

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 7753/2015

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

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DATE

In the matter between:

ABSA BANK LIMITED**Applicant**

and

LONGCHAMP TURF INVESTMENTS (PT) LTD**First Respondent****KOTZE, OLGA N.O****Second Respondent****COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION****Third Respondent****PODLAS, HILDA BETTY N.O****First Intervening****Party****CAMBOURIS, SHAWN N.O****Second Intervening Party**

JUDGMENT

MANOIM J:

Introduction

- [1] The applicant, Absa Bank Limited (ABSA) brings this application for the final winding up of the first respondent, Longchamp Turf Investments (Pty) Ltd (Longchamp). The application is opposed by those described as the first and second intervening parties, Betty Podlas and Shawn Cambouris. The reason they do so is that they are trustees of the Reshawna Trust (Reshawna) which is the sole shareholder of Longchamp. Cambouris is a director of Longchamp. Reshawna it is relevant to mention is a family trust. Another member of the family is Emmanuel Cambouris. Although he is not one of the intervenors, he is Podlas' husband, is also involved in the business affairs of Longchamp, and has deposed to affidavits in this matter relating to background facts. For this reason, when I refer to the family, that means the intervenors as well as Emmanuel Cambouris. The family has other trusts through which they hold equity in other businesses, one of which is relevant to this matter, as I discuss later.
- [2] The citing of the second respondent is now historic. The second respondent was previously appointed as the Business rescue practitioner for Longchamp. However, as I go on to explain Longchamp's business rescue process has been terminated by an order of court. Accordingly, the second respondent has no further interest in the matter.
- [3] This application was brought seven years ago. Considering this is a winding up application, that is an extraordinary long gestation period. The delay is partly explained by the large number of interlocutory applications that have happened on the way leading to its final hearing before me.

The basis for the application

- [4] ABSA has two claims against Longchamp. The first is in respect of what it terms a term loan agreement. In 2008 ABSA extended a loan of R 10 million to Longchamp. As security for the loan ABSA required Longchamp to mortgage a vacant property it owns in the Western Cape in that amount. It also required sureties from various directors, but they are not pertinent to this application. Longchamp's defence as I go on to explain is that the bond is not repayable as it was induced by fraud to enable ABSA to get security for another but unrelated loan for which ABSA was not secured.
- [5] The second claim is based on an overdraft facility that ABSA extended to Longchamp. Initially the overdraft was not secured. By January 2009 Longchamp owed R 2 789 520 on the facility and by February 2009, it was just over R 3 million. ABSA required security for the overdraft and so Longchamp registered another bond over its property for R 5 million. It continued to make some payments on the overdraft until 2010. ABSA then called in the overdraft which Longchamp was unable to repay. Whilst the fact that the overdraft has been secured by the R 5 million bond is common cause the reason why this came about is not common cause.
- [6] On Longchamp's version the reason they had registered the bond was so that the overdraft facility could be increased to R 5 million. ABSA, it alleges, had agreed to this, and having induced the registration of the bond now denies it. This representation Longchamp alleges was fraudulent. ABSA's version is that because the facility was not secured, they needed to get better security otherwise it would have been called in much earlier. There was on ABSA's version never an agreement to extend the overdraft to R 5 million.
- [7] Longchamp failed to make payment of the amounts due in terms of both the loan agreement and the overdraft facility despite demands for it to do so. As a result, ABSA first brought proceedings by way of action to recover the money in 2012. Longchamp defended the matter but its defence at that stage was a bare denial.
- [8] Then on the eve of the commencement of the trial, Longchamp applied for business rescue. The CIPC approved the resolution to place Longchamp in business rescue in October 2014. At the same time the defendants in the

action, which included Longchamp, sought a postponement, in order to amend their pleadings. The action case has been overtaken by events and never proceeded.

- [9] ABSA then brought the present proceedings in February 2015 to wind up Longchamp. This is the proceeding still before me.
- [10] On 18 February 2015 Absa served a demand in terms of section 345(1)(a) on Longchamp at its registered address'. Receipt thereof is admitted.
- [11] The amount outstanding as of 3 May 2016 in respect of the former was R17 337 868.13 and, in respect of the latter, the amount outstanding as of 4 May 2016 was R5 992 811.89
- [12] It also brought a challenge to the business rescue. This was eventually successful. Satchwell J held that Longchamp had no business to be rescued and set aside the business rescue proceedings.¹ This outcome requires some explanation. Longchamp is a company which owns a piece of vacant land. It is the intention of its directors to establish a business or businesses on the site but that had not yet happened at the time Satchwell J heard the application hence her finding that there was no business to be rescued.

Point in limine

- [13] Longchamp raises as point in limine that ABSA had brought the winding up application at the time when the business rescue process had already been instituted. This meant, it was argued, that the application was in contravention of the moratorium on the institution of legal proceedings against companies in business rescue in terms of section 134(1) of the Companies Act 71 of 2008, (the Act).
- [14] That section states:

134 General moratorium on legal proceedings against company

(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property

¹ There is no written judgment but this remark by the learned judge appears common cause.

belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) ...

[15] But the intervenors have mischaracterised the liquidation application. The original application sought two types of relief. First to terminate the business rescue process on the basis that no business rescue plan had been published within the requisite period, and second for the liquidation of the company. This is competent relief that does not contravene the moratorium provision as it seeks to make the latter relief contingent on the former. As it happens the former was not required as the court found that on the facts there was no business to rescue hence the process to place Longchamp into business rescue was not competent.

[16] As Van der Linde J observed in *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others*²

“Where the main relief to be sought goes to the very status which invokes the moratorium protection, it seems overly technical to insist on two distinct applications as opposed to one application with two (sets of) prayers: one for permission, and one for the substantive relief.”

[17] Likewise, in this case when it was brought this application went to the very heart of the status of the business rescue application. The application was therefore not one commenced in contravention of section 134(1) and so the point in limine fails.

Longchamp’s defences in respect of the loan agreement

No original agreement

² 2017 (4) SA 592 at 27.

[18] Longchamp raises as one of its defences that ABSA has failed to prove that the mortgage agreement attached to the application is the one that was signed by the parties. ABSA has attached what it says is a copy of the agreement as the original was destroyed in a fire. However, Longchamp has not suggested that this is not a genuine copy of the agreement and if not where it is inaccurate. This point too must fail.

Fraudulent misrepresentation

[19] The main defence advanced, and the one which received the most attention from both parties, was Longchamp' allegation that the bond agreement was not binding on it because it had been induced by a fraudulent misrepresentation by the ABSA employee responsible for arranging it.

[20] The family behind Longchamp had previously had dealings with this employee at ABSA, Lashner Ciorovich, who was at the time a 'Relationship Executive' with ABSA Corporate and Executive Bank. Ciorovich had arranged finance for a company known as Good Hope Diamonds (Kimberley Limited (GHD) which had offshore investors as its shareholders as well as the family, via another trust known as the El Shaddai Trust. For various reasons due to exchange control complexities, the security that ABSA relied upon for this transaction had been compromised. ABSA was thus exposed to an increased risk of R 10 million that was not secured.

[21] Sometime in 2007 Podlas and Cambouris had met with Ciorovich and another ABSA executive to discuss the GHD problem. A proposal was made that the security could be 'improved' using Longchamp's assets to do so. The idea was that Longchamp would loan R 10 million from ABSA and then bond its property as security. The loan would then be paid to the El Shadai Trust which in turn would make payment on behalf of GHD. This is in fact what happened. El Shaddai paid over two cheques from this loan to extinguish the unsecured debt.

[22] At the same time the family had approached ABSA with a business proposal in respect of Longchamp. They wanted to construct a private hospital on the empty property and asked ABSA to finance them with a loan of R 450 million.

On Longchamp's version, Ciorovich had agreed to provide the financing, provided that the family could help him increase the security on the GHD financing using the mechanism for payment I described above.

- [23] There is no agreement in the record that sets out the linkage between these two arrangements. But central to proving Longchamp's case is an email that Ciorovich had sent it, or purportedly sent it, on 26 February 2008 in which this arrangement is set out. Ciorovich wrote:

"Please can you let me have an update from the attorneys on the position of Display Gardens I have also approached credit and Absa Capital finance for your Hospital Project. Following perusal of the documents and business plan they have decided to grant up to R450 million for the international Velddrif Medical Clinic. The documentation will be sorted out as soon as the Good Hope facilities have been arranged accordingly and the bond taken over the land. They are happy with the land valuation by the valuator."

- [24] According to the intervenors they only own 0.6 % of the share capital in GHD. There is no reason why they would have bonded a property of an unrelated company when they were not obliged to. The reason they advance for doing so was the quid *pro quo* they got for getting the bank out of this embarrassing situation of its own making. The quid *pro quo* was that the bank had undertaken to advance them a loan of R 450 million for their hospital venture which was to be conducted under the auspices of Longchamp.

- [25] The misrepresentation was according the intervenors:

*"As already stated, ABSA misrepresented that the R450 million loan had been approved and that as soon as the bond had been registered and the Good Hope Diamonds debt extinguished the R450 million loan would be made available to Longchamp."*³

- [26] But the intervenors do not stop there. They go on further to claim the misrepresentation was:

³ Record page 52 -16.

“.... made intentionally by the Applicant [ABSA] knowing full well that it never intended to finance the Hospital Project at all nor was any finance approved nor was any decision made as misrepresented by the Applicant to finance the Hospital Project on payment of the Good Hope Diamonds loan by the 1st respondent.”⁴

- [27] The funding for the hospital never came through but Longchamp entered into the bond arrangement and on paid most of the R 10 million to the El Shaddai trust. ABSA contend that Longchamp itself had sought the funding. Each party has attacked the credibility of the other’s version.
- [28] ABSA questions the credibility of the Longchamp version because of the manner in which this defence was raised. Only when the civil action was ready to proceed to trial was it raised. This came about because during discovery process the email that Ciorovich had sent to Podlas came to the attention of Longchamp’s legal team. Based on this document at the behest not of the client, but the attorney, Longchamp decided to change its defence to the civil action which up until then had been a bare denial, to one of fraud.
- [29] But in a strange twist of events the credibility of ABSA’s version is also in question. Initially ABSA’s defence was to accept the authenticity of the Ciorovich email but to put a different interpretation on what it meant. That changed later and ABSA then suggested an error had been made by the attorney who should have referred to the email as the ‘purported email’. The current version is that ABSA has no knowledge of the email and they have searched for it on their system and no record of it can be found.
- [30] For present purposes I will accept that the email was sent by Ciorovich on the date it purports to have been made. The question then is what to make of this most unusual set of facts. I will first look at the relevant legal tests and then apply them to the facts of this case.

Legal Tests

⁴ Record 6-206 to 6-207.

[31] The legal test is not controversial although applying it to the facts sometimes may be more so. In terms of the so-called 'Badenhorst rule' winding up procedures cannot be used to enforce a debt that is disputed on *bona fide* and reasonable grounds. In *Freshvest Investments (Proprietary) Limited v Marabeng (Proprietary) Limited*⁵ the court described the application of the rule in this way.

"Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the court will refuse a winding-up order. 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."

[32] However, the courts have also held that where 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.⁶ In this case Longchamp's indebtedness is not in dispute. The onus to show that the defence of fraud rests on the intervenors to demonstrate it is based on *bona fide* and reasonable grounds.

[33] It matters as well whether the order sought is one for final or provisional liquidation. In *Kalil* the court said the test for provisional liquidation only required a showing of a *prima facie* case by the applicant i.e., as Corbett JA put it:

"Where on the affidavits there is a prima facie case (i.e., a balance of probabilities) in favour of the applicant, then, in my view, a provisional order of winding-up should normally be granted and save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence. This does no lasting injustice to the respondent for he will on the return day generally be given the opportunity, in a

⁵ [2016] JOL 36911 (SCA).

⁶ See *AFGRI Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at paragraph 6 which relies inter alia on *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A).

proper case and where he asks for an order to that effect, to present oral evidence on disputed issues.”⁷

- [34] Does that mean the court out of caution when a *prima facie* case has been made out should prefer to grant a provisional rather than a final order? In *Afgri* the court considered this and held:

*“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. 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 the relief that it had sought in the first instance. Following *Johnson v Hirotec (Pty) Ltd*, it will be appropriate for this court to direct the issue of a final order.”⁸*

- [35] In *Johson v Hirotec*, the court in deciding to grant a final order for winding up, took into account that the issues had been fully ventilated and that the respondent had “...put nothing forward to persuade us that further relevant facts would be forthcoming if a rule nisi were issued.”⁹

Analysis of the factual issues

- [36] The intervenors case is that they would never have agreed to bond Longchamp’s property to benefit GHD, in which they had a miniscule interest, unless they had been induced to do so by the fraudulent representation made by ABSA officials that if they did so, ABSA would loan them R 450 million rand to fund their hospital project. There are several problems with this version.
- [37] Longchamp entered into the loan and bond for R 10 million in early January 2008. No document exists to confirm such an arrangement prior to this. If this

⁷ Kalil, supra, at 979.

⁸ Afgri, supra, paragraph 19.

⁹ *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA) paragraph 9.

was the condition for Longchamp bonding the property one would have expected these to exist prior to the signing of these documents. Second the amount of R 450 million is disproportionate to the value of the Longchamp property which was valued at the time at some R 40 million. If it was already bonding R 10 million to the loan for GHD that meant that R 30 million was unbonded. (at best) or one-fifteenth of the value of the loan. The intervenors do not mention any other security required. It beggars belief that they could have thought the bank would agree to such a loan as a quid *pro quo* for providing R 10 million security to an unrelated transaction.

[38] Second, the failure by the intervenors to take any action about the alleged misrepresentation was never adequately explained. If they were paying off a bond as they were for a time and had not had any advance on the hospital loan, why is there no further correspondence in the record (apart from one letter of enquiry in early 2008 from Podlas) indicating their outrage that they had been duped. Third, why was it their attorney on the eve of trial and not them who had raised the issue of the misrepresentation. Recall that the initial defence to the action was a bare denial. He had not done so on any instruction from them but on his inference from the Ciorovich email. Moreover, this was not a hidden communication that he had uncovered which his clients were unaware of. It was a communication addressed to them.

[39] Further the allegation made is that ABSA made the representation knowing full well that it was not going to do provide the R 450 million loan. There is no evidence of this other than a particular reading attributed to Ciorovich's email. But that cannot be the basis of their reliance as the Ciorovich email was sent after they had already entered into the bond and other security agreements for the R 10 million. This means that if their case is correct there must have been a prior representation. But they have put up no evidence of this. It is unlikely that entrepreneurs of the family's experience would not have had their paperwork in order before entering into the agreements. Nor is it likely that if they had had a fraud perpetrated on them, they would have needed their lawyers at discovery stage in an action where payment was being required of them, to explain this to them. As the record shows they are experienced in raising finances for their various endeavours and had a long relationship with

ABSA. They continued making payments in respect of this loan until 2009. They do not explain why they continued to do so if they had been defrauded based on representations made as early as 2007.

[40] Given the prior action, in which there was discovery, one might have expected such documents to have been produced or required, but apart from the Ciorovich email there are none in the record. Nor is there any indication from the intervenors that if given an opportunity to they could obtain such information.

[41] These facts strongly indicate that the fraudulent representation defence advanced is not *bona fide* and reasonable. It may well be that ABSA's clumsy attempt to distance itself from the Ciorovich email is an indication that there is something more going on. But I have accepted the authenticity of the email for the purposes of this decision. The fact that the denial has lacked credibility does not lead to an inference that therefore there is some substance to the claim of a fraudulent misrepresentation.

[42] In any event even if my analysis of these facts is wrong, Longchamp remains liable to ABSA for enrichment. It is common cause that Longchamp did not pay the full R 10 million over to the El Shadei Trust and that a certain amount R 92 300, remained with it. Even if there was a fraud perpetrated on Longchamp, it is bound to make restitution on this amount which it has not done nor tendered to do so. This constitutes a self-standing basis for having the firm wound up. Longchamp's response was to allege that the claim for this payment had prescribed. But the claim is not based on a debt due, but a debt secured by a mortgage bond for which the prescription period is 30 years in terms of the Prescription Act.¹⁰

The overdraft

[43] Finally, there is the additional self-standing claim in respect of the overdraft facility which was also secured by a further mortgage bond over the property in the amount of R 5 million. Here again a fraudulent representation is alleged. But this claim suffers the same credibility problems as the other. There is no

¹⁰ Section 11(1)(a)(i).

evidence in the record that the overdraft was induced because a higher limit was promised. This suggestion is a post hoc creation by the intervenors once faced with repayment difficulties. ABSA has explained that it would have called in the facility at an earlier date if they had not got this security. It was not intended to increase the facility to this amount. There is no agreement or correspondence to support Longchamp's version. Then to the extent this claim is also defended on the basis that the claim has prescribed, this too must fail as the claim is based as well on the underlying mortgage bond secured against the facility.

Conclusion

- [44] The applicant has established its claim in terms of section 345 of the Companies Act.¹¹ None of the defences to this claim are *bona fide* and reasonable. For the reasons I have given there is no point in granting a provisional order. The papers in this matter are prolix. There are several supplementary affidavits and the facts have been regurgitated on several occasions. The intervenors have had ample opportunity to put any new facts before the court if they had them. Nor as noted in *Johnson* have, they sought to do so.
- [45] Adding to this is the fact that alleged misrepresentation if it existed must have happened in 2007 early 2008 thus nearly fifteen years ago. If this matter were to go to oral testimony (which in any event the intervenors have not sought) how reliable would that testimony still be? It would be an injustice to ABSA if there was any further delay in this matter being brought to finality. It must be born in mind that these winding up proceedings were first brought in February 2015 - more than seven years ago. The business rescue practitioner whilst in

¹¹ This relevant portion of this section states:

345(1) A company or body corporate shall be deemed to be unable to pay its debts if-
(a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
(ii)...
and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

office has also reached the conclusion that the business rescue process was unlikely to prove successful and she too had moved for winding up.

[46] The rider attached to the well-known *Plascon-Evans* rule is apposite in this case. As the SCA stated in its reformulation of that rule in *National Director of Public Prosecutions v Zuma*:

*“It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”*¹²

[47] A final order for winding up has been satisfactorily made out and is accordingly granted. Costs will follow cause as is the normal course, but I see no reason to make a special award of costs.

ORDER:-

[48] In the result the following order is made:

1. The First Respondent is finally liquidated in the hands of the Master of the High Court, Johannesburg.
2. The applicant’s costs of the application shall be costs in the winding up.

**N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG**

¹² 2009(2) SA 277(SCA) par [26].

Date of hearing: 10 March 2022

Date of judgment: 12 August 2022

Appearances:

Counsel for the Applicant: N J Horn

Instructed by. Tim Du Toit

Counsel for the First Respondent

and intervenors: W B Boonzaaier

Instructed by: Potgieter and Associates