IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO : A5024/2012

Reportable in the electronic reports only

DELETE WHICHEVER IS NOT APPLICABLE

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

30 OCT 2012

In the matter between:

TOTAL AUCTIONEERING SERVICES AND SALES CC t/a CONSOLIDATED AUCTIONEERS Appellant (Applicant in the court below)

and

NORFOLK FREIGHTWAYS CC Respondent (Respondent in the court below)

JUDGMENT

WILLIS J:

[1] The appellant, which was the applicant in the court below, brought an application for a final, alternatively, a provisional order of liquidation of the respondent. The court below (*per* Jacobs AJ) dismissed the application with costs. This appeal is heard with the leave of the court below. For the sake of convenience, I shall hereinafter refer to the appellant as the 'applicant'.

[2] The application was brought in terms of section 68 (c), read with section 69 (1) (c), alternatively section 68 (d) of the Close Corporations Act, No. 69 of 1984, as amended ('the Act'). The basis of the application was an alleged debt of R842,311-80 which the respondent owed the applicant in respect of commission, advertising costs and insurance costs which are due to the applicant as a result of an auction. The applicant has held no security in respect of the respondent's alleged indebtedness.

[3] One Neerandan Lallbehadu, representing the respondent, attended an auction which was held under the auspices of the appellant on 27 July 2010. Prior to the auction, Mr Lallbehadu signed the applicant's 'buyer's card' on behalf of the respondent. This 'buyer's card' contains the applicant's terms and conditions for the sale of movable assets by auction.

[4] This buyer's card provided, *inter alia*, as follows:

(i) At the fall of the hammer, each sale would be finally and irrevocably concluded and the risk and benefit in the goods sold would pass to the respondent ;

(ii) The respondent would be liable to pay the applicant's costs in respect of the sale which included *inter alia* the applicant's documentation fees, advertising costs, insurance costs and commission, which amounts would immediately be payable, at the fall of the hammer, by the respondent to the applicant;

(iii) All goods sold would only be removed from the auction premises and possession of the goods would only be given to the respondent thereof after payment in full of the purchase price and or presentation of a paid invoice thereof to the applicant;

(iv) In the event of the respondent failing to pay the full purchase price of any goods purchased within the prescribed time being immediately after the sale, alternatively after a reasonable period of time after the sale, or failing to comply with the applicant's terms and condition of sale, the applicant would have a lien over and would have the right to sell the goods by public auction or private sale without notice to the respondent;

(v) Should the applicant re-sell these lots and should the net proceeds thereof (after deducting commission and all costs incurred or to be incurred by having to re-sale the lots) be less than the sale price, the

applicant would have the right to demand forthwith that the respondent pay it, as pre-estimated liquidated damages, this difference less any deposit which may be forfeited.

[5] At that auction, Mr Lallbehadu successfully bid for movable goods which the respondent thereby purchased from the applicant. These goods were purchased for an aggregate amount of R4,930,950-35. The goods are mainly trucks and mechanical horses and trailers. The applicant alleges that, in breach, of its agreement with it, the respondent has failed to pay the applicant this amount in respect of these goods.

[6] The applicant goes on to allege that, owing to the alleged breach by the respondent, the applicant, as it was entitled to do, cancelled the agreement of sale, alternatively accepted the respondent's repudiation of the agreement. In the result, the respondent is alleged to have been indebted to the applicant in the sum of R842 311-80. Notwithstanding written demand by the applicant to the respondent, the respondent has failed to pay the applicant this amount or any portion thereof.

[7] In light of the above, the applicant has contended that:

(i) the respondent is unable to pay its debts as contemplated in terms of section 68(c) read with section 69 (1)(c) of the Act; alternatively

(ii) it is just and equitable within the meaning of Section 68(d) of

the Act that the respondent should be wound up.

[8] Mr Lallbehadu, who deposed to the answering affidavit on behalf of the respondent, does not deny having attended the auction, as the respondent's duly authorised representative, having signed the buyer's card, having bid for and having successfully purchased the goods in question. Mr Lallbehadu also admits that the respondent has not paid for such goods. Mr Lallbehadu tenders no explanation, or justification as to why the respondent has not made payment, other than baldly to deny that any monies are due to the applicant. Mr Lallbehadu does not deny the allegations in the applicant's founding affidavit, that having repeatedly acknowledged liability, the respondent subsequently advised that it did not have the money to pay for the goods, as it could not raise the necessary finance.

[9] Mr Lallbehadu alleges that the applicant, rather than the respondent that repudiated the agreement of sale but does not state whether or not the respondent accepted the repudiation or whether its acceptance or rejection thereof was ever communicated to the applicant. The respondent has produced no evidence of its solvency. The respondent raises the point that it did not take delivery of the goods in question. This is irrelevant to the issues in dispute.

[10] The application was heard by the court below on 30 March 2011. The judgment in the court below was delivered on 20 September 2011. The judgment, quoted in full, reads as follows:

[1] This is an application by the applicant who seeks an order for the final winding-up of the respondent or alternatively provisional winding-up including costs.

[2] For convenience sake I shall continue to refer to the parties as plaintiff and defendant.

[3] It is evident from the papers that there is a bona fide dispute. In *Kalil v Decotex (Pty) Limited and Another*[1] at p 980B-D thereof Corbett JA as he then was directed:

> *"...that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company... 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."*

[4] I believe there are convincing reasons why I should refuse the application.

In the result:

Application is dismissed with costs.

[11] As Margo J said in the case of *Meyer N.O. v Bree Holdings (Pty) Limited*[2] where, in liquidation proceedings, the applicant has *prima facie* established its case that the respondent is unable to pay its debt to the applicant, the onus is on the respondent to show that this debt is disputed on *bona fide*, reasonable grounds[3].

[12] In *Kalil v Decotex* Corbett JA (as he then was), delivering the unanimous judgment of the then Appellate Division of the Supreme Court, pointed out that the refusal of the provisional order of winding-up represents a final decision against the applicant and, if such a decision is made purely on affidavits, injustice

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[1] 1988 (1) SA 943 (AD)
[2] 1972 (3) SA 353 (T)
[3] *Ibid.* at 354E-F; See, also: *Commonwealth Shippers (Pty) Ltd v Mayland Properties (Pty) Limited* 1978 (1) SA 70 (D) at 72A.

may be done to the applicant.[4]

[13] In the same *Kalil v Decotex* case, Corbett JA held that, where there is a *prima facie* case (i.e. a balance of probabilities) in favour of the applicant, a provisional order of winding-up should normally be granted.[5] Corbett JA said that guidance as to what is meant by a *prima facie* case is to be found in the judgment of Trollip J (as he then was) in *Provincial Building Society of South Africa v Du Bois* (even though the *Provincial Building Society* case dealt with sequestration proceedings).[6] In the *Provincial Building Society* case, Trollip J said that a 'provisional order should generally be decided on affidavit'.[7] This, as Corbett JA pointed out in the *Kalil v Decotex* case, constitutes an exception to the general reluctance of the court, in motion proceedings to decide disputes of fact purely on the basis of the probabilities.[8] A weighty consideration, justifying this exception, is that a provisional but not a final order is granted on this assessment of probabilities.

[14] In the case of *Hannover Group Reinsurance (Pty) Ltd and Another v Gungudoo and Another,*[9] I said the following:

> [11] Counsel for both sides relied on the case of *Kalil v Decotex (Pty) Ltd*[10] and more particularly on the cases of *Badenhorst v Northern Construction Enterprises (Pty) Limited*[11] and *Provincial Building Society of South Africa v Du Bois*[12] both of which were referred to, in general terms, with approval in the

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[4] 1988 (1) SA 943 (AD) at 979G
[5] *Ibid.* at 979B
[6] 1966 (3) SA 76 (W); *Kalil v Decotex* case at 977A.
[7] *Ibid.* at 79G
[8] *Kalil v Decotex* case at 979G-H. See also, the judgment of Stegmann J in *Reynolds No v Mecklenberg (Pty) Limited* 1996 (1) SA 75 (W) at 80G-81B.
[9] (09/35648) [2010] ZAGPJHC 65; [2011] 1 All SA 549 (GSJ) (31 August 2010)
[10] 1988 (1) SA 943 (A)
[11] 1956 (2) SA 346 (T)
[12] 1966 (3) SA 76 (W)

Kalil v Decotex case. Nevertheless, the reasoning in the *Badenhorst* case, as will be seen shortly, did not receive unqualified approval in the *Kalil* case.

[12] In the *Badenhorst* case, Hiemstra AJ (as he then was) said that where a respondent disputes liability for a debt "*bona fide* en op redelike gronde"... "dan moet die aansoek afgewys word". In the *Kalil* case, Corbett JA (as he then was), referred to this as the "*Badenhorst* rule".[13] Corbett JA then went on to say:

> Whether the *Badenhorst* rule should be accepted then as an exception to the general approach relating specifically to the *locus standi* of an applicant as a creditor, and the further question as to whether it should be applied inflexibly or only when it appears that the applicant is in effect abusing the winding-up procedure by using it as a means of putting pressure on the company to pay a debt which is *bona fide* disputed (see the English case of *Mann and Another v Goldstein and Another* [1968] 2 All ER 769 at 775C-D) need not, however, be decided in this case. The point was not argued before us and, as I shall now show, it seems to me that for various reasons the *Badenhorst* rule should not be applied here.[14]

[13] In *Badenhorst*, Hiemstra AJ justified his decision to dismiss the application by referring to Buckley on *Companies*[15] where Buckley says that a winding-up petition is not to be used as a means of enforcing a debt which is in *bona fide* dispute and that if 'there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed'.[16] In the present case, I regret to say that there is nothing before me to indicate that the debt claimed, if established, will be paid. The respondents have been vague, sketchy and unhelpful when it comes to addressing the applicants' allegations in this regard. In this respect, the present case is very different from that of *Payslip Investment Holdings CC v Y2K TEC Ltd.*[17] Furthermore, the facts of

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[13] At 980F
[14] At 980G-I
[15] 11th Edition, 1930, Stevens & Sons Limited: London, p357
[16] At 348A-B.
[17] 2001(4) SA 781 (C) at 788A-B.

the present case are very different from those in *Hülse-Reutter & Another v HEG Consulting Enterprises (Pty) Ltd*[18]. In that case, the *bona fides* of the respondent were not even in issue. I accept that in the present case one is not considering affidavits resisting summary judgment but, nevertheless, in the present case, the applicants have, in their founding affidavit, established *prima facie* (a) that a debt is owing and (b) that the respondents will not be able to pay it. That case has to be met by the respondents in an adequate and reasonably convincing manner in order that the dispute can be said to be *bona fide* and predicated on reasonable grounds. After all, the respondents do have to show that the alleged indebtedness is disputed on *bona fide* and reasonable grounds. [19] Having said that, I accept that there is no *onus* upon the respondents to establish either that (a) their defence is 'good' or (b) that, in the event of the applicants' claim being proven, the respondents will be able to meet it. This is clear from the *Kalil* case.[20] In the *Kalil* case, Corbett JA dealt with the difficulties of what is meant by the term *prima facie* in section 10 of the Insolvency Act but it seems that he considered the approach of Trollip J (as he then was) in the *Provincial Building Society v Du Bois* case to be correct: the court must do its best to decide the probabilities by taking into account the full conspectus of allegations and denials as they appear in the affidavits, read as a whole, which are placed before it.[21] Not only should referrals to oral evidence be rare in applications for provisional orders of sequestration but also a court must bear in mind that refusal of a provisional order is final against an applicant and may, as such, result in an injustice. [22]

[14] The judgment of Trollip J in the *Provincial Building Society v Du Bois* case is of particular assistance in deciding this case. In that case the following appear clearly:

(i) *Viva voce* evidence should ordinarily not be heard in deciding whether or not to grant a provisional order of sequestration;

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[18] 1998 (2) SA 208 (C) at 219F.
[19] At 980C
[20] At 980C
[21] At 976C-980A
[22] At 979E-980A

(ii) Quite apart from other difficulties, such as the loss of time and expense which the hearing of *viva voce* evidence may entail, the hearing of *viva voce* evidence at a provisional stage in proceedings may result in credibility findings which would be unfairly prejudicial to a litigant;

(ii) The Insolvency Act intended that the procedure for obtaining a provisional order should be simple;

(iii) The procedure should be speedy;

(iv) The object of the procedure should not be stultified;

(v) It should always be borne in mind that the order, although it may have serious consequences for a respondent, is provisional only;

(vi) A court will exercise greater caution when it comes to making the order final. [23]

[15] Counsel for the respondents submitted that, in the event that there is doubt about the applicants' case, the court has no discretion in the matter and must dismiss the application for provisional sequestration. I am far from convinced that this is correct. There are three reasons for my not accepting this argument:

(i) the very word 'provisional' entails the notion that greater clarity and certainty will be obtained later; [24]

(ii) although, as is apparent from the *Kalil* case, a precise understanding of the meaning of the expression *prima facie* is not without difficulty, it embraces a sense of inconclusivity, a sense that, pending certain happenings in the future, the *facta probanda* remain open to doubt, a sense of there being a process on the road to greater certainty; [25]

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[23] At 978A-980F.

[24] See, for example, *The Oxford Dictionary.*

[25] See, for example, *Salmons v Jacoby* 1939 AD 588 at 592-4. See, also, *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 105A.

> (iii) one cannot escape a sense, from what Corbett JA had to say in the *Kalil* case, that in applications for provisional orders of this kind, where there is doubt as to (a) whether the indebtedness is disputed on *bona fide* and reasonable grounds and (b) whether the respondent is, in fact, insolvent, then a court, like a bateleur, must perform a difficult balancing act.[26] This balancing act, in the end, requires the exercise of a judicial discretion, after having taken everything into account. This, it seems to me, follows as a matter of logic. That there is an overall discretion where there is a residual doubt as to the issues in (a) and (b) immediately above seems, in my respectful opinion, also to be implicit in Corbett JA's *discursus* in the *Kalil* case.[27]
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> [16] That this balancing act is sometimes indeed difficult to perform is, in my respectful view, well illustrated by Stegmann J's *cri de Coeur* in *Reynolds NO v Mecklenberg (Pty) Ltd.*[28] Nevertheless, it needs to be borne in mind that the ballet of a bateleur is not the inevitable judicial ordeal of every application for a provisional order of sequestration.

[15] Ordinarily, I should be coy about referring to my own judgment in a subsequent case between different parties. The provisional order granted by me in the *Hannover v Gungudoo* case on 30 August 2010 was, after various postponements at the instance of the respondent, finally heard by our brother Tsoka from 22 to 24 March 2011. Tsoka J granted a final order of sequestration on 21 April 2011.[29] The Supreme Court of Appeal ('SCA') dismissed the appeal against Tsoka J's order with costs on 30 May 2012.[30] I trust that I shall not be considered to have abandoned any pretence at modesty when I claim that the imprimatur of the SCA lends weight to what I had to say in the *Hannover v Gungudoo* case.

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[26] At 976A-982G.
[27] At 78A-80F.
[28] 1996 (1) SA 75 (W) at 78G-83I.
[29] See *Hannover Reinsurance Africa (Pty) Limited & Another v Gungudoo & Another* 2012 (1) SA 125 (GSJ)
[30] See: *Gungudoo v Hannover Reinsurance Group Africa* (585/11) [2012] ZASCA 83 (30 May 2012)

[16] Against the above background of case law, a proper case was clearly established for a provisional order of liquidation of the respondent. The court below wrongly dismissed the application. In this appeal there has been no appearance on behalf of the respondent. In view of the time that has been lost and the seemingly hopeless position of the respondent, it is tempting to make a final order of liquidation immediately. A cautious, careful approach may be wiser and fairer. A provisional order of liquidation of the respondent shall emanate from this court.

[17] Herebelow is the order of the full court on appeal:

(i) The appeal is upheld.

(ii) The order of the court below is set aside.

(iii) The following is substituted for the of the court below:

'The respondent is placed under a provisional winding-up order in the hands of the master of the court'.

(iv) The respondent and all interested persons are called upon to show cause in the ordinary opposed Motion Court in the South Gauteng High Court on Tuesday, 27 November, 2012 why the provisional order should not be made final.

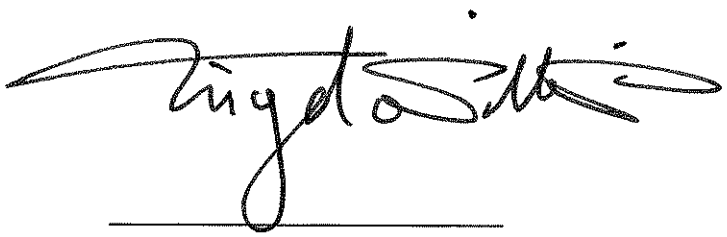
(v) A copy of this order is to be served on the respondent by no later than 4 pm on 9 November 2012.

(vi) A copy of this order is to be sent to all known creditors of the respondent by registered post by no later than 9 November 2012.

(vii) A copy of this order is to be published in the *Government Gazette*, *The Star* newspaper and the *The Citizen* newspaper by no later than 16 November 2012.

(viii) The costs of the application in the court below, the costs of this appeal and the costs subsequent to the order of this appeal court are to be costs in the liquidation of the respondent.

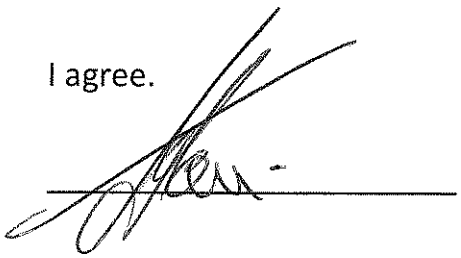
DATED AT JOHANNESBURG THIS 30th DAY OF OCTOBER, 2012



N. P. WILLIS

JUDGE OF THE HIGH COURT

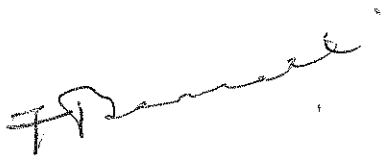
I agree.



J.P. HORN

JUDGE OF THE HIGH COURT

I agree.



F.J. BASHALL

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: Adv. *M. Nowitz*

Attorney for the Appellant: Nowitz Attorneys

No appearance for the Respondent

Dates of hearing: 25th October, 2012

Date of judgment: 30th October, 2012