HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 46739/2017

In the matter between:

WILLOW ACRES HOME OWNERS ASSOCIATION Applicant

and

MAMIKI CAPITAL INVESTMENTS (PTY) LTD Respondent

***Case summary*: Winding-up application – Respondent disputing debt on *bona fide* and reasonable grounds – such finding should be the end of the matter and the dismissal of the winding-up application ought to follow without incurring further costs and delay - winding-up proceedings are not designed for the enforcement of disputed debts. Application dismissed.**

JUDGMENT

MEYER J

[1] The applicant, Willow Acres Home Owners Association (the association) seeks an order for the final winding-up of the respondent company, Mamiki Capital Investments (Pty) Ltd (Mamiki). The application is made by the association as a creditor of Mamiki in terms of s 344(h) read with s 345 of the Companies Act 61 of 1973 (the Companies Act), and that it would be just and equitable to wind-up Mamiki.

[2] Mamiki is the registered owner of Erf 668 Willow Acres Extension 12, Pretoria, Gauteng, which property is situated in the Willow Acres Estate. In terms of clause 5.2 of the Willow Acres Memorandum of Incorporation, a person *ipso facto* becomes a member of the association when that person becomes the registered owner of a property within the estate. All members, in terms of clause 5.6, 'must pay levies to the Association and must obey the rules of the Association'. Clause 6 contains various provisions relating to the imposition of levies on members by the directors of the association, and clauses 6.6 and 6.7 read thus:

'6.6 The Directors shall be empowered in addition to such other rights as the Association may have in law as against its Members to determine the rate of interest from time to time chargeable upon arear levies, provided that such rate of interest shall not exceed the rate laid down in terms of the Prescribed Rate of Interest Act No 55 of 1975, as amended.

6.7 Any amount due to the Association by a Member in respect of levies, fines, interest and/or otherwise shall be a debt due by him to the Association.'

[3] Clauses 11.3.1 and 11.3.2 of the Willow Acres Estate Rules provide as follows:

'11.3.1 Existing Owners of a vacant Erf, who should have erected a dwelling by September 2011, will be subject to a building transgression levy as determined by the Members from time to time.

11.3.2 New Owners of a vacant Erf will have a three month period in which to finalise any preliminary construction activity such as plan approval, approval of finances, etc. A further nine month period hereafter would then be available for the completion of construction activities, failing which building transgression levies may be imposed by the Association. All new Members shall submit a copy of their Title Deed to the Estate Office.'

[4] A decision by the directors of the association to impose a building transgression levy was confirmed at the association's annual general meeting, held

on 21 November 2012. Mamiki, in terms of an agreement between it and the association, was to commence with building works during August 2012, but it failed to do so. The association, therefore, imposed a monthly building transgression levy upon Mamiki. The association avers that Mamiki was in arrears in respect of the building transgression levies in the amount of R226 428.96, which amount includes interest calculated monthly in advance at a rate of 2% per month compounded monthly.

[5] Mamiki disputes the association's claim essentially on two grounds: First, it asserts that the building transgression penalties fall to be reduced in accordance with the Conventional Penalties Act 15 of 1962 (the Conventional Penalties Act. It contends that the association's monthly building transgression levy in the sum of R 8000 per month was out of proportion to the prejudice suffered by the association by reason of Mamiki's breach of the relevant rules of the association, that it would be equitable to reduce the penalty and that it should be reduced to an amount equivalent to the monthly levy imposed on all the members of the association. Second, relying on clause 6.6 of the Memorandum of Incorporation, Mamiki contends that the interest rate of 2% per month charged by the association on arrear monthly building transgression levies 'exceeds the prescribed rate of interest by some margin' and that the association is 'not entitled to charge interest at a rate higher than the rate in terms of the Prescribed Rate of Interest Act.

[6] In support of Mamiki's contention that the monthly building transgression levies fall to be reduced in accordance with the Conventional Penalties Act, it states that it owns properties in several other residential estates governed by home owners associations and that it was commonly accepted in those associations that a monthly building transgression levy equal to the ordinary monthly levy at any given time, is equitable, which results in an owner having to pay double the ordinary monthly levy until the owner has commenced and completed his or her building construction. Therefore, it contends, that the association should not be allowed to impose a monthly building transgression levy in excess of the ordinary monthly levy at any given time.

[7] Mamiki produced a calculation of the amount payable to the association based on a monthly building transgression levy equivalent to the association's ordinary monthly levy, interest on arrears calculated at the maximum prescribed rate of interest in terms of the Prescribed Rate of Interest Act, and deducting the amounts which it had paid to the association. On that calculation, Mamiki is not indebted to the association in the amount of R246 658.06 as the association would have it, but the calculation reflects a credit in the sum of R162 237.92 in favour of and owing to Mamiki.

[8] In *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C), para 12, Budlender AJ found that the penalty levies imposed by a home owners association, such as the one in the present case, constitute a penalty in terms of s 3 of the Conventional Penalties Act. The court was therefore required to decide (para 14):

'(a) Is the penalty out of proportion to the prejudice suffered by the defendant by reason of the plaintiff's breach of the contract? If so,

(b) would it be equitable for the court to reduce the penalty? If so,

(c) to what extent?'

[9] In finding that the Erinvale Country Estate Home Owners Association suffered prejudice by reason of the homeowner's breach of contract, Budlender AJ said the following:

'[24] It appears to me that the defendant had a "rightful interest" in ensuring and obtaining compliance with the terms of the contract. It was entitled to impose a penalty clause to compel the homeowners to carry out their obligations under the contract by providing "harsh consequences" should they default: *Western Bank Ltd v Meyer, De Waal, Swart and another* 1973 (4) SA 697 (T) at 699H.

[25] The fact that the contractual provision is intended as a penalty which creates a deterrent, rather than as a provision which provides compensation for default, does not mean that the defendant suffered no "prejudice" as a result of the breach of contract. The prejudice was prejudice to its right to enforce concerted action for the common good, and to its interest in obtaining concerted action.'

[10] In finding that the penalty imposed upon the homeowner in that case 'was out of proportion to the prejudice suffered' by the homeowners association, Budlender AJ had reference to comparable situations where the desired result was achieved, the size of the penalty in question and the penalties in general in relation to the income and expenditure of the home owners association, and a sense of fairness and justice. On the questions whether the penalties should be reduced, and if so, to what extent, Butlender AJ considered comparable provisions in respect of other estates in setting the quantum, which was reduced.

[11] I am in all the circumstances satisfied that Mamiki succeeded in establishing that its indebtedness to the association is disputed on *bona fide* and reasonable grounds. In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016), para 1, Fourie AJA said the following:

'This is an appeal, with the leave of the court a quo, against the dismissal of an application for the winding-up of the respondent, Marabeng (Pty) Ltd. In essence, the matter serves as a stark reminder that winding-up proceedings are not designed for the enforcement of a debt that the debtor-company disputes on bona fide and reasonable grounds. This has become known as the "Badenhorst rule" after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348. See also *Kalil v Decotex (Pty) Ltd and another* 1998 (1) SA 943 (A) at 980B-D, as well as the authorities referred to in *Kalil* at 980D-F. A collection of more recent authorities on the application of the Badenhorst rule is found in PM Meskin et el *Henochsberg on the Companies Act* 5 ed Vol 1 at 693-694.'

[12] I respectfully agree with the following passage in *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd* [2012] ZAWCHC 43 (15 May 2012) para 25. There Binns–Ward J said the following:

'I am hesitant to accept the notion that the *Badenhorst* rule goes to standing. After all, as Corbett JA observed in *Kalil v Decotex* supra, at 980, it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent company in winding-up proceedings, while the respondent at the same time was able to establish that the claim was disputed on *bona fide* and reasonable grounds. The applicant in such a case would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The *Badenhorst* rule would thus seem to constitute a self-standing (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is *bona fide* disputed. Availment of the procedure in circumstances in which the *Badenhorst* rule applies can be an abuse of process. It is so, however, only when the creditor knew, or should reasonably have foreseen that the debt was disputed on *bona fide* and reasonable grounds at the time of the institution of the proceedings.'

(Also see *Freshvest* para 6.)

[13] In *Hülse – Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219F-220A, Thring J said the following with regard to what a respondent must show to demonstrate in winding-up proceedings that a creditor-applicant's claim is reasonably disputed:

'Apart from the fact that they dispute the applicant's claims, and do so *bona fide*, . . . what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They 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 claims and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit, or otherwise, the actual evidence on which they would rely at such trial. This is not an application for summary judgment in which . . . a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a

bona fide defence to the action, but in terms of the Rule must also disclose fully in his affidavit or affidavits "the material facts relied upon therefor". . . . It seems to me to be sufficient for the [respondents] 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.'

[14] A lack of *bona fides* is not readily inferred (see *Robsen v Wax Works (Pty) Ltd and others* 2001 (3) SA 1117 (C), para 15) and there is nothing on the papers which leads me to conclude that Mr Kau Msimango, the sole director and shareholder of Mamiki, does not genuinely dispute the claim of the association. Mamiki satisfied me that the grounds which they advance for disputing the association's claim, are not unreasonable. It has alleged facts which, if proved at a trial, would constitute a good defence to the claim made against it. My conclusion that Mamiki has succeeded in establishing that its indebtedness to the association is disputed on *bona fide* and reasonable grounds, renders it unnecessary to decide the question whether Mamiki is able to pay its debts, which is a contentious issue on the papers.

[15] In support of the association's conclusion that it would also be just and equitable for Mamiki to be liquidated, it relies on 'the fact that there is a huge outstanding debt together with legal costs and interest, which remains unpaid' and the fact that Mamiki 'owns various properties most of which are bonded' and that 'an inference can be made that the Respondent pays the bank, benefitting one creditor over another.' But, if Mamiki's indebtedness to the association is disputed on *bona fide* and reasonable grounds, as I have found it is, then the grounds upon which the association relies can also not support a finding that it would be just and equitable for Mamiki to be wound-up. It does not pay the association, while paying the banks, because it disputes the association's claim.

[16] I have been informed that action proceedings have been instituted by the association for the recovery of the amount allegedly due to it by Mamiki. The association argues that application should be postponed *sine die* pending the outcome of the action proceedings in the event of a winding-up order not being granted. The association relies on *Freshvest* in support of this contention.

[17] But *Freshvest* is an extra-ordinary case where the Supreme Court of Appeal had to 'unscramble the egg' (para 13). There, on the strength of an indebtedness which the appellant alleged was due and owing by the respondent to it, it approached the Free State Division of the High Court (Lekale J) for the winding-up of the respondent company. Lekale J held as follows:

'I am, therefore, persuaded by common cause facts in the present matter that the respondent disputes the debt on *bona fide* and reasonable grounds.'

Lekale J then came to the following conclusion:

'In the light of the need for speedy finalisation of a matter of the present nature, the nature and extent of the dispute involved as well as the fact that the dispute was not foreseeable on the part of the applicant [the appellant], I am convinced that the parties are correct, in their alternative submissions, that the correct course to follow is for the issue concerning the respondent's liability to the applicant to be referred to oral evidence.'

[18] The application was, in the temporary absence of Lekale J, referred to Jordaan J for the hearing of oral evidence. In dismissing the winding-up application with costs, Jordaan J *inter alia* said the following:

'The irony of the matter is that my brother held that the debt was disputed on *bona fide* and reasonable grounds. However, I accept that this finding was obiter, otherwise there would have been no reason to refer the matter for oral evidence to have the same issue decided.'

The Supreme Court of Appeal, however, held:

'[11] The finding of Lekale J was not obiter. As recorded above, he had expressly held that, on the common cause facts, the respondent disputed the debt on bona fide and reasonable grounds. In view thereof, Jordaan J ought to have held that it was unnecessary to hear oral evidence. See *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263 H. The dismissal of the application ought then to have followed without incurring further costs and delays.'

The Supreme Court of Appeal also held that once Lekale J had found 'that the respondent disputes the debt on *bona fide* and reasonable grounds', that 'that should

have been the end of the matter. Lekale J ought thereupon to have dismissed the application' (para 7). In this regard Fourie AJA said the following:

'[8] The consequences of this referral were unfortunate. As recorded earlier, there was no need in these proceedings for a finding whether or not the respondent is indebted to the appellant, as the respondent does not have to proof its defence. All that was required of the respondent, was to show that the appellant's claims were disputed on *bona fide* and reasonable grounds. This Lekale J held it had done.'

[19] The Supreme Court of Appeal, however, did not simply dismiss the appeal, but instead granted an order that the application for the winding-up of the respondent is postponed sine die. This was done, as I have mentioned, in order to 'unscramble the egg' and factors taken into account were 'the possibility that the appellant in the main action obtain an order recovering some portion of the debt allegedly owing and on which the winding-up application is based' and also 'the fact that both of the parties were instrumental in having the matter referred to oral evidence by Lekale J', 'and then actively participated in the hearing before Jordaan J, notwithstanding the prior finding made by Lekale J that the respondent disputed the debt on bona fide and reasonable grounds'.

[20] My finding that Mamiki disputes the debt on bona fide and reasonable grounds should be the end of the matter and the dismissal of the winding-up application ought to follow without incurring further costs and delay. Winding-up proceedings are not designed for the enforcement of disputed debts.

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

(a) The provisional winding-up order issued on 1 September 2017 is discharged.

(b) The application is dismissed with costs.

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P.A. MEYER

JUDGE OF THE HIGH COURT

Date of hearing:	16 October 2018
Date of judgment:	31 October 2018
Applicants' counsel:	Adv PJ Niemann
Instructed by:	Eduard de Lange Attorneys, Lynwood Ridge, Pretoria
Counsel for Respondent:	Adv J Vorster
Instructed by:	Werner Prinsloo Attorneys, Garsfontein, Pretoria