

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/29872

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

20 May 2022

Date


Signature

In the matter between:

VOLTEX (PTY) LIMITED T/A ATLAS GROUP

Applicant

and

RESILIENT ROCK (PTY) LIMITED

Respondent

Heard: 18 May 2022

Judgment: 20 May 2022

JUDGMENT

MOVSHOVICH AJ:

1. This is a leave to appeal application against my judgment of 26 April 2022, in which I dismissed the applicant's application for the respondent's liquidation.
2. The application is opposed.
3. I do not intend to traverse every averment in the leave to appeal application. The application essentially contends that, having regard to all the facts and circumstances, I misapplied the *Badenhorst* principle and that there is a reasonable prospect of another court coming to the conclusion that there is no *bona fide* defence to the alleged indebtedness, that without prejudice correspondence is admissible in liquidation proceedings and that once the debt is established, a creditor is entitled to a provisional or final winding up order *ex debito justitiae*.
4. The first difficulty for the applicant is that not a word is said in its leave to appeal application about the respondent's *insolvency* (commercial or otherwise). This remains a central requirement for the grant of a winding up order, and the applicant bears the onus in this regard. The maxim *ex debito justitiae* does not assist the applicant as the very authorities relied on by the applicant make plain that an "*unpaid creditor only has a right ex debito justitiae to a winding up order against a company unable to pay its debts*"¹ and not simply any debtor company. In this regard, counsel for the applicant confirmed that the applicant relies only on the fact that the alleged debt remains unpaid as proof of an inability to pay. This is plainly not enough in this case, as I set forth in the main judgment, and I do not think there is a reasonable prospect that an appeal Court would find otherwise.
5. To overcome this, the applicant placed reliance on *Rosenbach & Co (Pty) Ltd v Singh's Bazaars* 1962 (4) SA 593 (D). I do not think this case assists the applicant.

¹ *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T), 428.

Caney J in that matter stated that each case depends on its own facts and that in cases where the debt is undisputed and where the debtor does not otherwise provide a good reason for non-payment, this may be an indication that the company is commercially insolvent.² In the present case, the debt is very much disputed and it is not possible on the papers to conclude that at the relevant times, the view that the debt was not due was not *genuinely* held by the debtor (however misguided its defence may have been in law). If that is so, then no inference can arise from a mere *failure* to pay, as an entity which genuinely does not believe that it is liable will be expected not to pay the alleged debt.

6. Given that an appeal lies against the order and not the reasons for judgment, this is dispositive of the leave to appeal application.
7. But even if the insolvency were established, I do not think that the balance of the applicant's case provides a sound and rational basis for success on appeal. The applicant relies on correspondence which is not unequivocal and which the respondent placed in the context of the overall relationship between the parties and what the respondent avers were the unambiguous terms of agreement from the onset. The authorities on insolvency proceedings make clear that it is not for the court in such proceedings to weigh up probabilities when it comes to the existence and enforceability of the debt. That is the import of the *Badenhorst* principle.
8. A key term of indebtedness is the date of repayment and that is disputed. I do not think the 29 April 2021 correspondence assists the applicant, even if it were admissible, and the applicant has not set forth a basis on which an appeal court can conclude on motion that the debt was payable in law and that the respondent's

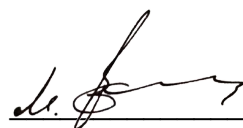
² At 597 and 600.

defence may be rejected without oral evidence. The applicant's reliance on *Absa Bank Limited v Hammerle Group* 2015 (5) SA 215 (SCA) and related cases is similarly misplaced as the courts have only made an exception to the without prejudice rule in respect of *acts of insolvency*, not proof of indebtedness. As the Supreme Court of Appeal reiterated in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd*³ the without prejudice rule continues to protect acknowledgments of debt in settlement proceedings from being used as proof of indebtedness in subsequent court proceedings.⁴

9. The above reinforces my view that there is no reasonable prospect that an appeal court would come to a different conclusion.
10. There is no reason why costs should not follow the result.
11. In the premises, the application for leave to appeal is dismissed with costs.

Hand-down and date of judgment

12. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 13:00 on 20 May 2022.



VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

³ 2017 (6) SA 55 (SCA), para [39].

⁴ Even though, in that case, an exception in respect of prescription was made for public policy reasons.

Applicant's Counsel: N Segal

Applicants' Attorneys: Orelowitz Inc Attorneys

Respondents' Counsel: D Keet

Respondents' Attorneys: Rina Rheeders Attorneys

Date of Hearing: 18 May 2022

Date of Judgment: 20 May 2022