IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

Date: ***24 MAY 2022*** Signature:

CASE NO: 43756/16, 43734/16,

43755/16, 43757/16

In the matter between:

Emvest Agricultural Corporation (Mauritius) Ltd **Applicant**

Emvest Food Products (Mauritius) Ltd **Intervening Party**

and

Emvest Evergreen (Pty) Ltd **Respondent**

(Registration number: 2010/004451/07)

and

Case number 43755/2016,

the matter between –

Emvest Agricultural Corporation (Mauritius) Ltd **Applicant**

Emvest Food Products (Mauritius) Ltd **Intervening Party**

and

Emvest Foods (Pty) Ltd **Respondent**

(Registration number: 2009/017451/07)

and

Case number: 43757/2016,

the matter between –

Emvest Agricultural Corporation (Mauritius) Ltd **Applicant**

Emvest Food Products (Mauritius) Ltd **Intervening Party**

and

Emvest Barvale (Pty) Ltd **Respondent**

(Registration number: 1950/036399/07)

and

Case number: 43756/2016,

the matter between –

Emvest Agricultural Corporation (Mauritius) Ltd **Applicant**

and

Superior Macadamias (Pty) Ltd **Respondent**

(Registration number: 2010/001094/07)

JUDGMENT

NYATHI J

NATURE OF APPLICATIONS AND CHRONOLOGY

[1] These are applications for the confirmation of provisional winding-up orders, and for the final winding-up of the respective Respondents.

[2] The Applicant brought four applications for the winding-up of four different companies, namely Emvest Evergreen (Pty) Ltd, Emvest Foods (Pty) Ltd, Emvest Barvale (Pty) Ltd and Superior Macadamias (Pty) Ltd. The matters are similar, and for convenience of the court and the parties the matters were heard together and dealt with.

[3] Provisional orders for the winding-up of each of the Respondents were granted on 19 December 2018, and a *rule nisi* with a return date of 6 March 2019 was issued, calling on all interested parties to show cause why the provisional orders should not be made final. The return date was postponed several times until the current date of hearing.

[4] The Applications for intervention were then brought by a shareholder of three of the abovementioned companies (Evergreen, Foods and Barvale), in which the shareholder also seeks confirmation of the provisional orders concerned.

[5] On 15 March 2021, the Court granted leave to the Intervening Party to intervene in the three applications concerned, and the Intervening Party thereafter served its three applications on the three companies concerned. The three companies concerned oppose the said applications. They are joined by the Second Intervening Applicant in their opposition.

[6] APPLICANT'S APPLICATIONS AS CREDITOR:

6.1 The Applicant brings its applications for the final liquidation of the Respondents.

6.2 The Applicant's cases are that the Respondents are indebted to it in terms of four Service Level Agreements ("the SLAs") and that this debt remains unpaid.

6.3 The only issue to be determined by this Court is whether the Applicant has *locus standi* to apply for the winding-up of the Respondents.

6.4 This turns on whether, on the established tests, the Applicant has established that the Respondents are indebted to the Applicant in terms of the SLAs upon which the Applicant itself relies.

6.5 The extent of the discretion of the Court to not grant the relief in the event that the Applicant's *locus standi* is established.

[7] SHAREHOLDER APPLICATIONS (BY THE INTERVENING PARTY):

7.1 The Intervening Party seeks the final winding-up of the three Respondents concerned in its capacity as a shareholder of these Respondents on the basis that the three Respondents are unable to pay their debts and that it is just and equitable to wind-up these Respondents.

7.2 As the Intervening Party indisputably has *locus standi*, the issue that must be determined in this application is whether the Intervening Party has met the other requirements for the winding-up of the three Respondents concerned.

7.3 In relation to the intervening applications, the issues that must be determined are:

7.3.1 In respect of the commercial insolvency ground: whether, having regard to section 346(2) of the Companies Act, 1973, a shareholder is entitled in law to rely on section 344(f) to windup the Emvest respondents on the basis of commercial insolvency.

7.3.2 In respect to the just and equitable ground:

7.3.2.1 First, whether the Intervening Party has established that these respondents are commercially insolvent as absent such commercial insolvency, the Companies Act, 1973 does not apply at all;

7.3.2.2 Second, and in any event, whether the Intervening Party has established the requirements for a just and equitable winding-up.

[8] Due to the similarity of the four matters, the parties agreed that only one of the four applications, namely, the Barvale matter should be used as a central point in the hearing of the applications.

[9] It is common cause that the Applicant and the Respondents were previously companies within the same group up until the Respondents were sold off to a Canadian Company.

[10] The founding affidavits in all the four applications were all deposed to by Ms. Susan Margaret Law Payne, formerly a director of all the Respondents but currently a director of the Applicant.

[11] According to Ms Payne, when one distils information from the four founding affidavits for the sake of brevity, the Respondents owed the Applicant as follows:

11.1 Emvest Evergreen: USD 233 177

11.2 Emvest FOODS; USD 152 087

11.3 Superior MACADAMIAS: USD 478 634 and

11.3 Emvest Barvale: USD 287 304

[12] Ms Payne has attached in each instance copies of the SLA's and the respective invoices.

[13] Now that the provisional order has been granted, the Respondents who seek to discharge the provisional order, bear the onus to do so. In this case the Respondents strive to do that by once again disputing the existence of the debts on which the Applicant creditor relies.

THE CASE FOR THE RESPONDENTS

[14] *Mr Miller* submitted that there were disputes of fact arising from the papers of both the Applicant and the Respondent.

[15] The Respondent's main contention is that the debts do not exist or there is no proof that anything is owing to the Applicant; and therefore the Applicant has no *locus standi* to bring the application in the first place.

[16] If the debts exist, it was submitted, they are not enforceable.

[17] Factual insolvency was not a ground for winding up a company, commercial insolvency is required.

THE APPLICANT'S CASE

[18] The Applicant had delivered its letters of demand as contemplated in section 345 (1) (a) (i) of the Companies Act, 1973, which elicited no discernible response from the Respondents. The debts remain unpaid.

18.1 On 26 November 2015 and on 1 June 2016 the Applicant caused a letter of demand to be served on the Respondent (EMVEST EVERGREEN) at the Respondent's registered address.

18.2 On each occasion the return of service by the sheriff who effected service of the letter of demand concerned recorded that the company closed down and premises were empty and that there were no employees at the given address.

[19] The issue of *locus standi* is a question of law which has for ages been governed by the principle that an unpaid debtor has a right *ex debito iustitiae* to a winding up order against a company that is unable to pay its debts. This was recently confirmed by the Supreme Court of Appeal in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd 2022 (1) SA 91 (SCA) at para 12.*

[20] The respondents' submissions are denials of indebtedness, suggestions that the invoices relied upon by the applicant are not real. Respondents even take issue with Ms. Payne's allegation that the facts she deposed to fall within her personal

knowledge, having been a director of the Applicant and the Respondent companies themselves.

[21] Respondents make suggestions that the property where the sheriff could not effect proper service due to abandonment has some intrinsic value, and that should this provisional order not be confirmed, it could somehow realize and pay off its indebtedness (which it denies!) with the proceeds.

[22] Once a creditor has satisfied the requirements of a liquidation order, the court has a narrow discretion to refuse the relief sought. In fact, the court may not on a whim decline the order.[1]

[23] The respondents' answering affidavits contain broad denials of each and every averment by the applicant's deponent with a view to put forward artificial disputes of fact which are not borne out by any real proof.

ANALYSIS AND CONCLUSION

[24] Winding-up proceedings ought not to be resorted to as a means to enforce payment of a debt which is contested by the respondent company on bona fide reasonable grounds. The winding-up procedure was not designed to resolve disputes as to the existence or non-existence of a debt. This is the core of the so-called *Badenhorst* rule.[2]

[1] Diepenaar N.O. and Others v Business Venture Investments N.O. 134 (Pty) Ltd and Another [2014] 2 All SA 162 (WCC); [2014] ZAWCHC 7.
[2] Named after the case of Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 348.

[25] Where the existence of the debt is bona fide disputed by the respondent on reasonable grounds a winding-up order, provisional or final ought to be refused.[3]

[25 In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* Corbett JA had occasion to state that: "In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact." In such an instance the court is entitled to grant a final order.

[25] The debts owed to the applicant remain unpaid to this date. The respondents have not succeeded to discharge the burden of proof, on a balance of probabilities, that they are not indebted to the applicant. Neither did they successfully dispel applicant's allegations that they are not in a state of solvency and are unable to pay their debts.

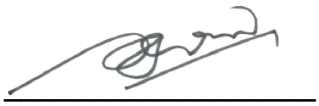
[26] The above considerations are applicable similarly to the application by the intervening parties.

[27] I accordingly grant the following order:

That: in cases No: 43756/2016, 43734/2016, 43755/2016 and 43757/2016 the respondents be and are hereby placed under final winding-up

The applicant is entitled to its costs of this application which are to be costs in the winding-up.

[3] Kalil v Decotex (Pty) Ltd and Another 1998 (1) SA 943 (A) at 980B-D



JS. NYATHI

JUDGE OF THE HIGH COURT

CASE NO: 43756/2016, 43734/2016, 43755/2016, 43757/2016

HEARD ON: 15 March 2022

For the Applicant and Intervening party: Adv. S D Wagener S.C.

INSTRUCTED BY: Weavind & Weavind Inc.

For the Respondents and Second Intervening party: Adv. S Miller

INSTRUCTED BY: Bernardt Vukic Potash & Getz Inc.

c/o Friedland Hart Solomon & Nicolson

DATE OF JUDGMENT: 24 May 2022