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

CASE NO: 10869/2020

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

3 May 2022 **.....**
DATE

In the matter between:

ARK CONSTRUCTION (PTY) LTD Applicant
(Registration No: 2016/347605/07

and

VEATEL (PTY) LTD Respondent
(Registration No: 2017/271009/07)

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Ark Construction (Pty) Ltd, sought an order of provisional winding-up, alternatively final winding-up placing the respondent, Veatel (Pty) Ltd, in the hands of the Master of the High Court.

[2] The applicant alleged that the respondent owed it an amount of R4 425 529.50 for construction services rendered at the respondent's instance and which amount remained due and payable to the applicant.

[3] On 4 December 2020, the applicant made demand upon the respondent in terms of s 345(1)(a) and (c) of the Companies Act 61 of 1973 (as amended) ('the Act'). The demand was served by the sheriff on 4 December 2020. The respondent failed to pay, secure or compound the indebtedness within the 21-day period in terms of s 345(1) of the Act or at all.

[4] The respondent's attorney remitted correspondence alleging a '*bona fide* dispute'. Notwithstanding, the applicant proceeded with this application for the respondent's winding-up. The respondent opposed the application.

[5] At the hearing of the application on Monday, 25 April 2022, the respondent tendered payment of an amount of R1 457 539.69 in respect of which it admitted its indebtedness to the applicant. The admission arose pursuant to an assessment of the work completed by the applicant, conducted by a chartered accountant, one P J Carstens.

[6] The application stood down until Thursday, 28 April 2022, for the respondent to pay the tendered amount of R1 457 539.69 ('the tendered amount') to the applicant's attorney's trust account, which duly transpired.

[7] At the hearing on 28 April 2022, the applicant's counsel persisted with the application on the basis that the respondent's alleged dispute of fact in respect of the balance of the respondent's indebtedness to the applicant was devoid of merit. Furthermore, that the applicant had a statutory right to the winding-up of the respondent

in terms of s 345 of the Act given that an amount of approximately R3 million remained due and payable to the applicant.

[8] The applicant referred in particular to the report of P J Carstens ('the Carstens report'), which reflected that Carstens had not considered all of the applicant's invoices for work performed by the applicant, and that the respondent had not placed the invoices of third party contractors, allegedly utilised to complete the work that the applicant did not attended to adequately, (being invoices that the respondent must have had in its possession when it deposed to its answering affidavit), before the Court.

[9] The respondent's answer was that it was not obliged to place the entirety of its evidence before this Court.

[10] The applicant is obliged to show that the respondent is indebted in an amount of more than R100.00, which amount is due and payable and that the respondent is unable to pay its debts.

[11] The respondent sought to differentiate between an inability and an unwillingness to pay its debts, contending that the latter applied in this instance pursuant to the dispute of fact that militated against a court ordering its winding-up.

[12] The test to be applied in respect of a provisional winding-up based on s 344 of the Act is whether the requirements are met on a *prima facie* basis by the applicant, regard being had to whether the balance of probabilities on all of the affidavits favour the applicant's case.

[13] The respondent raised various grounds, allegedly reasonable and *bona fide*, on which it disputed its liability and indebtedness to the applicant. These were:

13.1 In terms of the partly oral partly written agreement entered into between the parties;

13.2 The extent of the services rendered by the applicant, specifically in relation to the CAC invoices and the actual meters claimed to have been completed by the applicant;

13.3 The existence of an ostensible oral agreement in relation to the respondent's purported liability for interest on the factoring agreement of Enable; and

13.4 The indebtedness by the respondent to the applicant.

[14] It is well to remember that the respondent has to show only that its indebtedness is disputed on *bona fide* and reasonable grounds.[1] The respondent does not have to demonstrate that it is not indebted at all to the applicant.[2]

[15] The respondent contended that the terms of the partly written partly oral agreements concluded by the parties were disputed and that the applicant failed to set out the written portions of the agreement concluded between the parties.

[16] The respondent alleged that the terms of the agreement that were disputed were that the applicant, on the respondent's version, was entitled to 75% of R140 per meter of the work performed, after completion of the CWC certificates, after which the outstanding 25% of R140 per meter of work performed would fall due and payable after completion of the CAC certificates, which the respondent alleged the applicant did not

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1 *Kalil v Decotex (Pty) Ltd & Another* 1988 (1) SA 943 (AD).

2 The '*Badenhorst* Rule;' *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348B.

complete. In addition, the respondent contended that the applicant did not complete the CAC works.

[17] In the light of the *Kalil v Decotex* and *Badenhorst* authorities referred to above, my task is to determine only whether the disputes of fact raised by the respondent are *bona fide* disputed on reasonable grounds.

[18] As to the reasonable grounds of the disputed terms of the agreement, the respondent pointed to the fact that the invoices issued by the applicant and on which it relied, correlated with the terms of the agreement relied on by the respondent. The respondent referred in this regard to annexure FA5 to the applicant's founding affidavit, calculated and based on 75% of R140 per metre of completed work or R105 per metre, being the terms alleged by the respondent in respect of the CWC works.

[19] In addition, the respondent referred to annexure FA19 to the applicant's founding affidavit, allegedly calculated at the rate of 25% of R140 per metre of completed work or R35 per metre, being the terms agreed upon in respect of the CAC works as alleged by the respondent.

[20] Given the above-mentioned, the dispute raised by the respondent in respect of the terms of the agreement on which the parties contracted, is raised on grounds that are reasonable and that if proven at the trial would constitute a defence to the applicant's claim.[3]

[21] Similarly, the respondent disputes the extent of the services rendered by the applicant and in respect of which it contends an entitlement to payment. The

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[3] *GAP Merchant Recycling CC v Goal Reach Trading 55 CC* 2016 (1) SA 261 (WCC).

respondent contends that the applicant only performed in respect of the CWC works, which the applicant allegedly did partially, until termination of the agreement.

[22] The respondent allegedly had to employ third party contractors to complete the CWC works and also the CAC works. The respondent contended that the applicant did not perform any of the CAC work.

[23] The alleged cost to the respondent of completing the CWC work, being an amount of R77 883.81, was not supported by an invoice or invoices attached to the respondent's answering affidavit and nor were details of the computation of the amount furnished by the respondent, thus casting doubt on the reasonable basis of the respondent's alleged counterclaim.

[24] However, the respondent does not have to prove its defence or adduce the evidence upon which it will rely at the trial in these proceedings. All that the respondent has to do at this stage is set out grounds that are not unreasonable and on which the respondent disputes the applicant's claim.[4]

[25] In my view the respondent has set out sufficient facts, even taking account of the issues raised by the applicant, such as to meet the onus resting on the respondent to show that it disputes the applicant's claim on grounds that are both *bona fide* and reasonable.

[26] In addition, however, the respondent contended that to wind up the respondent, even provisionally, at the instance of the applicant after the applicant received payment of an amount exceeding R1 400 000.00, would be to favour one creditor above the balance of the respondent's creditors. I am in agreement with that contention.

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[4] *Hulse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd (Lane v Fey NNO intervening)* 1998 (2) SA 208 (C) at 219F – 220 C.

[27] In the circumstances and by reason of the aforementioned, it is not in the interests of justice for the respondent to be provisionally wound up and an order in these terms will follow hereunder.

[28] In respect of the costs of the application, the respondent's tender of payment was made on the morning on which the matter was called.

[29] In the circumstances, given the lateness of the tender on the part of the respondent, it is appropriate that the respondent be ordered to pay the costs of the application.

[30] Accordingly, I grant the following order:

1. The application is dismissed.

2. The respondent is ordered to pay the costs of the application.

I hand down the judgment.

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CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **3 May 2022**.

COUNSEL FOR THE APPLICANT:	Ms N Lombard.
INSTRUCTED BY:	Van Zyl Johnson Attorneys.
COUNSEL FOR THE RESPONDENT:	Mr FW Botes SC and Mr C van Gass.
INSTRUCTED BY:	Steenkamp Van Niekerk Inc Attorneys.
DATE OF THE HEARING:	25 and 28 April 2022.
DATE OF JUDGMENT:	3 May 2022.