



**HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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| (1) | REPORTABLE: Electronic reporting only |
| (2) | OF INTEREST TO OTHER JUDGES: No. |
| (3) | REVISED. |

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DATE

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SIGNATURE

Case No. 36162/13

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Applicant

and

SENTIO BUILDING (PTY) LIMITED

Respondent

JUDGMENT

MEYER, J

[1] The applicant, Firststrand Bank Limited, applies for the final winding-up of the respondent, Sentio Building (Pty) Limited, on the ground that it is unable to pay its

debts as contemplated in s 344(f) and described in s 345 of the Companies Act 61 of 1973 ('the old Act') and read with the provisions of s 9 of Schedule 5 of the Companies Act 71 of 2008 (the new Act). The application is opposed by the respondent.

[2] It is common cause that the applicant is a creditor of the respondent. As at 20 September 2013 the respondent's indebtedness to the applicant amounted to R10 587 660,02 and interest thereon at the applicant's prime lending rate plus 5%. The indebtedness arose as a result of monies lent and advanced to the respondent by the applicant pursuant to the conclusion of a written loan agreement on 8 February 2013. The respondent was obliged to repay the loan amount in monthly instalments and as at 20 September 2013 it was in arrears in the sum of R394 702,11. The respondent's default in the due payment of the instalments due in terms of the loan agreement, amongst others, entitled the applicant to withdraw from the agreement, which it elected to do by notice of termination of the loan agreement dated 24 July 2013. The moneys borrowed from the applicant were secured by a covering mortgage bond registered over an immovable property owned by the respondent, three suretyships and two cessions.

[3] The respondent failed to heed to the applicant's written statutory demand dated 16 August 2013 in terms of which the respondent was required to pay the sum R10 484 424, 27 and interest thereon that was then due to the applicant. The respondent has for three weeks thereafter neglected to pay the sum due or to secure or compound for it to the reasonable satisfaction of the applicant.

[4] On 27 September 2013 the applicant launched the present application in which it seeks the winding-up of the respondent. On 16 October 2013 the

respondent gave notice of its intention to oppose the application, but it did not file an answering affidavit. The matter was later settled between the parties, and their written agreement of settlement was made an order of court by Wepener J on 14 May 2014. The agreement of settlement reads as follows:

‘WHEREAS the Applicant has launched an application for the winding up of the Respondent under the aforesaid case number;

WHEREAS the Respondent has opposed the application

AND WHEREAS the parties are now desirous of settling the various disputes between them in respect of the application.

NOW THEREFORE THESE PRESENTS WITNESSETH THAT:

1. The Respondent acknowledges that it is indebted to the Applicant in the amount of R10 587 660,02 (TEN MILLION FIVE HUNDRED AND EIGHTY SEVEN THOUSAND SIX HUNDRED AND SIXTY RAND AND TWO CENTS) together with interest thereon at the rate of 5% per annum above the Applicant’s prime bank lending rate of 9% per annum calculated from 20 September 2013 to date of final payment and costs on the attorney and client scale (“the indebtedness”).
2. It is recorded that on or about 12 March 2014 the Respondent made payment of an amount of R800 000,00 to the applicant in respect of the indebtedness. It is furthermore recorded that the Respondent made a further payment of R142 000,00 to the Applicant on 11 April 2014 in respect of the indebtedness.
3. The respondent undertakes to settle the balance of the indebtedness as follows:
 - 3.1 the Respondent undertakes to make a payment of an amount of R142 000,00 to the Applicant within 7 (SEVEN) days from the date of signing of this agreement of settlement by both parties hereto;
 - 3.2 the Respondent thereafter undertakes to make monthly payments in the amount of R142 000,00 to the Applicant as from 7 June 2014 and thereafter on the same

day of each succeeding month, until such time as the indebtedness has been settled in full;

3.3 in addition to the foregoing, the Respondent undertakes to make a payment of R500 000,00 to the Applicant by no later than 11 October 2014.

4. All payments are to be made directly by the Respondent to the Applicant into the following bank account
5. Should the Respondent fail to make payment of any of the aforesaid amounts on due date, the Applicant shall be entitled to an order placing the Respondent under final winding up in the hands of the Master of the above Honourable Court and the costs thereof shall be costs in the final winding up.
6. This agreement of settlement is in full and settlement of all and any disputes which either party may have against the other, arising out of the application launched under the aforesaid case number.
7. No amendment, deletion, addition, variation or cancellation of this agreement of settlement shall be of any force or effect unless reduced to writing and signed by both parties hereto.
8. No relaxation, indulgence, extension, condonation or any act or omission afforded by the Applicant to the Respondent shall be regarded as a waiver of the Applicant's rights in terms of this agreement of settlement.
9. The parties agree to make this agreement of settlement an order of court.'

[5] The respondent also breached the payment terms of the settlement agreement which had been made an order of court. It only made payment of the instalment amounts of R142 000,00 to the applicant on 21 May, on 5 June and on 8 July 2014. Relying on clause 5 of the agreement of settlement the applicant adopted the stance that it was entitled to proceed with its initial application for the winding-up of the respondent. It filed a supplementary affidavit on 9 July 2015 in which it referred to the events that occurred subsequent to the filing of the founding affidavit.

The respondent persisted in its opposition of the applications and its answering affidavit was filed on 14 July 2015 whereafter the applicant's replying affidavit was filed on 4 August 2015.

[6] Relying on clause 6 which provides that the 'agreement of settlement is in full and final settlement of all and any disputes which either party may have against the other arising out of the application' in question, the respondent contends that the winding-up application was settled between the parties *in toto* and the settlement agreement constitutes a *novatio necessaria* which created an independent cause of action that is enforceable as such. The applicant, so the respondent argues, was enjoined to launch new proceedings instead of proceeding with its original application for the winding-up of the respondent. The applicant contends that in terms of clause 5 of the agreement of settlement it expressly reserved its right to proceed with the initial application for the winding-up of the respondent in the event of the agreement of settlement being breached. The respondent joins issue with the interpretation of clause 5 contended for by the applicant. The respondent also raised an argument that concerns a second application for the winding-up of the respondent, which was launched by the applicant, but I do not deem it necessary to deal with this argument since the applicant had withdrawn the that application.

[7] Counsel are *ad idem* that whether the applicant is entitled to a final winding-up order of the respondent in terms of its initial winding-up application depends on a proper construction of clause 5 of the agreement of settlement. Another alternative argument raised by the respondent in its answering affidavit is that clause 5 of the agreement of settlement amounts to a 'consent' to a winding-up order, which, so the respondent contends, is contrary to public policy. The respondent confined its opposition to the winding-up application to these questions.

[8] The respondent's indebtedness to the applicant is admitted. The respondent is deemed unable to pay its debts within the meaning of s 345(1)(a) as read with s 344(f) of the old Act. The respondent did not provide an iota of evidence to show that it is not commercially insolvent in order to rebut the deeming provision of s 345(1)(a). Furthermore, the fact that the respondent indisputably so dismally failed to comply with its payment obligations in terms of the agreement of settlement provides further proof of its commercial insolvency within the meaning of s 345(1)(c) as read with s 344(f). Furthermore, counsel agreed that the formal requisites for a final winding-up order have been met. I am satisfied that the formal and substantive requisites for a final winding-up order have been established.

[9] I now turn to consider the proper interpretation of clause 5 of the agreement of settlement which was made an order of court. It must be interpreted in accordance with the established principles of interpretation. 'The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18-19.) Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. (*Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.) Regarding the interpretation of court orders following on settlement agreements, the Constitutional Court in *Eke v Parsons* (CCT214/14) [2015] ZACC 30, paras 29-30, held as follows:

'[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

“The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. . . . The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. . . . ‘

[10] The meaning to be attributed to clause 5 as contended for by the respondent is not sensible and has no basis in its language, in context or in its manifest purpose. The settlement agreement was a compromise of the application for the winding-up of the respondent. The terms of the settlement agreement created clear payment obligations with which the respondent had to comply. Clause 5 spells out a consequence for non-compliance with those obligations: the applicant shall be entitled to an order placing the respondent under final winding-up. The applicant, therefore, conditionally abandoned the right to seek an order for the final winding-up of the respondent.; the condition was that the respondent should strictly perform the payment obligations assumed by it in terms of clause 3. (Compare: *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D&CLD) at 574B-C.) Clause 5 was clearly intended to have contractual effect. It is not merely an incidental provision as the respondent would have it. (See: *ABSA Bank Ltd v Swanepoel* (246/03) [2004] ZASCA 60, paras 6-7) Reference to the context supports this contractual intent.

[11] An agreement of settlement excludes proceedings on the original cause of action unless the agreement expressly or by clear implications provides that a party may revert to its original cause of action in the event of non-compliance with the terms of the settlement agreement. (See: *Van Zyl v Niemann* 1964 (4) SA 661 (A), at 669-670.) The manifest purpose of clause 5 is to reserve to the applicant the right to persist with its application for the final winding-up of the respondent in the event of the respondent not strictly complying with its payment obligations which it assumed in terms of clause 3 of the agreement of settlement.

[12] The interpretation contended for by the respondent renders clause 5 superfluous and without purpose. In the event of non-compliance by the respondent with its payment obligations in terms of the settlement agreement the applicant would in any event as creditor of the respondent pursuant to the settlement agreement be entitled to make an application to court for the winding-up of the respondent. But clause 5 preserves the applicant's right to proceed with its original application for the winding-up of the respondent *qua* creditor of the respondent pursuant to the conclusion of the loan agreement between the parties.

[13] Nothing in the language used requires the applicant to make yet another application to court for the winding-up of the respondent in the event of the respondent's non-compliance with its payment obligations. Clause 5 refers to the applicant's entitlement 'to an order placing the Respondent under final winding up' in such event. The agreement of settlement also does not provide for the withdrawal of the winding-up application. On a proper construction of clause 5 of the settlement agreement the applicant abandoned the right to seek an order for the final winding-up of the respondent upon the basis as set out in its original application for the final winding-up of the respondent on condition that the respondent should strictly perform

the payment obligations assumed by it in terms of clause 3 of the settlement agreement.

[14] The applicant's contractual entitlement to a winding-up order in the event of the respondent's non-compliance with its payment obligations in terms of the settlement agreement is by necessary implication subject to the court being satisfied that a final winding-up order should in all the circumstances be granted. Corbett JA, in *Rennie NO v Gordon & another* 1988 (1) SA 1 (A), said that '[w]ords cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands'. I am of the view that effect cannot be given to clause 5 'as it stands' without by necessary implication importing that condition. The applicant's entitlement to a final winding-up order must be competent and proper. The court to decide on the appropriateness and competency of a final winding-up order is not the court which made the settlement agreement an order of court, but the court before which the final winding-up order is sought. A court is not bound to accept anything agreed to by the parties and to make it an order of court. As was held by the Constitutional Court in *Eke* (supra), para 25, '[t]he order can only be one that is competent and proper.' Thus, the contention that clause 5 is against public policy since it permits a company to consent to a liquidation order without the need for a proper case to be made out, has no merit.

[15] In the result the following order is made:

- (a) The respondent is placed under final winding-up in the hands of the Master.
- (b) The applicant's costs are included in the costs of liquidation.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing: 26 January 2016
Date of judgment: 1 April 2016
Applicant's counsel: FJ Becker SC
Instructed by: Smit Jones & Pratt, Parktown, Johannesburg
Respondent's counsel: CE Thompson
Instructed by: Martin van Vuuren Attorneys, Northcliff, Johannesburg