

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 3492/2008

DATE: 22 AUGUST 2008

5 In the matter between:

THE NEW L1 PARTNERSHIP APPLICANT

and

EXECUTIVE HELICOPTERS (PTY) LTD RESPONDENT

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JUDGMENT

FOURIE, J.:

Applicant seeks an order for the provisional winding up of
 15 respondent. The ground on which the application is brought is
 that respondent is unable to pay its debts as provided in
 Section 344(f), read with Section 345(1) of the Companies Act
 61/1973. The application is opposed and there are two main
 20 issues that fall to be decided, namely, firstly, applicant's *locus*
standi and in particular whether applicant's claim is disputed
 by respondent on *bona fide* and reasonable grounds, and
 secondly, respondent's alleged inability to pay its debts.

In Badenhorst v Northern Construction Enterprises (Pty)

25 Limited 1956(2) SA 346 T at 347-348, it was held that winding

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up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is *bona fide* disputed by the respondent company on reasonable grounds, as the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt. This is commonly referred to as the Badenhorst Rule, which has consistently been applied in numerous subsequent cases. See Henochsberg on the Companies Act at 694(1) and the authorities there cited.

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It is trite that a respondent in a liquidation application, who disputes the applicant's claim, is not saddled with a full blown onus to prove its defence. As held in Hülse Reuter v Hag Consulting 1998(2) SA 208 (C) at 221 F to G, all that such a respondent need do is to *bona fide* allege facts which, if proved at the trial, would constitute a good defence to the claims made against it. A respondent in this position is not required to adduce on affidavit, or otherwise, the actual evidence on which it relies in disputing the applicant's claim.

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By contrast, a defendant who resists summary judgment, is required to disclose fully the material facts relied upon for its defence. See also Porterstraat 69 Eiendomme v P A Venter, Worcester 2000(4) SA 598 C at 606 J to D and Robson v Wax Works (Pty) Limited 2001(3) SA 1117 C at 1122 D to G.

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In its papers applicant alleges that respondent is indebted to it in an amount of at least R584 581,58, which amount is due and payable. This indebtedness is said to arise from an agreement in terms of which respondent chartered a helicopter from applicant. In its opposing papers, respondent admits receipt of invoices from applicant relating to charges levied by applicant, totalling R1 098 080,44. It is common cause that respondent only made payment of a total amount of R361 860,44 to applicant.

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However, respondent claims that it rendered services to applicant in respect of which amounts became due and payable by applicant to respondent. In this regard respondent alleges that the parties maintained a running account which reflected the amounts respectively due by the parties to each other. This account was updated from time to time in terms of which debits and credits between the parties were set off against each other. In terms of this account, respondent contends that the amount of all its claims against applicant exceeds the amount of applicant's claim against respondent.

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In response thereto, the applicant has in reply denied these allegations of respondent and calls into question the *bona fides* of respondent. Applicant says that the lack of *bona fides* on the part of respondent is demonstrated by the late raising

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of this defence which, according to applicant, is also based on fictitious documentation. In view of this dispute of fact on the papers, applicant seeks an order referring the matter to evidence. In this regard applicant submits that the validity or otherwise of the respondent's claims against applicant, can only be determined by means of oral evidence. Applicant submits that the probabilities relating to the indebtedness or otherwise of applicant to respondent, are evenly balanced on the papers and that *viva voce* evidence might tip the balance of probabilities in favour of applicant, should it be held that respondent's claim based on set off is baseless.

I have a fundamental difficulty in principle with this approach of the applicant. The *ratio* underlying the Badenhorst Rule is that winding up proceedings are not designed for the resolution of disputes as to the existence or not of a debt, hence if the debt is disputed on *bona fide* and reasonable grounds, the application for winding up cannot succeed. What the applicant is now asking me to do is to involve the Court in a forensic investigation to thrash out the validity of the claims upon which the respondent's defence is based. The forum designed for such a thrashing out is a trial action and not an application for liquidation. My task at this stage of the proceedings is to decide whether, on the basis of the affidavits and annexures thereto, filed by and on behalf of respondent,

respondent has *bona fide* disclosed facts which, if proved at the trial, would constituted a good defence. If so, the application for liquidation cannot succeed.

5 What I should not do is to refer this very issue to evidence to enable me to decide whether respondent is disputing the claim on *bona fide* and reasonable grounds. That would, in my view, undermine the whole *ratio* and purpose of what has become known as the Badenhorst Rule. As I have mentioned,
10 applicant concedes that on the papers before me, the probabilities relating to the indebtedness or otherwise of applicant to respondent, are evenly balanced. This concession of necessity means that there are at least on paper, probabilities in favour of respondent's version, as well as
15 probabilities in favour of applicant's version.

As Mr Spamer for applicant submitted, the scale is evenly balanced and oral evidence is required to tip it one way or the other. From this it follows, in my view, that respondent has
20 succeeded in showing that the grounds advanced by it in disputing its alleged indebtedness to applicant, are not unreasonable. I am in any event satisfied that on the papers before me, respondent has alleged sufficient facts which, if proved at trial, would constitute a good defence of set off to
25 applicant's claim. I do not consider it necessary to traverse all

the evidence in this regard, but it will suffice to refer to the following.

5 It is not disputed by applicant that there was a business relationship between the parties, in terms of which they would render services and hire equipment to and from each other. It is common cause that a running account was maintained between the parties during the course of their relationship. It would, therefore, not be strange, as alleged by respondent, 10 that such account would be updated from time to time by the setting off of debits and credits between the parties. The services allegedly rendered by respondent to applicant cover a wide range of activities and as submitted by Mr Kantor for respondent, the overwhelming probability appears to be that 15 same would not have been rendered free of charge to applicant.

In its reply, applicant has disputed the veracity of the statement of account annexed to respondent's papers, stating 20 that it is a fabrication including fictitious amounts. However when applicant, in its replying affidavit, challenged the respondent to furnish supporting documentation for certain claims, respondent did respond by filing additional documentation as part of a supplementary set of affidavits.

To summarise, on the strength of what has been presented to the Court, I cannot draw the conclusion as suggested by applicant, that this is merely a fictitious claim made up by respondent. Also on the information before me, I am unable to reject the respondent's defence as *mala fide*. Clearly the contention of applicant, that respondent's defence is in essence fictitious and *mala fide*, can only be properly adjudicated upon at a full scale trial where discovery has been made of all relevant documentation, oral evidence is tendered and witnesses can be subjected to cross-examination. The present forum, is not, in my view, the correct forum for such an exercise.

I accordingly conclude that respondent has shown that applicant's claim is opposed on *bona fide* and reasonable grounds. In view of this finding, it is not necessary for me to deal with the issue regarding respondent's alleged inability to pay its debts. It follows that the application for the winding up of respondent cannot succeed and in the result the application is DISMISSED with costs.



FOURIE, J.