IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:37063/2018

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

__21 June 2019____ _____

DATE SIGNATURE

In the matter between:

JJP PROPCO (PTY)LTD	**FIRST APPLICANT**
JJP PROPCO MEDICAL (PTY)LTD	**SECOND APPLICANT**

And

JACARANDA HAVEN (PTY) LTD	**RESPONDENT**

JUDGMENT

STRIJDOM AJ

INTRODUCTION

[1] In this case the applicants applied that the respondent be placed under provisional winding up. The applicants relied upon two alternative grounds for the application.

1.1 The first is that the respondent is factually insolvent in it cannot pay "at least R8,9 million to the applicants" and another R9 million to the seller of a property registered in the name of the respondent.

1.2 The second ground is that it is just an equitable for the respondent to be wound up in terms of either the Companies Act 1973 alternatively section 81 of the Companies Act of 2008.

The Factual disputes

[2] The factual disputes between the parties on whether any amount is owing by the respondent to either of the applicants' may be summarised as follows:

2.1 The case of the applicants is that the applicants and others made payments of fairly substantial amounts in respect of the Jacaranda property. However, it was submitted by counsel for the respondent that these payments were not made in terms of loan agreements, and they cannot be recovered by any condictio or delictual cause of action.

2.2 What is in dispute is whether those funds were spent as part of the payment of the purchase price of 90% shares in Jacaranda Haven (respondent) or whether these were loans made to Jacaranda Haven.

2.2 The respondent denies that it owes any funds to the applicants.

The correct approach to the evidence

[3] The applicants are applying for the provisional winding up of the respondent, as provided for in Kalil v Decotex (Pty) Ltd 1988 (1) SA 93 (A) at 976 A-C.

[4] It was submitted by counsel for the respondent that the so-called Badenhorst[1] Principle applies. In terms of this principle, liquidation proceedings are designed to bring about a concursus creditorum to ensure the equal distribution between creditors and such proceedings are unappropriate to resolve disputes 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 liquidation proceedings is indebted to the applicant, the court should as a general rule dismiss the application.[2]

[5] The question is thus not whether the respondent has proven a defence but only whether the respondent has put up sufficient facts to illustrate the existence of a genuine and bona fide dispute as to the question whether the respondent is indebted to the applicants at all.

The Applicants' locus standi as creditor

[6] In terms of the provisions of section 34(6)(1)(b) of the Companies Act, 1973, an application for the winding- up of a company may be brought by one or more of its creditors (including contingent or prospective creditors).

6.1 A contingent creditor is a creditor in regard to a liability which, by reason of an existing vinculum juris between the creditor and the company, may become an enforceable liability on the happening of

[1] See Badenhorst v Northern Construction Enterprises Ltd 1956(2) 346 (T) at 347 H to 348C.
[2] See Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A).

some future event.

6.2 A prospective creditor is a creditor in regard to liability which, by reason of an existing vinculum juris between the creditor and the company, will become an enforceable liability on a future date or on a date determinable by reference to future events. Such a creditor would include a creditor with a valid unliquidated claim for damages for breach of contract or a delictual claim.

The Facts

[7] The case for the applicants is that the respondent is indebted to the applicants in the amount of R9 811 662.00 which the applicants made available and paid over to various creditors of the respondent to the benefit of the respondent, and in return for which the respondent, was to ensure the transfer of 90% of its shareholding to the second applicant.[3] The respondent failed or refused to ensure the transfer of the shares concerned to the second applicant.

[8] The respondents' version of the purported agreement regarding the payment of the amount of R 9811 662.00 entails the following:

8.1 The second applicant would purchase 90% of the issued shares of the respondent from a company called Via Viva Properties, at a price equal to 90% of the municipal value of the property that the respondent was at that time purchasing, being about R 11,7 million.

8.2 The said purchase price would be payable by the time that the

[3] Founding Affidavit, para 21 page 12 to paragraph 23 page 14, para 24, page 14 read with para 34 page 17

respondent took transfer of the property concerned.

8.3 Only once the full purchase price for the shares had been paid to the seller (Via Viva Properties) would the shares concerned be transferred to the second applicant.

8.4 The purchase price of the shares (or at least a part thereof) would then through a route through the Via Viva Group be borrowed by the respondent to enable it to pay the purchase price for the land and other expenses in developing the property.

[9] It was submitted by counsel for the respondent that the present application is one for the provisional liquidation of the respondent and as the claims of the applicants against the respondent are in issue, the "Badenhorst principle" applies in terms of which the sole question for the court to determine at this stage is whether there is a genuine and bona fide dispute as to whether the respondent is indebted to the applicants. In such a case the court should dismiss the application.

[10] It was further submitted that apart from the fact that the applicants claim are confusing and do not have the benefit of any contract or allegations found in claims in delict or enrichment, the respondent has demonstrated that the amounts that the applicants paid, were not payments made to the respondent but were payments made in satisfaction of the purchase price of 90% of the shares in the respondent that a company, Via Viva Properties (PTY) Ltd, sold to the second applicant.

[11] The following considerations show that there is no commercial sense in the purported agreement suggested by the respondent;

11.1 The respondent was at the material time an empty shell that had just been created, without any assets or trading history;

11.2 The respondent would immediately enter into a purchase agreement with the owner of the land, for which purchase price it had no money to pay;

11.3 The respondent would also not obtain the purchase price of the land from the second applicant, and the purchase price would accrue to Via Viva Properties;

11.4 At the end of the purchase of land transaction concerned, the respondent would thus hold the land as asset, but owe the purchase price to the owner of the land;

11.5 On the respondents' version the second applicant would thus purchase a company that was an empty shell with a huge debt (the purchase price of the land) and no means whatsoever to pay the debt, from an amount of approximately R10 million;

11.6 The respondent would then allegedly borrow the amount of the purchase price of the land from one of the companies in the Via Viva Group of Companies , thus ending up with the land and a debt equal to the purchase price of the land-resulting in the respondent having no net value whatsoever. The respondent would then be obliged to obtain money from somewhere to develop the property to be able to lease it to the Via Viva Group of Companies;

11.7 Thus, the second applicant (or some other company in the (JJP Propco Group) would spend a huge amount of money to redevelop the property concerned all against the possible repayment of its investment from the rentals to be paid by the proposed operating company that

was similarly a shell.

The Respondents' insolvency

[12] Apart from being indebted to the applicant for the amount of R 9 811 662.00 the respondent is also indebted as follows;

12.1 To the seller of the immovable property which is the respondents' only asset – at least R9 million;

12.2 On the bond registered in favour of its new shareholders at least R12 million.[4]

[13] In the premises, the respondent is indebted in an amount of not less than R30 million, whereas its only asset is the immovable property that was purchased about a year ago for only R12 million. The respondent is thus patently factually insolvent. The respondent has also failed to show any other assets that would render the respondent factually solvent.

[14] The fact that the respondent disputes a portion of the liability concerned does not affect the applicants' locus standi in iudicio.[5]

[15] The respondent has misrepresented to the Registrar of Deeds, Pretoria that the deed of transfer in terms of which it holds the immovable property concerned was lost (whereas it was to the knowledge of the respondent in the lawful possession of the applicant). This misrepresentation caused the Registrar of Deeds, Pretoria to

[4] Founding affidavit , para 59.2, page 24
[5] Prudential Shippers SA Ltd v Tempest Clothing CO (Pty) Ltd 1976(2) SA 856 (W).

issue a new Deed for Transfer, that the respondent then used to register a mortgage bond for the amount of R12 million in favour of its new shareholders.[6]

Conclusion

[16] Having considered the affidavits and submissions made by counsel for the parties I am of the view that the respondent failed to prove on a balance of probabilities that it disputes the applicants' locus standi on bona fide and reasonable grounds.[7]

[17]I am further of the view that the respondent is insolvent and that it is just and equitable for the respondent to be wound up.

[18] In the result the following order is made;

(a) That the respondent company be and is hereby placed under provisional winding up;

(b) That all persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding up of the respondent company on_____ at 10h00.

(c) That a copy of this order be forthwith served on the respondent company at its registered office and be published in the Government Gazette and in a daily newspaper which circulates throughout Gauteng Province.

(d) That the costs of the application be costs in the liquidation.

---

[6] Founding Affidavit, para 58, page 23

[7] Kalik v Decotex (Pty)Ltd and Another 1988 (1) SA 943 (A).

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

Matter heard on:	**2 May 2019**
Judgment delivered:	**21 June 2019**
Counsel for Plaintiff:	**ADV SD Wagenaar SC**
Attorneys for Plaintiff:	**Coetzer E Partners**
Counsel for Defendant:	**ADV PF Louw SC**
Attorneys for Defendant:	**Couzyn Hertzog & Horak**