



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

CASE NO.: 4956/17

In the matter between:

ARABELLA INVESTMENTS (Pty) LTD

Applicant

and

COBOW (Pty) LTD

t/a ALBOURNE BOUTIQUE LODGE

SOMERSET WEST

Respondent

AND:

CASE NO.: 4957/17

In the related matter between:

KOREVEST LEISURE GROUP BV

Applicant

and

KOREVEST INVESTMENT GROUP PROPRIETARY LIMITED

(Registration Number 2013/023166/07)

Respondent

JUDGMENT – 28 JUNE 2017

Le Grange, J:

[1] In this matter there are two opposed applications for the provisional liquidation of associated companies. I have prepared one judgment that covers both cases.

[2] In the first case, Arabella Investments Pty (Ltd) ("Arabella") seeks the provisional winding up of the holding company Cobow (Pty) Ltd ("Cobow"). Arabella contends that Cobow should be wound up on the basis that it is unable to pay its debts, as envisaged in s 344(f) as read with s 345(1)(c) of the 1973 Companies Act.

[3] In the second case, Korevest Leisure Group BV (Pty) Ltd ("KLG") seeks the provisional winding up of Korevest Leisure Group (Pty) Ltd. The issue in the second case is whether or not the Respondent ("Korevest") has lost its substratum. KLG alleges that because Korevest owns 100% of the issued shares in Cobow, Korevest fate is inextricably wound up with that of Cobow and the latter's liquidation will inevitably result in the liquidation of Korevest. Accordingly, it was accepted by all the parties that if the Cobow application fails, then the Korevest application should also fail, and vice versa.

[4] There are numerous factual disputes on the papers filed of record. The salient background facts which are largely uncontroversial can be summarised as follows: Cobow is currently carrying on business as a guesthouse under the name of Albourne Boutique Lodge in Somerset West, Cape Town. Cobow owns the immovable property on which the guesthouse is conducted. The immovable property, according to Cobow was

valued at an amount of approximately R17 million, and together with its business, has a market value of approximately R22 million.

[5] The sole shareholder of Cobow is Korevest. Cobow currently has two directors, Gustav Schaefer (Schaefer) and Jan Eberhard Schliemann (Schliemann). Martin Lennard Korver (Korver) was also a director of Cobow until he resigned in August 2016. Korver is the sole director of Arabella and controls KLG

[6] Korevest has three shareholders namely, KLG which owns 47 %. The Schliemann Family Trust which owns 28% of the shares and the Finserf Foundation which owns 25% of the shares.

[7] In March 2017, Investec Bank (Mauritius) Limited ("Investec") issued summons against Korevest, Cobow and Korver under case no 5690/2017 ("the action") in which it claims; payment from Korevest, Cobow and Korver, jointly and severally, of the amount of Euro 442,602.94 or the Rand equivalent thereof which is roughly about R6. 8 Million, (plus the interest as agreed upon contractually); an order declaring the immovable property (owned by Cobow) to be specially executable and costs on an attorney and own client scale.

[8] The claim by Investec is based on a loan agreement concluded in May 2015 between Investec and Korevest, represented by Korver, in terms whereof Investec

loaned Korevest the Euro equivalent of the amount of R6.8 Million (“the Investec Loan”).

[9] Investec’s claim for an order declaring the immovable property specially executable is based on a covering mortgage bond registered by Cobow in favour of Investec over the immovable property as security for the monies loaned to Korevest.

[10] Cobow in opposing the relief sought raised the following defences. Firstly, that Arabella lacks *locus standi* as a creditor. Secondly, that Korver has allegedly perpetrated a fraud on Cobow and Investec by fraudulently misrepresenting his authority to have concluded the Investec loan and as such cannot rely on his own wrongdoing as the causa for the winding up of Cobow. Thirdly, Cobow has a good defence to the claims of Investec on the grounds that Korver allegedly committed a fraud and lacked authority to have concluded a loan agreement between Korevest and Investec, to execute a guarantee by Cobow in favour of Investec and to pass a covering mortgage bond over Cobow’s immovable property in favour of Investec. Lastly, that Cobow denies it is commercially insolvent and or unable to pay its debts.

[11] Mr. RG Goodman, SC assisted by Ms. DM Davis appeared for the Applicants. Mr. WG Woodland assisted by Mr. C Cutler appeared for Cobow.

[12] At the start of the hearing, leave was sought by Cobow and Arabella to file additional affidavits. Having heard counsel and having regard to the relevance of the matter contained in the affidavits, such leave was granted and the affidavits admitted as forming part of the factual matrix underpinning the two cases.

[13] Arabella also at the outset launched an application in terms of the Uniform Court Rules 6(5)(g) for the referral of certain issues to oral evidence. The issues Arabella wants to have resolved at such hearing were as follows:

- 13.1 *whether or not there was an agreement as alleged at paragraph 22 of the answering affidavit that Korevest would discharge Cobow's indebtedness to the applicant from funds paid by Cobow to Korevest;*
- 13.2 *whether or not the admitted liability of R570 000 was paid by the respondent to the applicant;*
- 13.3 *whether or not Schaefer and or Schliemann had knowledge, prior to the execution thereof, of the loan agreement between Korevest and Investec Bank Limited (Mauritius) ("Investec Mauritius") ("the Investec loan"), the ancillary Cobow guarantee and the Cobow mortgage bond;*

13.4 *whether or not Schaefer and or Schliemann authorized Korver to negotiate with Investec Bank Limited (Cape Town) and Investec Mauritius to conclude the Investec loan and Cobow guarantee and to register the mortgage bond in favour of Investec Mauritius;*

13.5 *whether or not the respondent is able to pay its debts.*

[14] Arabella premised their application for referral to oral evidence on the dictum in Lombaard v Dropop 2010 (5) SA 1 at para [53] wherein it was held that such applications be made from the outset and before argument, unless there are exceptional circumstances present to depart from it. Despite the request up front for the referral to oral evidence, Arabella was confident that on the papers as it stands a case had been made out for the primary relief sought.

[15] Arabella's *locus standi* is underpinned on the allegation that it is a creditor of Cobow. In this regard, Arabella placed reliance on the following: first, an extract from the management accounts of Cobow which at 3 February 2017 reflects the amounts of R235 000; R250 000 and R250 000 totalling an amount of R735 000. Secondly, a tax invoice dated 8 January 2015 for R570 000.00 (being R570 000.00 plus VAT) for the four quarters of 2014 (in respect of the 2015 tax year). According to Arabella the amount of R 735 000 is due and payable but remains unpaid either in whole or in part.

[16] On the papers filed of record, Cobow admitted liability to Arabella in the amount of R 570 000.00 as at year end February 2015, but claims it has paid the said amount. It disputes liability for the balance of Arabella's claim. According to Cobow in terms of an agreement between Cobow and Korevest, Korver caused Korevest to make payments totalling R843 500.00 to Arabella in discharge of Cobow's liability to it.

[17] Korver disputes that there was such an agreement between Korevest and Cobow to make these payments to Arabella. According to Korver the payments made by Korevest to Arabella were repayments on his loan account in Korevest and certain amounts he borrowed from it.

[18] Counsel for Arabella in the main contended that the defences raised by Cobow is contrived and must fail even on the lower threshold required to stave off a liquidation application as the debt are not disputed on *bona fide* and reasonable grounds. According to Arabella's counsel, Cobow simply failed to allege facts which, if proven at the trial, would make out a good defence of payment.

[19] The principal argument by Counsel for Cobow was that the grounds advanced by the company in disputing the claims against it were not unreasonable. It was contended that the grounds as alleged by Cobow were also made *bona fide* and if proven at a trial would constitute a good defence.

[20] Arabella is adamant that the version advanced by Cobow of an alleged agreement to discharge the liability to Arabella is contrived. It was argued that the alleged agreement was contradicted by Cobow's own answering papers. According to Arabella the payments listed by Cobow's are described in the books of Korevest as "*misappropriated funds Arabella*", and not as payments to Arabella on behalf of Cobow. It was further contended that if indeed as alleged payments were made from Korevest to Arabella on behalf of Cobow for management fees in terms of an agreement, then it is highly improbable that it would have been described as "*misappropriated*" in the books of Korevest. Moreover, the payments underlined on the Korevest bank statements do not reflect a payment for an invoiced amount of R570 000.00 to Arabella but rather payments for different amounts ranging from R1 000.00 to R175 000.00 between the period May 2015 to March 2016.

[21] It was further argued that the recorded payments in the creditor's ledger account of Arabella in the books of Cobow, shows payments being made directly to Arabella by cheque and that these recorded payments must negate the version of any agreement that Korevest would discharge Cobow's liability to Arabella from money transferred by Cobow to Korevest.

[22] Furthermore, according to Arabella, the alleged payment of R843 500.00, on which Cobow placed reliance on, is based on a journal entry dated 29 February 2016 in the books of account of both Korevest and Cobow and as such are only a journal entry

in both sets of accounts. The argument was advanced that the relevant journals and opposite entries in the books of account were not disclosed, as one would have expected, and that Cobow's defence of payment rests not on the physical payment of the R570 000.00 but on dubious journal entries, the effect whereof is purportedly to set off amounts owed by Arabella to Korevest against amounts owed by Cobow to Arabella.

[23] Cobow on the other hand contended there is no duty on them to establish as a matter of fact that the defences raised will succeed in any action which may be brought against them. It was contented that all that was required were the grounds advanced by Cobow upon which it rely to dispute the claims were reasonable and *bona fide*. According to Cobow, they have a reasonable prospect of successfully defending the Investec Bank Mauritius action and in doing so will cause the mortgage bond and loan agreement to be set aside.

[24] Cobow in this regard has alleged that Korver falsified the signatures of Schaeffer and Schliemann on the resolution of Cobow authorising the conclusion of the Cobow guarantee and the registration of the mortgage bond. Furthermore, Korver falsely misrepresented KLG as owning 100% of the shares of Korevest, whereas it only owned 47% of the shares, and Korver was the only director of Korevest who signed the Korevest resolution authorising the conclusion of the Investec loan whereas Schaefer and Schliemann, as directors of Korevest, should also have signed the resolution. Moreover, Schaefer and Schliemann have alleged that they had no knowledge of, did

not agree to, and did not sign any documents authorising the conclusion of the Investec loan or the passing of the mortgage bond. It was therefore denied by both that they had authorised Korver to engage in any dealings with Investec on behalf of Cobow.

[25] The version advanced on behalf of Cobow was that Korevest had borrowed funds in foreign currency from a foreign entity called Cloetenberg Management ("Cloetenberg") to pay out the previous shareholders' loans in Cobow, and that it was agreed between Korver, Schaefer and Schliemann that Korevest's debt to Cloetenberg would be secured by a bond over the immovable property in favour of Cloetenberg. However, nothing came of this and it is alleged that Korver instead suggested that it would be better to have a bond registered over the immovable property in favour of Investec as security for a guarantee which Investec would provide to Cloetenberg to secure Korevest's debt to Cloetenberg.

[26] Korver on behalf of Arabella disputes this version, in particular the professed ignorance of Schliemann and Schaefer of the fact of the Investec loan and the mortgage bond. According to Korver, Schaefer and Schliemann were well aware of the fact of the loan and of the mortgage bond. To this extent reliance was placed on the following documents:

- 26.1 A letter dated 8 April 2015 from Investec to Korevest setting out full details of the terms of the loan and the security therefor (including the

Cobow guarantee and the mortgage bond) which was sent to the address of the offices of Schliemann Incorporated;

- 26.2 A letter dated 27 May 2015 written by Schliemann to the Registrar of Deeds, Cape Town, in which he made reference to the fact that Cobow had been granted a bond through Investec and was merely waiting for delivery of the title deed before the bond could be lodged and funds released to Cobow.
- 26.3 A WhatsApp message sent by Korver to Schaefer on 15 May 2015 in which Korver refers to two resolutions in connection with Investec (to be signed on behalf of Korevest and Cobow) and asks Schaefer to sign them and scan them back to him and Schaefer replies stating "Check email".
- 26.4 One of the two documents signed by Schaefer on 15 May 2015, being a resolution signed on behalf of Korevest in which it is pertinently stated that Korver is authorised on behalf of Korevest to negotiate with Investec, to conclude documents and to "*consummate any transaction*".

[27] According to Korver, Schaefer signed a similar resolution for Cobow on 15 May 2015, and that on 18 May 2015 Schliemann was meant to meet with him and Schaefer to sign the two resolutions, but did not arrive for the meeting. He accordingly signed

Schliemann's name on the resolutions in the presence of Schaefer in the knowledge and belief that Schliemann would in due course sign the resolutions, which according to Korver in fact happened a few days later but was unable to produce these signed resolutions as they were apparently removed from his files.

[28] According to Korver, much was made by Schaefer and Schliemann of the fact that he supposedly "falsified" their signatures on the resolution. Korver was however adamant that he was duly authorised to sign all necessary documentation on behalf of Cobow and Korevest in relation to the Investec transaction, and therefore there could not have been an objection if he had signed his own name "pp" for Schaefer and Schliemann instead of signing Schaefer's and Schliemann's names.

[29] It was argued that Schaefer and Schliemann's denial of knowledge of the transaction and of Korver's authority is opportunistic and falsely contrived to escape liability to Investec in terms of the Cobow guarantee and the mortgage bond.

[30] Cobow further contended that the present applications are an abuse of the Court's process. To this end it was contended that it is opportunistic for Korver to rely on his own wrongdoing as a *causa* for winding up Cobow where he allegedly unlawfully caused Cobow to encumber its immovable property and having allegedly stolen a substantial part of the funds loaned by Korevest from Investec.

[31] According to Korver, this argument loses much of its force if it is accepted that Schaefer and Schliemann were well aware of and acquiesced in the Investec loan, the Cobow guarantee and the mortgage bond. Korver also denied that he stole a substantial part of the loan funds received from Investec.

[32] It was further contended that Cobow is commercially insolvent. According to Arabella, the financial statements of Cobow as at 29 February 2016 reflected a total loss of R179 703 as opposed to a profit of R1 524 347 the previous financial year. Furthermore, Cobow's management accounts, profit and loss statement for the 6 months period of March to October 2016 also reflected a loss for that period of R349 138, 11. It was further contended that Cobow has no readily realisable assets which can be liquidated to fund its liabilities while it continues trading, since its main asset is the immovable property and guesthouse business. Furthermore, if Investec does take judgment against Cobow in the action, Cobow does not have the funds to settle the judgment debt without the sale of the immovable property, which would mean the end of its trading activities.

[33] Cobow has denied it is commercially insolvent. On the papers filed of record, Cobow is adamant that the loan and subsequent mortgage bond was unauthorised. According to Cobow, Korver then misappropriated most of the funds loaned and advanced by Investec in the amount of approximately R6 001 596. 00. In addition, he apparently unlawfully took an aggregate amount of at least R3 150 500.00 from

Korevest and Cobow. Unauthorised personal expenses of at least R306 164.19 were also apparently paid out of the bank accounts of Korevest and Cobow to Korver.

[34] According to Cobow, it is the consequence of this fraudulent conduct of Korver that Arabella now contends that Cobow should be wound up because Investec has foreclosed on the mortgage bond and as a result issued summons against both Cobow and Korevest. According to Cobow, if the current assets were to be calculated to include the funds misappropriated by Korver, which are due and payable, then Cobow's assets exceeds its total liability significantly and Arabella's relief for provisional winding up must fail.

[35] Cobow has also taken issue with the contention by Arabella that there will be an imminent sale in execution of its only asset being the guesthouse, to defray the indebtedness of Korevest to Investec. It is not in issue that Korver, Cobow and Korevest have entered an appearance to defend the summons instituted by Investec. Cobow and Korevest are opposing the claims of Investec on the basis *inter alia* that the loan and the mortgage bond are void and unenforceable for want of authority. Korver also as the Third Defendant in the matter, filed an affidavit resisting summary judgment.

[36] Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in Kalil v Decotex (Pty) Ltd

and Another 1988 (1) SA 943 (A) and restated in Payslip Investment Holdings CC v Y2K Tec Limited 2001 (4) SA 781 (C) at 783 H-I where the following was held:

'According to these guidelines a distinction is to be drawn between disputes regarding the respondents liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favour the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for the hearing of oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers filed of record that the applicant's claim is disputed on reasonable and bona fide grounds. In this event it is not sufficient that the applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general.'

[37] In Hülse-Reutter & another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening) 1998 (2) SA 208 (C) at 219E-220A, the Court commented as follows on the nature and the extent of this onus:

'I think that it is important to bear in mind exactly what it is that the trustees have to establish in order to resist this application with success. Apart from the fact that they

dispute the applicants' claims, and do so bona fide, ... what they must establish is no more and no less than the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce their disputed claims. They do not, ... have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable... It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide,... to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company.'

[38] Applying these stated principles and guidelines a distinction is to be drawn between disputes regarding Cobow's liability to Arabella and other disputes. With reference to disputes regarding Cobow's indebtedness, the test is and remains whether on the papers filed of record, Arabella's claim is disputed on reasonable and *bona fide* grounds. In this instance it is not sufficient that Arabella may have made out a case on the probabilities regarding the other disputes. The stated exception regarding disputes about an applicant's case in matters of this nature cuts across the approach to factual disputes.

[39] On Cobow's own version it has admitted liability to Arabella in the amount of R570 000.00 as at year end February 2015, but claims it has paid the said amount. It

disputes liability for the balance of Arabella's claim. According to Cobow, Korver caused Korevest to make payments totalling R843 500.00 to Arabella in discharge of Cobow's liability to it in terms of an agreement between Cobow and Korevest. In fact Cobow avers that an overpayment occurred and is entitled to reclaim it. Moreover, it appears on the papers filed of record that there is no longer an imminent threat of a sale in execution of Cobow's only asset. It is common cause that Korver, Cobow and Korevest have entered an appearance to defend the summons instituted by Investec. Cobow and Korevest are opposing the claims of Investec on the basis *inter alia* that the loan and the mortgage bond are void and unenforceable for want of authority. Korver has also as the Third Defendant in the matter filed an affidavit resisting summary judgment

[40] It is now a well-established in our law that an application for liquidation should not be resorted to in order to enforce a claim which is on reasonable grounds and *bona fide* disputed.

[41] On a conspectus of all the evidence, and in view of the low threshold test that a respondent had to satisfy to discharge its onus in matters of this nature, I am satisfied that the grounds Cobow have advanced for disputing Arabella's claims are objectively not unreasonable. With regard to the requirement of *bona fides*, in the context of the Badenhorst Rule (Badenhorst v Northen Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T)), Cobow in my view need not hold the belief that at the trial its defence(s) to the claim(s) would definitely succeed. What is required is that it genuinely wished to

contest the claim(s) and genuinely believes it has a reasonable prospect of success that the alleged facts which, if proved at a trial, would constitute a good defence to the claims made against it. In this regard see Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another 2015 (4) SA 499 (WCC) at para [67].

[42] On the papers filed of record, Cobow in my view has further demonstrated that despite refusing to pay Arabella's disputed claim(s), it has assets or readily realizable assets available to meet its liabilities as they fall due in the ordinary course of business and remain buoyant. On these facts, I see no reason why my residual discretion in matters of this nature should not be exercised in favour of Cobow.

[43] Since Cobow has discharged its onus that the claim(s) against it are disputed *bona fide* and on reasonable grounds it is unnecessary to refer the matter for *viva voce* evidence on the disputed issues. In this regard see Freshvest Investments (Proprietary) Limited v Marabeng (Proprietary) Limited [2016] JOL 36911 (SCA) at para [7].

[44] For these stated reasons it follows that the Application for provisional winding up of the Respondent (Cobow) cannot succeed and falls to be dismissed. Korevest fate, in the second case is inextricably wound up with that of Cobow and it follows that if the Cobow application has failed, then the Korevest application also falls to be dismissed.

[45] In the Result the following order is made.

The Application for the provisional winding up of Cobow (Pty) Ltd t/a Albourne Boutique Lodge Somerset West in case no. 4956/17 and the Application for the provisional winding up of Korevest Investment Group Proprietary Limited (Registration no. 2013/023166/07) in case no 4957/17, are dismissed with costs. Such costs to include the costs occasioned by the employment of two counsel.

LE GRANGE, J