IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA 15/12/2016
CASE NO: 91998/2015

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: Yes/~~No~~
3. Revised: Yes/~~No~~

15 December 2016

(Signature)

In the matter between:

FIRSTRAND BANK LTD **Applicant**

and

MAHEM VERHURINGS CC **Respondent**

JUDGMENT

DE VILLIERS, AJ:

Introduction

1 This is an application for liquidation of the respondent. The applicant relied on two grounds in its founding affidavit:

1.1 The respondent is deemed to be unable to make payment of its debts by virtue of the provisions of section 69 of the **Close Corporations Act**, 69 of 1984 (**"the CC Act"**). It is common cause that the applicant delivered a notice (**"the statutory demand"**) in

terms of the section to the respondent and it has not paid the sum demanded or secured it or compounded it to the reasonable satisfaction of the applicant; and

1.2 The respondent is unable to make payment of its debts.

Main facts

2 The big picture facts are uncomplicated.

3 The case in the founding affidavit was:

3.1 The respondent is a close corporation, and Gert Jacobus de Beer is its only member;

3.2 The applicant and the respondent concluded "*a mortgage redemption agreement*" in 2011 and its terms were set out in a credit facility letter, attached to the founding affidavit. This document formed part of the founding papers;

3.3 Amendments to the agreement had to be in writing and signed by both parties, and no relaxation or indulgence granted by the applicant to the respondent would be deemed to be a waiver of any of the applicant's rights;

3.4 The facility of four million rand, and interest, had to be repaid by the respondent over one hundred and twenty months in monthly instalments, the minimum monthly amount payable would be R33 514.60;

3.5 A mortgage bond in favour of the applicant would be registered as security for the facility over sections 1 to 15, 24 and 26 to 42 in the sectional title scheme known as "*Mahem*" together with all exclusive use areas;

3.6 The respondent also ceded to the applicant its rights in and to all rentals and other revenues of whatsoever nature which may accrue from the mortgaged property as security for the due repayment by the respondent of all amounts owing or claimable;

3.7 The respondent would be in default of the facility should it fail pay any amount owing to the applicant when due and the applicant would be entitled to claim immediate repayment of the full outstanding balance;

3.8 In the event of such default, should the default continue for a period of longer than twenty days, the applicant would draw such default to the respondent's notice in writing by pre-paid registered mail affording it seven days to rectify such default.

3.9 The respondent defaulted-

3.9.1 The debit order for the monthly payment of the instalment which fell due on the 7th of December 2014 was returned as unpaid due to insufficient funds in its account;

3.9.2 The debit order for the monthly payment of the instalment which fell due on the 7th of April 2015 was returned as unpaid and no amounts have been paid since;

3.10 The applicant demanded payment of the instalment in arrear (December 2014) in a letter dated 12 February 2015. The default has not been rectified;

3.11 As a result, the applicant avers, it is entitled to payment of the full amount due, which on 7 April 2015 stood at R3 016 204.30. The respondent did not take issue with any of the averments set out so far, save for the applicant's conclusion that it was entitled to payment of the full amount due;

3.12 The applicant thereupon in the statutory demand dated 9 April 2015 demanded payment of the above sum within twenty-one days, alternatively that it be secured. The letter was served on 13 April 2015, and on 15 April 2015 the respondent's attorneys reacted thereto and setting out their client's approach as follows (without stating its defence):

> "... *Ons kliente ontken dat u klient geregtig is om op te tree soos wat hy tans optree en spesifiek nie geregtig is om die skuld van ons klient op te roep nie.*
>
> *Ons hou instruksies om op rekord te plaas dat ons kliente van mening is dat u klient se optrede mala fide is en dat ons enige aansoek van u klient moet opponeer en ook 'n bestraffende kostebevel teen u klient aanvra. ...* "

3.13 The respondent only took issue further with any of applicant's conclusion that it was entitled make the statutory demand;

3.14 As stated at the outset, the applicant relies on the statutory demand as one of its two liquidation grounds. The other ground of inability to pay is essence a conclusion drawn upon the respondent's failure to make payments to the applicant. The applicant based its conclusion further on the wide-ranging financial troubles in entities that conduct farming operations in which the "de Beers" have an interest.[1] The applicant averred that-

> "*The De Beers (together with their father) are, in their own capacities and through trusts, the beneficial owners of Koedoeskop River Farms Alpha CC, Seringhoek Boerdery CC and various other legal persons. They carry on farming activities through these entities*"

4 The defendant raised the following defences to the claim:

4.1 The real defence in this matter is about the effect of an undertaking not to institute "*any form of legal action*" for a period. From that defence flowed a denial that the applicant was entitled to make the statutory demand, and had any right to call for repayment of the whole indebtedness on 7 April 2015. This case was argued at

some length. The respondent raised the defence in its answering affidavit as (underlining added):

> "*The application is mala fide because the Applicant undertook to refrain from taking any form of legal action against inter alia the Respondent*";
>
> "*The application under the abovementioned case number is legal action that is covered by the undertaking*";
>
> "*In the circumstances the application under the abovementioned case number is not legally competent, constitutes mala fide conduct on the part of the Respondent and should be dismissed with costs on a scale as between attorney-and-own client*";

4.2 The defence based on "*mala fides*" was not persisted with in the heads of argument delivered on behalf of the respondent and was not dealt with in argument. It had no prospects of success, as such a case had not been proven. The requirements to succeed with such a defence are trite.[2] This is clearly not a case where I could be called upon to exercise my inherent jurisdiction to prevent an abuse of the court processes;

4.3 A further defence was that the applicant has pleaded and proven insufficient facts for its conclusion that the respondent is unable to pay its debts;

5 Accordingly, the issues on the papers was the effect of the undertaking, a crisp issue, and a view that insufficient evidence was pleaded for a finding that the respondent should be wound up.

6 The replying affidavit took issue with the contentions by the respondent, in particular with regard to the undertaking. The replying affidavit further sets out that the applicant has become aware of a winding-up application instituted by Beaumont Assist (Pty) Ltd against the respondent for payment of loan finance amounting to R6 365 871,23 together with interest thereon from 8 January 2016. The alleged interest rate is exorbitant, somewhere on

average between 42% per annum and 54% per annum respectively. Furthermore, it was alleged that all the rental of the fixed property belonging to the respondent was ceded again to its financier (despite a prior cession) to the applicant. These agreements were entered into in July 2015, i.e. after the respondent stopped to make payment to the applicant.

7 This new evidence in reply is strong evidence of an entity in dire financial straits, yet the respondent did not seek to answer the averments or have them struck out. At the hearing I enquired if the respondent would seek an opportunity to answer, or would seek the striking out the averments in reply. The respondent's counsel stated that his client's approach would be that I had to ignore the averments as new matters in reply as a matter of law.

8 I deal with this aspect immediately. The counsel had stated the alleged legal position in clause 1.10 of his heads of argument, relying on **Van Zyl and Others v Government of the Republic of South Africa and Others** 2008 (3) SA 294 SCA at Para 50 and endnote 17, as follows:

> "The content of the replying affidavit by means of which the Applicant endeavours to make out a case that should have been made out in its founding papers, stands to be ignored. One is taught at mother's knee that the case for the Applicant needs to be made out in its founding papers and not in its replying papers."

9 The statement is wrong in law and could even be misleading. The law in this regard is trite.[3] The law taught at mother's knee is that the rules about new matter in reply is not a law of the Medes and Persians. This is not a matter where in reply an impermissible summersault was made in the case that the respondent had answered.[4] On the facts of this matter, the new matter was not abandoned, known matter, that were resurrected in reply, as had happened in the **Van Zyl**-case. The new matter about the winding-up application instituted by Beaumont Assist (Pty) Ltd, is admissible and relevant.

10 A further replying affidavit was served, dealing with the undertaking and subsequent events to reflect that the undertaking has run its course. I refer thereto later herein. Again this evidence is material and relevant.

The legislated basis for a winding-up of a close corporation

11 I first address the legislated basis for a winding-up of a close corporation on the two grounds set out in the founding affidavit. I have to do this, as the respondent took issue with the powers of this Court.

12 It was argued on behalf of the respondent that the matter had to be approached on the basis that this is an application for the winding up of a solvent close corporation and that it had to be done in terms of section 81 of the **Companies Act** 71 of 2008 ("**the New Companies Act**"). This, it was argued, would leave no room for a reliance on the statutory demand for a finding that the respondent was unable to pay its debts.

13 The respondent's counsel argued that that there was an onus on the applicant to plead insolvency[5] as was held in **HBT Construction and Plant Hire CC v Uniplant Hire CC** 2012 (5) SA 197 (FB). It is correct that the court[6] held at Para 13:

> *"No proof of any nature was tendered by the applicant that the respondent is insolvent, which has the effect that it must be taken that the respondent is indeed still solvent. If solvent, s 68 is no longer available to the applicant."*

14 Counsel[7] did not refer me to two reported decisions where it was found, correctly so, that the **HBT Construction**-case was wrongly decided. The first case is **Standard Bank of South Africa Ltd v R-Bay Logistics CC** 2013 (2) SA 295 (KZD) at Para 37, and 41 to 43. The second case is **Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another Case** 2013 (2) SA 439 (FB) at Para 12.[8] I agree with the findings in the **Standard Bank**-case and in the **Scania Finance**-case that there is no onus on the applicant to allege and prove actual insolvency for a finding to be made by me *in limine* (or later) on the legislated regime to be applied.

15 In addition, the respondent's counsel did refer me to **Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd** 2014 (2) SA 518 (SCA) where the court ruled at Para 21 to 24 that a solvent company has be both actually and commercially solvent (for the matter to be dealt with in terms of section 81 of the **New Companies Act**). For the rest, the matters are to proceed as they were dealt with under the **Companies Act** 61 of 1973 ("**the Old Companies Act**"). The relevant discussion started at Para 13. The court held at Para 24 and 25 (footnotes omitted):

> "*[24] Factual solvency in itself is accordingly not a bar to an application to wind up a company in terms of the old Act on the ground that it is commercially insolvent. It will, however, always be a factor in deciding whether a company is unable to pay its debts. See* ***Johnson v Hirotec (Pty) Ltd****. It follows that a commercially solvent company (whether factually solvent or insolvent) may be wound up in terms of the new Act only; a solvent company cannot be wound up in terms of the old Act.*
>
> *[25] Subject to the consideration of business rescue proceedings in terms of parts A to D of ch 6 of the new Act, it is indeed 'business as usual' when it comes to a decision as to whether a commercially insolvent company should be placed in liquidation. ...*"

16 In as far as the **Standard Bank**-case and the **Scania Finance**-case did not bring an end to the respondent's contention, the **Boschpoort**-case did. The case made out in the founding affidavit is clearly one of commercial insolvency. In the light of the **Standard Bank**-case, the **Scania Finance**-case, and the **Boschpoort**-case, an application based on commercial insolvency, as is the present case, has to be determined in terms of Item 9 of Schedule 5 of the **New Companies Act**, as addressed briefly in what follows.

17 It is not a question of an *in limine* onus, as suggested by the respondent's counsel. If I were to find that the applicant has failed to establish commercial insolvency, I must dismiss the application, or possibly refer commercial insolvency for the hearing of evidence. The applicant cannot succeed with a winding-up of a solvent company (i.e. both factually and

commercially solvent) under the **New Companies Act**, as it did not seek such relief. It therefore does not matter in this case that neither party has placed any accounting records or financial statements before me as evidence for an *in limine* or later finding that the respondent is solvent (both actually and commercially).

18 In the alternative, the respondent's counsel further contended that it has proven that it has an asset that exceeds the amount of the applicant's claim, and that it is therefore solvent and that therefore the matter should be dealt with as the liquidation of a solvent close corporation.[9] This has never been the test, even in the case of actual solvency.[10] In any event the submission is wrong in law as the **New Companies Act**'s provision only applies in cases of both actual and commercial solvency as determined in the **Boschpoort**-case. Not only was solvency not alleged, not only was commercial solvency not alleged, but the valuation of the property was by a professional valuer, Hanumankumar Bridgeraj Dinna with experience in property valuations and having been in private practice as such since 1995. The valuation was done on a forced sale basis, and under oath. The relevant part of the valuation affidavit reads (underlining added):

> *"I have visually inspected the assets of the applicant and based on my experience in the valuation of movables as well as immovables on a regular basis, I have valuated the assets on the strength of the following:*
>
> - *I have thoroughly inspected the condition of the assets.*
> - *I regularly attend and preside over loose asset auctions and am aware of the prices attained at these auctions*
>
> *FORCED SALE VALUE: R 12 200000*
>
> *Twelve Million Two Hundred Thousand Rand."*

19 The cover page to the valuation reflect that the property, a sectional title scheme, was acquired for a purchase price of R4 Million and that transfer was registered on 23 August 2011.

20 I have not encountered matters where sectional schemes have been sold on a forced sale basis, perhaps the valuer has. He does not say so. Even if he had, his valuation, with respect, is nothing more than a guess. He made no effort to value the scheme on an income stream basis, on a comparable sale basis, or on any other basis that would have reflected an attempt to come to a reasoned valuation.

21 I therefore find that the bald statement of valuation (not supported by any fact or reason) is of no value, on the basis of *inter alia* **Holtzhauzen v Roodt** 1997 (4) SA 766 (W), **Nel v Lubbe** 1999 (3) SA 109 (W), **Ex Parte Mattysen *Et Uxor* (First Rand Bank Ltd Intervening)** 2003 (2) SA 308 (T), and ***Ex Parte* Ogunlaja and Others** [2011] JOL 27029 (GNP) or 2010 JDR 0035 (GNP). Attorneys and professional valuers should take note of these decisions and many others.

22 The law that I have to apply in this matter, arises against a background of changes brought about by the **New Companies Act**:

22.1 Both the grounds relied upon by the applicant as the basis for the relief that it seeks (impact of statutory demand and inability to pay debts) are grounds that still are contained in section 69 of the **Close Corporations Act**;[11]

22.2 Section 68(c) of the **Close Corporations Act**, to which section 69 refers, has been repealed by the **New Companies Act**;[12]

22.3 The repeal of section 68(c) of the **Close Corporations Act** took place in circumstances where sections 66 and 67 of the **Close Corporations Act** were replaced by the **New Companies Act**:

22.3.1 Before its replacement, section 67 had the heading "*Voluntary winding-up*". It now reads (underlining added):

"67 Dissolution of corporations

> *(1) Part G of Chapter 2 of the Companies Act, read with the changes required by the context, applies to a solvent corporation.*
>
> *(2) This Part of this Act must be administered in accordance with the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act."*

22.3.2 Before its replacement, section 66 had the heading "*Application of the Companies Act, 1973*". It listed the sections and had an extensive deeming clause to effect *mutatis mutandis* a change in the reading of the applicable winding-up sections of the **Old Companies Act**. The new section 66(1) reads (underlining added):

> "*The laws mentioned or contemplated in item 9 of Schedule 5 of the **Companies Act**, read with the changes required by the context, apply to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.*"

22.4 Item 9 of Schedule 5 of the **New Companies Act**, to which both sections 66 and 67 of the **Close Corporations Act** refer after their replacement, essentially maintains the applicability of the winding-up provisions of the **Old Companies Act** for the time being.[13]

23 Accordingly, I have to apply Chapter 14 of the **Old Companies Act**. Accordingly in terms of that act, adapting the wording in terms of sections 66(1) and (2) of the **Close Corporations Act**:

23.1 A close corporation may be wound up the Court [section 343(1)(a)];

23.2 A close corporation may be so wound up-

23.2.1 Upon an application by a creditor (including a contingent or prospective creditor [section 346(1)(b)];

23.2.2 If the close corporation is deemed to be unable to pay its debts as described in section 69(1)(a) of the **Close Corporations Act** [section 344(f) read with section 345(1)(a)];

23.2.3 If it is proved to the satisfaction of the Court that the close corporation is unable to pay its debts taking into account the contingent and prospective liabilities of the close corporation [section 344(f) read with section 345(1)(c) and (2)].

24 It follows that the respondent's contention that in law it is no longer open for the applicant to rely on the statutory demand for payment, is wrong in law.

25 Should it fail in its defences based on the undertaking not to institute "*any form of legal action*" for a period, I have a discretion to wind it up based on the statutory demand. My limited discretion is trite.[14] In exercising it, I would only have the views of a substantial creditor before me, the applicant before me, and the knowledge that another entity avers that it is a substantial creditor, and that it also seeks a winding-up, Beaumont Assist (Pty) Ltd. That case has not been addressed in papers before me. The respondent's counsel handed me a file of affidavits in that matter during argument and invited me to have regard thereto should I find that the new matter in reply is admissible. Orderly practice and the *audi alteram partem* rule dictated that I had to ignore those papers. I did. I also knew of non-payment by the respondent to the applicant for a very long time.

The Badenhorst-rule

26 The next matter that took a substantial amount of time to address, is that the respondent's counsel contended that the **Badenhorst**-rule[15] has an extended meaning to include the dispute arising from its reliance on an undertaking. It seems that the case is that I am invited to apply the rule to the applicant's *locus standi* as creditor.[16]

27 The starting point obviously ought have been the origin of the rule, **Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T).[17] The court held at 348 A to C (underlining added):

> "*'n Gerieflike opsomming is die volgende, uit* ***Buckley on Companies****, 11de ed., bl. 357:*
>
> > *'A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court. Some years ago petitions founded on disputed debts were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed. The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the Court may decide it on the petition and make the order.'*
>
> *Die respondent betwis die geldigheid van die beweerde skuld, en ek is van oordeel dat die juiste benadering is om te oorweeg of respondent die Hof op 'n balans van waarskynlikheid oortuig het, nie dat die beweerde skuld nie opeisbaar is nie, maar dat dit bona fide en op redelike gronde betwis word. As hy dit doen ten opsigte van so 'n gedeelte van die beweerde skuld dat die onbetwiste gedeelte daarvan (as daar is) minder as £50 word, dan moet die aansoek afgewys word.*"

28 In that case, the applicant had to prove that it was a creditor with debt of the minimum prescribed amount. If that debt was disputed on bona fide and reasonable grounds, it lacked *locus standi* as a creditor, so the court found. Accordingly, from the outset the **Badenhorst**-rule was not aimed at a dispute about whether or not the debt was claimable/payable (in the words of the judgment "*opeisbaar*"), but if it existed (in the words of the judgment "*betwis word*"). Any argument about extending the interpretation of the rule to include disputes about whether or not a debt is payable as well, certainly had to start at this point. The case is squarely against the respondent's submissions.

29 The **Badenhorst**-rule was dealt with in **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (A), which in itself is trite law. That case did not resolve if the **Badenhorst**-rule should be applied as a *locus standi* rule or not, but it shed light on the flexibility of the rule.

30 The **Kalil**-case dealt with a matter where the applicant's locus standi was sought on two grounds, membership for the just and equitable ground, and as a creditor. Factual disputes existed. The court *a quo* found that the applicant had not established *prima facie* that he had locus standi, either on the basis of a shareholder, or as a creditor, and dismissed the application. On appeal the court held with regard to the membership *locus standi* ground that there was not a preponderance of probabilities either way on the affidavits and asked the following question:[18]

> "*The question then arises: how should the Court deal with an opposed application for a provisional winding-up order where the affidavits reveal fundamental and crucial disputes of fact and there is no preponderance of probability, either way, on the papers?*"

31 It is this context that the court held at 980B to 981C (underlining added):

> "*As in the present case, the disputes which arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether proper grounds for winding-up have been established. 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. Though not always formulated in exactly the same terms this rule appears from decisions such as* ***Badenhorst v Northern Construction Enterprises (Pty) Ltd*** *1956 (2) SA 346 (T) at 347H - 348B; ...* (the court referred to several judgments) *... . For convenience I shall refer to this as the* ***Badenhorst*** *rule. This rule would tend to cut across the general approach to applications for a provisional order of winding-up which I have outlined above as it is conceivable that the situation might arise that the applicant could show a balance of probabilities in his favour on the affidavits, while at the same time the respondent established that its indebtedness to the applicant was disputed on bona fide and reasonable*

grounds. 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 show, it seems to me that for various reasons the Badenhorst rule should not be applied here.*

I return now to the facts of the present case. As I have shown, the issue as to whether the appellant had locus standi, either as shareholder or as creditor, to bring the application, as also the merits of the application, are vitally dependent upon how certain factual disputes, principally as to whether or not the Easter agreement was concluded, are resolved. The probabilities in regard to the Easter agreement are, in my view, evenly balanced. No prima facie case (in the above-described sense) on these issues was thus established; and consequently the Court a quo could not grant a provisional order of winding-up. Before us it was argued on appellant's behalf that the Court a quo ought to have referred the matter for the hearing of viva voce evidence and appellant's counsel submitted to us a draft order to this effect.."

32 The court then came to the following conclusion (underlining added):[19]

"For these reasons, I am of the opinion that this Court, exercising the discretion which was vested in the Court a quo, should allow the application to refer the matter for the hearing of viva voce evidence on the disputed issues. The one further point which arises in this connection is whether such referral should include the issue as to appellant's locus standi as a creditor or whether, applying the Badenhorst rule, this should be excluded. In my opinion, it should be included. Even though it might be said that Decotex's indebtedness to the appellant is disputed on bona fide and reasonable grounds, there are several reasons why in this case the Badenhorst rule should not be applied. It is not disputed that Decotex was originally indebted to the appellant by way of his loan account. The dispute is whether this indebtedness has been eliminated by cession in terms of the Easter agreement. This is hardly a case of a creditor seeking to enforce a disputed debt by winding-up proceedings and thereby abusing the Court process. Moreover, since the matter is being referred to oral evidence on the issues of appellant's locus standi as a member and the merits of the application, which are also dependent on the existence or non-existence of the Easter agreement, it seems to me that it would be the height of technicality to deny appellant the opportunity of establishing by the same evidence his locus standi as a creditor."

33 I refer to herein to this approach as a flexible approach.

34 The **Badenhorst**-rule has been quoted with direct approval in numerous judgments. No argument has been presented that I should find that the **Badenhorst**-decision was wrongly decided or overturned. As a single judge sitting in the same jurisdiction I need to do so in order not to follow it.[20] However, the **Badenhorst**-rule has never been inflexibly applied. Our courts have always had to deal with the overlap between the **Badenhorst**-rule and **Plascon Evans**[21] approach to the resolution of factual disputes in motion proceedings where final relief is claimed.

35 Against this background to the application of the **Badenhorst**-rule the respondent relied only two cases for its contention that the **Badenhorst** rule as opposed the **Plascon Evans** approach should be applied to the dispute that it raised with regard to undertaking not to institute "*any form of legal action*" for a period. The first one, **Herman and Another v Set-Mak Civils CC** 2013 (1) SA 386 (FB), at Para 17 merely quoted the rule as set out in the second case. The second case is **Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another** 2011 (2) SA 266 (SCA).

36 It was argued by the respondent's counsel that the **Desert Star**-case is authority for an expansion of the interpretation of the so-called Badenhorst-rule in that it not be limited to a dispute about the indebtedness, but also as is this case, a defence based on an undertaking not to institute "*any form of legal action*" for a period (i.e. not a payable debt). The **Desert Star**-case is distinguishable as it in fact dealt with the existence of the debt in issue. The debt was disputed on the basis that it was based on an invalid agreement. The case did not expressly deal with the extension of the Badenhorst-rule. Para 16 (footnotes omitted and underlining added) in essence reflected an intention to apply the **Badenhorst**-rule as it has always been applied.

37 This ought to have ended the matter. But, I came across a judgment in point, **Firstrand Bank Limited v Nomic 153 (Pty) Limited** (A165/2013) [2014] ZAWCHC 20 (20 February 2014), a judgment by Cloete J, Yekiso J and Zondi J concurring. In that case the court held in Para 28, with no reference to authority (underlining added):

> *"...'Indebtedness" for purposes of the Badenhorst rule comprises two elements namely: (a) an admitted liability; and (b) that the debt is due and payable. In the present matter the respondent disputes that the debt (although its existence is admitted) is due and payable, which brings the dispute within the application of the rule".*

38 For the reasons reflected earlier, this is conflict with the wording of the **Badenhorst**-judgment itself and does not refer to any of the numerous cases that followed the **Badenhorst**-judgment and the **Kalil**-judgment. Notwithstanding, the case is quoted with approval by the authors of **Henochsberg on the Companies Act 71 of 2008**, Vol. 2 Page APPI-46 [issue 11].

39 I believe on the reasons stated earlier, that the statement that the question if the debt is due and payable forms part the **Badenhorst** rule, is wrong in law, with respect. I am not bound by the decision[22] and it to the best of my knowledge has not been followed. In addition, I need not deal with this case in that the finding does not matter as the flexible approach followed in the **Kalil**-case and followed in the South Gauteng court[23] would in the end lead to the same result. As a result, I also do not address the decisions in the Western Cape[24] it was questioned if the **Badenhorst**-rule goes to standing or should also apply where for example a counter-claim is in issue,[25] as had been raised in the **Kalil**-case.

40 The test that I will apply is the usual, limited **Badenhorst**-rule. The summary in **Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another** 2015 (4) SA 449 (WCC)[26] at Para 9 to 12 is concise (underlining added):

> *[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not*

permitted to determine the balance of probabilities on the affidavits but must instead apply the ***Plascon-Evans*** *rule (****Paarwater v South Sahara Investments (Pty) Ltd*** *[2005] 4 All SA 185 (SCA) para 4;* ***Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd*** *[2010] ZAWCHC 339 paras 8 – 10;* ***Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another*** *2012 (2) SA 28 (GSJ) para 14).*

[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the ***Badenhorst*** *rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the applicant. At the final stage, therefore, the* ***Badenhorst*** *rule is likely to find its main field of operation where the applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is bona fide disputed on reasonable grounds and should thus not be determined in liquidation proceedings. (In the present case neither side requested a referral to oral evidence.)*

[11] If, on the other hand, and with due regard to the application of the ***Plascon-Evans*** *rule, the court is satisfied at the final stage that there is no genuine factual dispute regarding the existence of the applicant's claim, there seems to be limited scope for finding that the debt is nevertheless bona fide disputed on reasonable grounds. It is thus unsurprising to find that the reported judgments where the* ***Badenhorst*** *rule has been relevant to the outcome have been cases of applications for provisional liquidation rather than final liquidation.*

[12] Even where the facts are undisputed, there may be a genuine and reasonable argument whether in law those facts give rise to a claim. I have not found any case in which the ***Badenhorst*** *rule has been applied, either at the provisional or final stage, to purely legal disputes. If the* ***Badenhorst*** *rule's foundation is abuse of process, it might be said that it is as much an abuse to resort to liquidation where there is a genuine legal dispute as where there is a genuine factual dispute. But if the* ***Badenhors*** *rule extends to purely legal disputes, I venture to suggest that the rule, which is not inflexible, would not generally be an obstacle to liquidation if the court felt no real difficulty in deciding the legal point. I have not conducted an exhaustive analysis of the English authorities but the position stated by the Court of Appeal in* ***Commissioners for Her Majesty's Revenue and Customs v Rochdale Drinks Distributors Ltd*** *[2011] EWCA Civ 1116 paras 79 – 80 indicates that the equivalent rule in England finds application where the dispute is shown to be one 'whose resolution will require the sort of investigation that is normally within the province of a conventional trial'. A purely legal question would not have that character."*

An undertaking not to take legal action for a period

41 The material facts pleaded about the undertaking are set out next:

41.1 Gert Jacobus de Beer, the deponent to the answering affidavit, avers that he, Lambertus Nicolaas de Beer, Koedoeskop River Farms Alpha CC, Seringhoek Boerdery CC, and Sandstone Projects Trust, form part of the "*De Beer group of entities*". He makes the statement that although he is the sole member of the respondent, "*(t)he other entities within the De Beer group of entities however also have a direct or indirect interest in the Respondent*". He did not explain how such interests could exist in law, or why a person should be seen as an entity. His version looks contrived on the application of normal legal interpretation;

41.2 The trustees of the Sandstone Projects Trust brought an urgent application to place Koedoeskop River Farms Alpha CC in business rescue. The applicant sought leave to intervene to wind-up Koedoeskop River Farms Alpha CC;

41.3 The legal representatives of the parties in those applications (only some of whom were identified) reached an agreement "*which resulted in a draft order*" on 5 March 2015 postponing the business rescue proceedings and placing Koedoeskop River Farms Alpha CC under provisional liquidation with a return date of 5 May 2015.

42 In issue is not the draft order, but the agreement that led thereto. The respondent's version is that "*(w)hen the aforementioned settlement agreement was negotiated and reached, the parties were represented by not only their attorneys but also by senior counsel on each side*". The settlement agreement was reduced to writing by two senior counsel, but I do not know who the decision-makers were.

43 The relevant portion of the agreement reads as follows (emphasis added):

> "***That pending the finalisation of the application for business rescue and the counter application for liquidation under case number 1350612015:***

> *1. 1 **That Firstrand Bank Ltd** ("the bank"), the intervening creditor under case number 1350612015 and Wesbank Ltd ("Wesbank"), **shall refrain from taking any form of legal action to collect outstanding debt against** Messrs Lambertus Nicolaas De Beer (Snr), **Gert Jacobus De Beer** and Lambertus Nicolaas De Beer (Jnr), in their personal capacities as sureties and co-principal debtors or otherwise, **or any of the entities in which they are involved, directly or indirectly including**, but not limited to, Tambotie Boerdery Trust and Sering Boerdery CC or any of the sureties liable to the Bank for outstanding debt."*

44 Despite a dispute in the papers about the ambit of the agreement, it was conceded in argument that the agreement was wide enough to cover the respondent. The operative part of the agreement therefore reads:

> *"... **pending the finalisation of the application for business rescue and the counter application for liquidation under case number 1350612015 ... Firstrand Bank Ltd ... shall refrain from taking any form of legal action to collect outstanding debt against** ... (**Mahem Verhurings CC**)."*

45 This agreement was never signed and remains an oral agreement.

46 I have been given almost no contextual material to assist me in the interpretation of the agreement. The present law is summarised in **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA) at Para 24 to 31. I have been asked to determine what the parties meant to achieve without the tools to do so, as if there had been no development in our law on this front. The case referred to pointedly summarises my role in Para 28:

> *"... A court must examine all the facts — the context — in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."*

47 I must come to a commercially sensible meaning. See **Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund** 2010 (2) SA 498 (SCA) at para 13 (footnotes omitted):

> *"The principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear. It is the principle upon which **Bekker NO** was decided, and, more recently, **Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another** was based on the same logic. The principle requires a*

court to construe a contract in context - within the factual matrix in which the parties operated. In this regard see ***KPMG Chartered Accountants (SA) v Securefin Ltd and Another.***"

48 There is a factual dispute about the purpose of the undertaking. The respondent stated it as:

> "... *The purpose of the agreement reached was thus to enable the persons and entities within the "De Beer group of entities" to keep on trading in an attempt to settle the obligations of the different entities".*

49 To this must surely be added in the light of the wording of the agreement:

> "*pending the finalisation of the business rescue application and the liquidation application of Koedoeskop River Farms Alpha CC*".

50 Leaving aside the respondent's version on the purpose of the undertaking as a result of the application of the **Plascon Evans** rule, the respondent averred in reply:

> "*Furthermore it was certainly an implied term that the Respondent would continue to meet its liabilities in terms of the agreement and not that the De Beers would be entitled to take the proceeds of the rental of such property (it being a rental earning concern) and use it for their own purposes. The rental has been ceded to the Applicant. The Respondent's failure to make any payments constitutes a repudiation of any agreement which may have existed (which is denied)*";
>
> "*Furthermore the Respondent alleges a variation of the agreement requiring it to make payment and this is in direct contravention of, inter alia, clause 15.1 of the General Terms and Conditions of the FNB Structured and Facility Mortgage Redemption appearing at page 38 of the paginated papers as well as clause 15.9 thereof*".

51 The respondent elected not to respond to these two averments.

52 The applicant's counsel, in heads delivered on the morning of the hearing, argued that "*any form of legal action to collect outstanding debt*" is a reference to either action or application proceedings for payment of the debt. The respondent's counsel averred that it meant any action taken in

terms of the law that could result in payment and that it therefore includes the statutory demand and liquidation proceedings.

53 I am satisfied that on a textual interpretation of the agreement the applicant is correct. The only fact, that senior counsel and attorneys agreed on the terminology of "*any form of legal action to collect outstanding debt*" would point to a finding that they intended to use its standard meaning, that of a prohibition against action or motion proceedings to collect outstanding debt, which excludes liquidation proceedings. The normal use of the words "*legal action*" would not include a demand, and it was common cause that liquidation proceedings are not proceedings to collect debt.

54 Accordingly, I do not have to deal with the defences raised in argument of repudiation, of the *exceptio non adimpleti contractus*, of non-compliance of the undertaking by the plaintiff, or of repudiation of the undertaking.

55 Consequently, I make the following order: That the respondent be placed under winding-up.

DP de Villiers
Acting Judge of the High Court
Gauteng Division

Heard on:	**22 and 23 November 2016**
On behalf of the Applicant:	**L Meintjes**
Instructed by:	**Rorich, Wolmarans & Luderitz Inc**
On behalf of the Respondent:	**GF Heyns**
Instructed by:	**Hartzenberg Inc**
Judgment handed down:	**15 December 2016**

[1] The "de Beers" so referred to are Gert Jacobus de Beer and Lambertus Nicolaas de Beer who are sureties for the debt in issue herein. Lambertus Nicolaas de Beer also represented the respondent in concluding the agreement in issue with the applicant, despite Gert Jacobus de Beer being its only member. Another surety for the respondent's debt herein is Koedoeskop River Farms Alpha CC;

[2] See **Wackrill v Sandton International Removals (Pty) Ltd and Others** 1984 (1) SA 282 (W) at 293B to F;

[3] See Erasmus, **Superior Court Practice**, Volume 2 Page D1-66.

[4] See **Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere** 1984 (2) SA 261 (W) at 270F-G and **Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd** 1984 (4) SA 87 (T) at 91F-92E;

[5] Heads of argument Para 3.16 and 3.19;

[6] Zietsman AJ;

[7] See a summary in **The Law of South Africa**, Vol. 14 Part 2 Second Edition, **Legal Practitioners** by K van Dijkhorst and J Church at Para 132;

[8] *"I respectfully disagree with the ratio decidendi, insofar as it relates to the issue at hand, in both the well-reasoned judgments of **HBT** and **Set-Mak Civils**. The misconception of requiring a creditor to prove insolvency before being able to rely on ch 14 of the previous Act is apparent merely from the provisions of s 345, read with s 344 of the 1973 Act, which clearly does not provide for factual insolvency, merely a deemed inability to pay debts (and also if it is proved to the satisfaction of the court that the company is unable to pay its debts). The section has always brought about a peculiar consequence, namely that the debtor was deemed to be unable to pay its debts, although it may well be able to pay other debts. One of the grounds available to such debtor to oppose the application for winding-up on this basis was to prove solvency. Then the court still retained its discretion"*;

[9] Respondent's heads of argument, Para 3.23;

[10] See the **Boschpoort**-case at Para 16;

[11] (Underlining added): *"**69 Circumstances under which corporation deemed unable to pay debts***

(1) For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if-

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) ....; or

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.

(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation";

[12] Before its repeal, section 68(c) of the **Close Corporations Act** under the heading "Liquidation by Court" read: "A corporation may be wound up by a Court if the corporation is unable to pay its debts";

[13] *"**9 Continued application of previous Act to winding-up and liquidation***

(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).

(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the Gazette, may-

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a)";

[14] **SAA Distributors (Pty) Ltd v Sport en Spel (Edms) Bpk** 1973 (3) SA 371 (C) at 373B to 374E;
[15] The full reference is given later herein, in essence winding-up proceedings ought not to used to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds. In such case the application will be dismissed;
[16] Respondent's heads of argument, Para 5.15 and 5.16;
[17] Hiemstra AJ;
[18] At 975J;
[19] At 982E to G;
[20] Hahlo and Kahn, **The South African Legal System and its Background**, 1968, Page 251; **Scania South Africa (Pty) Ltd v Smit** 2003 (1) SA 457 (T) at 471B to F;
[21] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A); See too **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA) at Para 12 and 13;
[22] Hahlo and Kahn, **The South African Legal System and its Background**, [supra] Page 255; **Scania South Africa (Pty) Ltd v Smit** [supra] at 471B to F;
[23] **Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC** (A5024/2012) [2012] ZAGPJHC 211 (30 October 2012) at Para 11 to 15 and
[24] See the discussion in **Gap Merchant Recycling CC v Goal Reach Trading 55 CC** (2480/2014) [2014] ZAWCHC 53; 2016 (1) SA 261 (WCC) (15 April 2014) at Para 20 to 33
[25] I may add that **Commentary on the Companies Act**, by Blackman, Jooste and Everingham, Volume 3, Page 14-93 and further deals with the treatment of counter-claims as a special case, and not as part of the Badenhorst-rule;
[26] Rogers J;