8 FEBRUARY 2017

DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:

LIQUIDATION APPLICATIONS ARE INAPPROPRIATE WHEN A GENUINE DISPUTE OF FACTS EXISTS

In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168, the Supreme Court of Appeal (SCA) was afforded the opportunity to pronounce on the so called *Badenhorst* which provides that winding-up (liquidation) proceedings are not designed for the enforcement of a debt that is disputed on *bona fide* and reasonable grounds.

NEW SERIES

PUBLIC LAW:

AN AFRICAN EXODUS FROM THE ICC – BUT WHAT ABOUT THE WITNESSES?

Over the course of this series, we will build on the contextual foundation in this alert by establishing the current ICC witness protection framework and any extant problems within it, scrutinising potential issues that may arise as a result of any walkout, and critically considering some approaches to solving those problems.

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CLIFFE DEKKER HOFMEYR

BUSINESS RESCUE, RESTRUCTURING AND INSOLVENCY:
LIQUIDATION APPLICATIONS ARE INAPPROPRIATE WHEN A GENUINE DISPUTE OF FACTS EXISTS

To persist with a winding-up application in the face of, and with knowledge of, a factual dispute may result in a costs order being made against the applicant and a delay caused by having the matter referred to trial.

To avoid unnecessary wasted time and costs, a winding-up application should not be launched if there exists a genuine dispute of fact, or there is a reasonable prospect of such a dispute arising during the proceedings.

In *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168, the Supreme Court of Appeal (SCA) was afforded the opportunity to pronounce on the so called *Badenhorst* which provides that winding-up (liquidation) proceedings are not designed for the enforcement of a debt that is disputed on *bona fide* and reasonable grounds.

The rationale underpinning this rule is that winding-up proceedings are application proceedings and applications, as opposed to actions or trials, are determined on the evidence submitted on affidavit by both sides. A dispute of fact between the parties on the papers, without the benefit of any additional evidence to support one's argument, amounts in most instances to a "your word against mine" argument.

Therefore, in order to determine a matter which contains genuine disputes of fact, further evidence needs to be led including oral evidence from witnesses who can be also be cross-examined. Application proceedings do not contain adequate mechanisms to settle disputed facts.

To persist with a winding-up application in the face of, and with knowledge of, a factual dispute may result in a costs order being made against the applicant and a delay caused by having the matter referred to trial (to resolve the dispute). The *Badenhorst* rule is also intended to prevent the abuse of winding-up proceedings. Applications serve as a "fast lane" for legal processes and to bog them down with witnesses and cross-examinations and the like would serve to destroy the very purpose for which applications were devised.

The facts of the *Freshvest* case clearly illustrates this principle. An agricultural financing facility was made available by Freshvest Investments to Marabeng. When Marabeng failed to make its repayments in terms of the agreement, Freshvest launched an application to wind up Marabeng. Marabeng filed an extensive answering affidavit setting out various defences to Freshvest's claim including allegations that an unauthorised individual agreed fraudulently and collusively to the facilities in the name of Marabeng. Accordingly, Marabeng argued that the debts were not enforceable.

The SCA clarified that the onus on the respondent (Marabeng above), is discharged if it can show on the balance of probabilities that the indebtedness to the applicant is disputed on a *bona fide* and reasonable ground. If so found (and absent exceptional circumstances) the court is obliged to refuse the order for winding up and dismiss the application.

In light of the above, it stands that in order to avoid unnecessary wasted time and costs, a winding-up application should not be launched if there exists a genuine dispute of fact, or there is a reasonable prospect of such a dispute arising during the proceedings. The inverse of this is that a reasonable allegation of a *bona fide* dispute will be sufficient to defeat a winding-up application.

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PUBLIC LAW:
AN AFRICAN EXODUS FROM THE ICC – BUT WHAT ABOUT THE WITNESSES?

NEW SERIES

This is the **first alert in an ongoing series of six exploring the legal ramifications of an African exodus from the International Criminal Court for its witness protection programme**. In particular, the alerts will focus on the implications for witnesses currently in the relocation process, previously relocated witnesses, as well as future witness relocations.

On 20 October 2016, South Africa delivered a formal notice of withdrawal from the Rome Statute to the United Nations (UN), and has previously called on other African states to do the same in solidarity.

On 31 March 2005, the United Nations Security Council (UNSC) adopted Resolution 1593, in terms of which it referred the situation in Darfur from 1 July 2002 to the International Criminal Court (ICC or Court). Following the investigations of the Office of the Prosecutor, President Omar al-Bashir, the current President of Sudan, stands accused of several international crimes under the Rome Statute of the International Criminal Court (Rome Statute). On 4 March 2009, the Pre-Trial Chamber of the ICC issued a warrant of arrest for President al-Bashir based on charges of war crimes and crimes against humanity. This was followed by a second warrant of arrest based on charges of genocide, issued on 12 July 2010.

Fast forward to June 2015, when President al-Bashir was expected to attend the African Union Assembly in South Africa. At this point, the South African Government (SA Government) was under pressure from civil society organisations to arrest President al-Bashir upon his arrival in the country in accordance with the arrest warrants. However, it declined to do so, arguing that President al-Bashir was protected from arrest due to the immunity granted to him under the Diplomatic Immunities and Privileges Act, No 37 of 2001.

The Southern Africa Litigation Centre launched urgent proceedings in the Gauteng Division of the High Court, Pretoria (High Court) seeking an order compelling the SA Government to cause the arrest of President al-Bashir and declaring the failure to do so to be in breach of the Constitution (see *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] ZAGPPHC 402; 2015 (5) SA 1 (GP)). In the midst of the procedural nightmare that ensued, the High Court issued an interim order prohibiting

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PUBLIC LAW:
AN AFRICAN EXODUS FROM THE ICC – BUT WHAT ABOUT THE WITNESSES?

CONTINUED

If this cause ultimately finds enough support with the other African states, this could cause a number of problems for the ICC, particularly in relation to its witness protection programme.

President al-Bashir from leaving the country before a final order was issued in the case. The following day, the High Court issued a final order in which it ordered the SA Government to take "all reasonable steps" to arrest President al-Bashir, and declared the failure to do so to be inconsistent with the Constitution. Conveniently for the SA Government, however, it transpired that President al-Bashir had left the country earlier that same day.

On 20 October 2016, South Africa delivered a formal notice of withdrawal from the Rome Statute to the United Nations (UN), and has previously called on other African states to do the same in solidarity.

Although this action by South Africa is being challenged in litigation before the High Court for being constitutionally impermissible, Burundi and Gambia have already made moves to withdraw, while Kenya, Namibia and Uganda have also indicated their intention to follow suit (although Uganda has indicated that its decision hinges on the resolution of the African Union). Stepping away from the African continent, Russia has also signaled its intention to withdraw from the Rome Statute, and Philippines has since indicated that it may follow Russia's lead.

If this cause ultimately finds enough support with the other African states, this could cause a number of problems for the ICC, particularly in relation to its witness protection programme, the International Criminal Court Protection Programme.

Over the course of this series, we will build on the contextual foundation in this alert by establishing the current ICC witness protection framework and any extant problems within it, scrutinising potential issues that may arise as a result of any walkout, and critically considering some approaches to solving those problems. While there will be a distinct focus on the effect of an African walkout, given that Africa is the largest regional group in the ICC, it will become apparent that some of these problems may present themselves on the withdrawal of any States Party.

Sarah McGibbon
Overseen by Lionel Egypt

This schedule briefly outlines the focus of the coming instalments in this series:

Date of release	Topic
22 February 2017	**The Witness Protection Framework:** the mechanisms used by the ICC to place witnesses into protection, and the important role of state cooperation in this framework.
8 March 2017	**Potential Problems with the Witness Protection Framework:** What problems may arise as a result of any African exodus?
22 March 2017	**Enforcement Mechanisms – Part 1:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – for what does the Rome Statute provide?
5 April 2017	**Enforcement Mechanisms – Part 2:** Possible ways of holding states accountable in respect of their obligations to protected witnesses – what about new approaches?
19 April 2017	**Concluding remarks:** Summarising key points from the series and potential future steps.

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