald disputed Ms Sly's version regarding the alleged understanding of when the loans would fall due for payment. He stated in his replying affidavit that he did not meet with Mr Pretorius as averred. They spoke on the telephone about the cash

crunch and made a decision to contribute what they could. Their contributions were not based on their shareholding, and none of the shareholders in the group of companies was required to make a contribution, as averred by Ms Sly. Mr Fitzgerald stated that the origin of his loans to the companies was simply that in the middle of a cash crunch, he made a deposit into the companies to assist with cash flow.

13. Critically, he recorded that there was no discussion whatsoever regarding repayment. There was no "*if-and-when-the respondents-could-afford-it*" condition attached to the loans he made. He did not share the understanding alleged by Ms Sly. Further, there was no discussion about the loans being subordinate to any other obligations. Mr Fitzgerald's version was that the loans were payable on demand, or within a reasonable time.

14. Mr Fitzgerald pointed out, correctly, that there were no confirmatory affidavits attached to the answering affidavit from Mr Pretorius or any of the other directors or shareholders to verify Ms Sly's version.

15. Picking up on Ms Sly's averments regarding the current healthy position of the respondent companies, Mr Fitzgerald contended in his replying affidavits that what the respondents in effect were saying is that they were now in a position to pay out his loan account, or at least a portion thereof. This begged the question: if the companies were now in profit, why were his loan accounts not being paid. He submitted that the undeniable inference to be drawn from the failure to repay at least a portion of his loans in response to his demand for payment was that, contrary to Ms Sly's statements of financial health, the companies were not, in fact, able to pay their debts.

16. In March 2018 the respondent companies filed supplementary affidavits with a view to updating the court on their most recent financial position. After describing various positive financial developments with the respondents, Ms Sly submitted that they now had a positive bank balance, and that the retained income was in the region of just shy of R550 000. 00 in respect of Filter Focus, and some R927 000 in respect of IFT.[6]. She then proceeded to add a new rider to the repayment terms of the loans alleged to have been agreed between the shareholders:

> *"Having a good understanding of the fluctuations in the economy and the trends in the economy it was always the understanding that as soon as the Respondent(s) reached a retained income of approximately one million rand (two million in respect of IFT) that the company will consider to declare profit on shares and start to make repayment on the loan accounts proportioned (sic) to shareholding. This is so bearing in mind the agreement as referred to in the answering affidavit."* (my emphasis)

17. No such condition or rider was alleged by Ms Sly in her original answering affidavit. It is difficult to escape the inference that it was introduced to deal with Mr Fitzgerald's point when he questioned why his loans had not been repaid if, indeed, the respondent companies were financially solvent and making a profit.

18. Against these facts I must determine whether the respondent companies have made out a *bona fide* and reasonable case that Mr Fitzgerald's loans are not yet due and payable. In this regard, it is important to restate that the *onus* on the respondents is not such that they must prove their averred defences based on a balance of

[6] In a supplementary reply to this affidavit, Mr Fitzgerald disputed these averments, asserting that the financials reflect a company with a declining turnover; declining stock levels and declining cash.

probabilities. What they are required to do in their affidavits is to allege facts which, if proved at a trial, would constitute a good defence to the claims against them by Mr Fitzgerald.

19. The respondent companies' primary defence is the existence of the understanding which, they say, means that the shareholder's loans are not yet due and payable to Mr Fitzgerald. Counsel for Mr Fitzgerald referred me to a decision of this Division, *Levay & Another v Van den Heever and Others*,[7] in which reliance was also placed on the alleged existence of an oral agreement in affidavits filed in liquidation proceedings. The court noted in *Levay* that:

> "It is trite that the affidavits in motion proceedings comprise both the pleadings and the evidence. Peters' evidence of the loan agreement will not even pass muster as a pleading, as it does not set out where the agreement was concluded, or who represented the respective parties."[8]

20. As I understand the point made in this *dictum* it is that if a party seeks to rely on factual averments in motion proceedings to found a defence, it must do so in a manner that reasonably approximates how the defence would be pleaded if the proceedings were in the nature of trial, rather than motion proceedings. When an alleged agreement is pleaded, this must be done with the same kind of particularity as regards the *facta probanda* relating to the agreement that would be required in a plea. For example, the necessary averments relating to the nature of the agreement (whether it was written or oral), the persons representing the parties to the agreement, when and where the agreement was concluded, and the material terms of the agreement should be

[7] 2018 (4) SA 473 (GJ)
[8] At para [44]. The court cited the case of *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C – G for the trite principle referred to in its dictum.

discernible from the affidavit in question. In their absence, the affidavit would not, as the court put it, "*pass muster*" as a pleading. For purposes of an inquiry like that in the present case, what this means in my view is that if these essential averments of the defence are not discernible from the affidavits, this will materially undermine the *bona fides* and reasonableness of the defence relied upon to dispute the debt. In other words, the dispute will not be based on substantial grounds.

21. The only specific details Ms Sly provides regarding an agreement are that Mr Fitzgerald and Mr Pretorius met in Johannesburg, during or about May 2016, and that they decided between themselves that the shareholders of the holding company would make proportionate investments in the respondent companies. She says she agreed to this. What is significant about these averments is that they do not relate to the repayment terms of the loans: the details pleaded relate only to the agreement to make the cash injection. Ms Sly does not say that Mr Fitzgerald also "*verbally resolved*" at this meeting what the repayment terms of the loans would be, and that she thereafter agreed to those terms. Instead, from this point onwards, Ms Sly's averments descend into a dark hole of vagueness.

22. What is crucial here is that the vagueness goes hand in hand with the most important aspect of the respondent companies' defence, viz. the understanding regarding the repayment of the loans. The court is told in vague terms that "*it was always and at any given stage the understanding between ourselves*" as to how the loans would be repaid. When was this understanding reached? Where was it reached? Who, exactly, was party to this understanding? Was the understanding constituted by way of a written, or oral agreement, or by the conduct of the parties? What was understood by repayment being dependent on "*if funds were available*", or "*when the companies were*

*in a position to do so*"? How was this to be determined? Did the parties consider what the effect on the alleged understanding would be if one of them resigned as a director and wished to withdraw from the companies? Ms Sly does not traverse any of this in her affidavits. On this score alone, in my view the respondents' defence does not pass muster.

23. There are further difficulties with the *bona fides* and reasonableness of the respondent companies' defence. It is inexplicable why, if the parties truly had agreed that the loans would not be repayable until the companies held retained income of certain amounts (as stated in the supplementary affidavit), this was not pleaded in the answering affidavit. The inescapable conclusion is that it was not pleaded because it was never agreed. It was an afterthought introduced to deal with the obvious difficulty in the respondents' own case: if they were now turning a profit and were not insolvent, why had they not repaid Mr Fitzgerald's loans? There is also the question of the absence of any confirmatory affidavits from any of the other shareholders or directors who, Ms Sly intimates, were part of the understanding. While it may not be necessary for the respondents to put up all their evidence in support of their defence at this stage, the court should at least have the comfort of knowing that the other parties to the alleged understanding confirm the version contained in the affidavits. Ms Sly's version stands on its own. There is no explanation as to why none of the other parties have confirmed her version. Without this, the court is left in doubt as to *bona fides* of the defence relied on by the respondents to dispute the debt.

24. For these reasons, I find that the respondent companies do not dispute the debt constituted by Mr Fitzgerald's loans on *bona fide* and reasonable grounds.

THE COUNTERCLAIM DEFENCE

25. The counter-application as a defence to the debt relates only to Filter Focus. It contends that it has a valid counterclaim that must be set off against Mr Fitzgerald's debt. On this basis, Filter Focus places the amount of the debt in dispute.

26. The counterclaim is based on Mr Fitzgerald's continued possession and use of a vehicle which belongs to Future Focus, as well as some other items of equipment. Filter Focus says that he refuses to return these assets to it. The vehicle was purchased for R425 553. 33, and Filter Focus continues to pay the monthly running costs of the vehicle. It contends that the value of the vehicle and other equipment completely extinguishes Mr Fitzgerald's claim based on his loan account.

27. It is common cause that Mr Fitzgerald is still in the possession of the vehicle. He says that historically the shareholders all had the use of motor vehicles from the company. He remains a shareholder of the company, and says he is entitled to continue to use the vehicle.

28. Whatever the ins and outs may be about Mr Fitzgerald's continued use of the vehicle, it is common cause that it remains registered to the company. It is an asset of the company and will be reflected as such in the financial statements. Filter Focus does not allege that Mr Fitzgerald has unlawfully transferred the vehicle into his own name, or that he has sold the vehicle and has pocketed the purchase price. It's real complaint is possessory: he will not give the vehicle back when it thinks he should. This being the case, it is difficult to understand how the dispute over his continued possession and use of the vehicle can form the basis of a valid claim against him,

sounding in money, and based on the value of the vehicle. The fact that Mr Fitzgerald offered to set off the vehicle against his loan account does not take the matter further: this would have entailed, one presumes, a transfer to him of ownership. This would not constitute a loss to Future Focus, as the loss of its asset would be compensated by a reduction in the loan account due. The offer could never constitute a recognition that Filter Focus has a valid counterclaim against Mr Fitzgerald, as it suggests.

29. For these reasons, I find that the counterclaim does not constitute a valid defence giving rise to a *bona fide* and reasonable dispute of the debt.

THE REQUIREMENTS FOR WINDING UP

30. It follows from my findings in relation to the defences raised that Mr Fitzgerald's *locus standi* as a creditor is not reasonably in dispute, and is thus established. There is also no reasonable and *bona fide* dispute arising from the respondents' averment that the loans were subordinate, and thus that Mr Fitzgerald is only a contingent creditor. On the contrary, the debts constituted by his two loan accounts are due and payable, either on the basis that they were payable on demand, or at least within a reasonable period.

31. Mr Fitzgerald relies primarily on section 344(f), read with section 345(a) of the 1973 Companies Act, read further with schedule 5 of the Companies Act 71 of 2008 as the basis for the winding up of the respondents. These sections permit the winding up of a company in circumstances where it is deemed to be unable to pay its debts. Mr Fitzgerald states that on 19 May 2017 he caused to be delivered to the respondent companies a letter demanding payment from them of his loan account within seven

days. The letters further referred the respondent companies to the relevant provisions of the Companies Acts, and advised them that in the event of their non-compliance therewith by meeting the demand to his satisfaction within three weeks, they faced the prospect of a liquidation application.

32. It is common cause that after receipt of these letters an approach was made by the respondents to meet to attempt to come to an arrangement between the parties. However, these were not to the satisfaction of Mr Fitzgerald. No payment was made subsequent to this, and Mr Fitzgerald commenced the winding-up proceedings.

33. In terms of section 345(1)(a) a company will be deemed to be unable to pay its debt if a demand is made in accordance with the section for the repayment of the debt and the company for three weeks thereafter has neglected to pay the sum demanded or to secure or compound the debt to the reasonable satisfaction of the creditor. The company respondents did not pay the debt in response to the section 345 demand letters, and accordingly they must be deemed to be unable to pay them.

34. The respondents submitted that despite this, I should exercise my discretion to refuse to order their winding up. They submitted that they had made a financial turnaround, they were now in a healthy financial position, and they were able to pay their day-to-day creditors. This is disputed by Mr Fitzgerald.

35. An unpaid creditor who cannot obtain payment and who brings his claim within the Act is, as against the company, entitled *ex debito justitiae* to a winding-up order and is not

bound to give the company time to pay.[9] In these circumstances, the discretion of a court to refuse a winding up is a very narrow one.[10]

36. Bearing this in mind, in my view there are no substantial reasons for me to exercise my discretion to refuse Mr Fitzgerald's application. On the respondents' own version, they do not have sufficient retainable income at this stage to pay Mr Fitzgerald's debt, even though they say they hope to be able to do so at some point in the future.

37. Finally, there is no dispute that Mr Fitzgerald has complied with the statutory formalities required for a winding-up order.

CONCLUSION

38. For all the above reasons, I make the following order:

38.1. Each of the above mentioned respondents is hereby placed under provisional winding up;

38.2. All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding up of the respondent on the 11th February 2019 at 10h00 am or so soon thereafter as the matter may be heard;

38.3. A copy of this order must be served on the respondents at their registered office;

38.4. A copy of the order must be published forthwith once in the Government Gazette;

38.5. A copy of this order must be forthwith forwarded to each known creditor by prepaid registered post or by electronically receipted telefax transmission;

38.6. A copy of the provisional winding-up order must be served on;-

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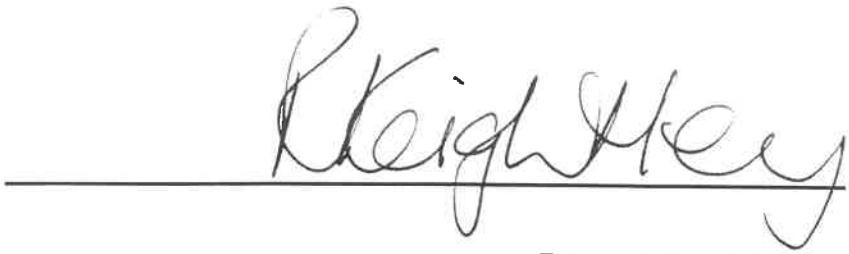
[9] See Henochsberg, above at APPI-56 and the cases cited there.
[10] *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662

a) Every affected trade union;

b) The employees of the respondent by affixing a copy of the application to any notice board to which the employees have access inside the respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;

c) The South African Revenue Services; and

d) The respondents.



**R M, KEIGHTLEY**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING : 31 OCTOBER 2018

DATE OF JUDGMENT: 26 NOVEMBER 2018

**APPEARANCES**

| | |
|---|---|
| APPLICANT'S COUNSEL | : A.P ELLIS; |
| INSTRUCTED BY | : ALLA LEVIN & ASSOCIATES |
| RESPONDENT'S COUNSEL | : CGVO SEVENSTER |
| INSTRUCTED BY | : VEZI & DE BEER INCORPORATED |