Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case Number: 2434 / 2022
Date argued: 13 October 2023
Date delivered: 03 November 2023

In the matter between:-

ANBIL BUILDING PROJECTS (PTY) LTD
APPLICANT

and

BRUYNCON CONSULTING AND CONSTRUCTION (PTY) LTD RESPONDENT

CORAM: STANTON J

JUDGMENT

INTRODUCTION:-

[1] This is an application for the provisional liquidation of the respondent in terms of section 343(1)(a) of the Companies Act, Act 61 of 1973 as amended ("the Act"). The applicant alleges that the respondent is unable to pay its debt that is due and payable in the ordinary cause of its business as contemplated in section 344(f) read with section 345(1)(a)(i) of the Act.

[2] On 09 November 2022, the applicant's attorney of record addressed a written letter of demand in terms of section 345 of the Act to the respondent. In this demand, the applicant points out that the respondent is indebted to it in the amount of R510 175,13 together with interest calculated at *mora* rate. It demanded the respondent to make payment within 21 days, failing which, the applicant would institute legal action or file a liquidation application. This demand was served on 16 November 2022 by the Sheriff at the respondent's registered address.

[3] In this application the applicant claims that the respondent is indebted to it in the amount of R468 924,00 ("the debt").

[4] It is common cause between the parties that:-

4.1 On or about 15 December 2020, the parties entered into a verbal agreement in terms of which the applicant agreed to lease a 10 Ton Ammann ASC100 roller ("the roller") to the respondent on a monthly basis. The applicant agreed to render invoices to the

respondent on a monthly basis, which amount was calculated based on the number of hours the respondent used the roller. The respondent agreed to duly pay the monthly invoices in cash ("the first agreement"); and

4.2 During February 2021, the parties entered into a further verbal agreement in terms of which the payment terms of the first agreement were amended. In *lieu* of paying the invoices in cash, the respondent undertook to reserve an industrial erf on behalf of the applicant and the purchase price of the erf would be reduced or set off by the amounts payable by the respondent in terms of the first agreement ("the second agreement").

THE APPLICANT'S CASE:-

[5] According to the founding affidavit:-

5.1 The applicant rendered tax invoices to the respondent in respect of the period December 2020 until March 2022 for the total amount of R468 924,00, for which amount the applicant states that *"the Respondent should therefore have reserved an erf on behalf of the Applicant and subtracted the total amount of R468 924,00 from the purchase price of the Applicant's industrial erf.";* and

5.2 The applicant's director, Mr PJ Bester, was informed by a Remax agent during March 2022 that the respondent had failed to reserve the industrial erf for the applicant and that all the stands had already been sold and/or reserved. The applicant did not disclose the name of the Remax agent in the founding affidavit and no confirmatory affidavit of the agent was attached. The applicant alleges that, as a result, the second agreement was *"no longer an*

option" and the parties *"explicitly agreed"* that the respondent would again make payment in accordance with the payment terms of the first agreement.

[6] In its replying affidavit, the applicant, for the first time, alleges that the second agreement amounts to an agreement for the purchase of immovable property, and in view of the fact that it was not reduced to writing and not signed by either of the parties, it is null and void as it does not comply with the provisions of section 2(1) of the Alienation of Land Act, Act 68 of 1981 ("the Alienation of Land Act").

[7] In reply, the applicant discloses the name of the Remax agent as "Madelein" and states that Mr J de Bruyn, the respondent's director, during March 2022 and in her presence, confirmed that the reservation of the property was no longer an option and that the outstanding amounts would be paid in cash, within 2 weeks. The applicant, however, again failed to attach a confirmatory affidavit of "Madelein".

[8] In support of the applicant's contentions, Mr SB Nel, argued that:-

8.1 The respondent would not have made payment of one of the invoices during May 2022 if the second agreement was still existent; and

8.2 The fact that the second agreement amounted to a sale of immovable property, albeit void, is confirmed by the following sentence in the 13 December 2022 letter from the respondent's attorney to the applicant's attorney ("the 13 December 2022 letter"): -

"2.1 Our client agreed to sell erf 2 on the attached plan to your client at a purchase price of R1,142,400.00."

THE RESPONDENT'S CASE:-

[9] The respondent denies that:-

9.1 Any erven had been sold;

9.2 The unknown Remax agent had any authority to bind the respondent;

9.3 The parties reverted to the payment terms of the first agreement;

9.4 Any amount is due and payable to the applicant;

9.5 Mr J de Bruyn during March 2022 admitted that the respondent is liable to the applicant or that he confirmed that payment would be made; and

9.6 It is commercially insolvent.

[10] The respondent also insists that the second agreement is still in force and effect and it tendered the transfer of Erf 2 on payment of the outstanding purchase price by the applicant.

[11] According to the 13 December 2022 letter, the respondent confirmed that:-

11.1 It agreed to sell Erf 2 to the applicant for a purchase price of R1 142 400,00;

11.2 In return, the respondent would have the use of the roller at the rate of R280,00 per hour; and

11.3 The purchase price of the immovable property would be set off against the amount owing in respect of the roller and the applicant would pay the difference thereof on the date of registration, which is anticipated for March/ April 2023.

[12] The respondent contends that it has a *bona fide* and reasonable dispute against the applicant's claim in view of an existing valid second agreement.

[13] Mr RS van Riet SC, on behalf of the respondent, persisted that the second agreement is not a sale agreement of immovable property, but merely an agreement that the lease fees would not be paid in cash, but set off or reduced against the purchase price of the immovable property, and as such, that it does not need to be reduced to writing and signed by both parties.

[14] The issue in dispute is crisp. Is the second agreement existent and valid or not; and if it is, does the respondent accordingly have a *bona fide* and reasonable dispute against the applicant's claim on the basis thereof?

APPLICABLE LAW:-

[15] I am mindful of the fact that the discretion of a court to refuse to grant a winding-u0070 order where an unpaid creditor applies therefor is a "*very narrow one*" that is rarely exercised and in special or unusual circumstances only.[1]

[1]Afgri Operations Limited v Hamba Fleet (Pty) Limited [2017] JOL 37585 (SCA) at paragraph [12].

[16] In ***Kalil v Decotex (Pty) Ltd and another***, [2] Corbett JA (as he then was), with reference to ***Badenhorst v Northern Construction Enterprises (Pty) Ltd***, [3] set out the approach to be adopted to this kind of dispute as follows:-

"*In regard to locus standi as a creditor it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. 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.*"

[17] The Supreme Court of Appeal made the following remarks in ***Exploitatie-en Beleggingsmaatschappij Argonauten 11 BV and another v Honig***:- [4]

"...Sequestration proceedings are designed to bring about a concursus creditorem to ensure an equal distribution between creditors, and are inappropriate to resolve a dispute as to the existence or otherwise of a debt. Consequently, where there is a genuine and bona fide dispute as to whether a respondent in sequestration proceedings is indebted to the applicant (as in this case), the court should as a general rule dismiss the application. This is the so-called 'Badenhorst rule'.

[18] In ***Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd***, [5] Thring J provided a most useful amplification of this approach when he said:-

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[2] [1988] 2 All SA 159 (A) at page 183(1).
[3] 1956 (2) SA 346 (T) at pages 347H – 348B.
[4] [2012] 2 All SA 22 (SCA) at paragraph [11].
[5] 1998 (2) SA 208 (C) at 219F-H.

"*...Apart from the fact that they dispute the applicant's claims, and do so bona fide which is now common cause, 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, in this matter, 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. 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 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 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.*"

[19] Davis J in the matter of ***Porterstraat 69 Eiendomme (Pty) Ltd (Reg No: 73/13536/07) v PA Venter Worcester (Pty) Ltd (Reg No: 98/04915/07)*** [6] quoted Professor Blackman [7] with approval where he summarised the meaning of *"bona fide dispute on reasonable grounds"* as follows:-

"*A debt is not bona fide disputed simply because the respondent company says that it is disputed. The dispute must not only be bona fide or genuine but must be on good, reasonable or substantial grounds. The expression 'genuine dispute' connotes a plausible contention requiring the same*

[6][2000] JOL 7116 (C) at page 9. See also Victory Parade Trading 74 (Pty) t/a Agri-Best SA v Tropical Paradise 93 (Pty) Ltd t/a Vari Foods [2007] JOL 20096 (C) at paragraph [17].
[7]Joubert "Companies" in Lawsa Vol 4 Part 3 at paragraph 113.

sort of consideration as 'serious question to be tried'. It is not sufficient for the company merely to establish that there is a serious question to be tried as to whether the dispute over the debt is genuine in that the debt is disputed on the basis that an honestly held belief that it is not payable, and is not disputed, merely for the purpose of delay or obstruction. 'Genuine' in this context does not mean not fabricated for the purpose of the proceedings or not just thought up or brought forward without genuine belief: there can be no genuine dispute if there are no substantial grounds for disputing the debt."

[20] Section 2(1) of the Alienation of Land Act provides:-

"No alienation of land after the commencement of this section shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on written authority."

[21] The Alienation of Land Act defines "alienate" as:-

"'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning".

[22] Mr van Riet SC argued that the second agreement can at best be equated to an option agreement. In support of his contention, he relied on the Constitutional Court judgment in the matter of ***Mokone v Tassos Properties CC and Another*** [8] where the Constitutional Court, in dealing with pre-emptive rights, decided that a right of pre-emption relating to land need not be in writing for it to be binding.

[8] 2017 (10) BCLR 1261 (CC); 2017 (5) SA 456 (CC).

[23] I find guidance in the judgment of ***Kretzmann v Kretzmann and another***, [9] where the Court with regard to options to purchase, held as follows:-

> *"An option to purchase, however, is a different phenomenon. An option to purchase is comprised of two distinct parts: an offer to purchase; and an agreement to keep that offer open, usually for a fixed period The undertaking to keep the offer open (the option agreement) is of course a pactum de contrahendo. It is not an alienation as envisaged in the Act and is not required to be in writing (Glover at 66 and Van der Merwe et al at 70)... (references omitted) (my emphasis).*

[24] On the basis of the above judgments and the *ipse dixit* of the applicant in paragraph 8.4 of the founding affidavit, I am not persuaded that the second agreement is an ostensible sale agreement, which is void as it does not comply with the provisions of section 2(1) of the Alienation of Land Act. It is nothing more, and nothing less, than an agreement to reserve an erf.

[25] In my view, the respondent has, on a balance of probabilities, also established that the second agreement had not lapsed or that the parties agreed to revert to the payment terms of the first agreement.

[26] I accordingly find that the respondent raised a serious question to be tried, namely whether the debt is due and payable, which is a genuine and *bona fide* dispute, based on reasonable, good and substantial grounds.

[27] There is no reason why the costs of this application should not follow the result and no contrary submissions were made in this regard.

In the result, the following order is made:-

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[9] [2019] JOL 45702 (ECP) at paragraph [13] Also see Venter v Birchholtz 1972 (1) SA 276 (A) at 283G-284B [also reported at [1972] 1 All SA 361 (A).

The application is dismissed with costs.

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STANTON J

On behalf of the applicant: Mr SB Nel o.i.o Engelsman Magabane Inc.
On behalf of the respondent: Mr RS van Riet SC o.i.o Haarhoffs Inc.