

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 5098/2022

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

13/06/2023

DATE


SIGNATURE

In the matter between:

**FIRSTRAND BANK LIMITED
(FIRST NATIONAL BANK DIVISION)**

Applicant

and

KELIANA GROUP (PTY) LTD

Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 13 June 2023.

JUDGMENT

MUDAU, J:

- [1] This is an application for the liquidation of the respondent on the grounds that it is unable to pay its debts as contemplated by section 344(f), read with

section 345(1)(c) of the Companies Act 61 of 1973 ("the Act"). The applicant alleges that the respondent is commercially insolvent. The subsection reads as follows:

"345 (1) A company or body corporate shall be deemed to be unable to pay its debts if—

...

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

In limine

- [2] First, counsel for the respondent, Adv Makhambeni raised from the bar, albeit in closing submissions that this Court lacked jurisdiction to entertain the application as opposed to Gauteng Division, Pretoria where the agreement was entered. Counsel referred this Court to the matter of *Export Development Canada and Another v Westdawn Investments (Pty) Ltd and Others*,¹ which is a judgment by this Court (per Kathree-Setiloane J). In that case, the respondents did not submit to the jurisdiction of this Court but contended that "their entitlement not to do so arises from both the Facility and the Lease Agreements which accord exclusive jurisdiction to the Court of England and Wales".²
- [3] The contention was found to be baseless since section 21(1) of the Superior Courts Act³ specifically provides that the Court has jurisdiction over all persons residing or being in its area of jurisdiction. Kathree-Setiloane J correctly concluded that as Westdawn is a company incorporated in South Africa with its registered office and its principal place of business being in Sandton, Johannesburg, this Court has jurisdiction.
- [4] In this instance, the parties as per clause 20.4 of their agreement ("DPF2"), agreed and consented to the High Court of South Africa, Gauteng Local Division, Johannesburg having jurisdiction to hear and determine any suit, action or proceeding which may arise in respect of this Agreement. The respondent's registered address in this matter is situated at Parktown, Johannesburg as

¹ [2018] ZAGPJHC 60.

² *Id* at para [39].

³ 10 of 2013.

indicated below. There is more. In terms of GN 30 published in GG 39601 of 15 January 2016,⁴ the local seat, Johannesburg has concurrent jurisdiction with the main seat, Pretoria until such time that the area of the local seat is determined in terms of section 6(3)(c) of the Superior Courts Act, 2013. It follows, accordingly, that this court has jurisdiction.

Background facts

- [5] The applicant, Firststrand Bank Limited (“Firststrand Bank”) is a public company which is duly registered and incorporated with limited liability according to the company laws of the Republic of South Africa and is registered as a Bank in terms of the Banks Act.⁵ The respondent, Keliana Management Company (Pty) Ltd (“Keliana”) with its registered address situated at 15 Jubilee Road, Parktown, Johannesburg, is a company duly registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa.
- [6] On 15 March 2018, the applicant and the respondent entered into a Structured Loan Credit Facility agreement (per DPF2) in terms of which the applicant agreed to lend and advance monies to the respondent. The facility was a maximum sum of R30 000 000.00. The terms of the Facility Letter were, *inter alia*, that the applicant would be entitled to levy interest on the facility at the applicant's prime interest rate from time to time less 0.95% per annum, which at the inception of the Agreement amounted to 9.3%.
- [7] It is common cause that the respondent agreed to repay the amount due to the applicant by making payments to the applicant of 120 monthly instalments. These payments were to be made on the first day of every month and were to be determined depending on the amount of the facility advanced and the interest rate applied. Should the Maximum Facility Sum be advanced, and the bank's prime interest rate remained constant, it was agreed that the instalment amount would be R385 140.18.

⁴ Determination of Areas under Jurisdiction of Divisions of the High Court of South Africa GN 30 GG 39601, 15 January 2016.

⁵ 94 of 1990.

[8] As required in terms of the Agreement, the respondent furnished the applicant with the following security to secure the obligations to the applicant:

- (a) A first ranking mortgage bond in the capital amount of R30 000 000.00 (Thirty Million Rand), plus an additional sum in the amount of R6 000 000.00, over Portion 9 of Erf 44 Sandhurst Township in the name of the Respondent as mortgagor;
- (b) a cession of an insurance policy covering the mortgaged property; and
- (c) A suretyship by Ms Nonhlanhla Ruth Mavie, the sole director of the respondent, limited to all amounts due or which may become due to the applicant from time to time under the agreement.

The mortgage bond, once registered, was to remain in place until the total amount of all amounts owed by the respondent to the applicant had been fully and finally discharged to the applicant's satisfaction.

[9] In time, on the applicant's version, the respondent breached the repayment terms of the agreement in that it failed and/or refused to honour its obligations in terms of the agreement. As of 23 August 2021, the respondent was in arrears with its repayments towards the outstanding balance in an amount of R712 663.40. Consequently, the applicant gave written notice to the respondent by prepaid registered post of the default and afforded the respondent 10 (ten) days to rectify the breach failing which the full balance outstanding would immediately become due and payable. The applicant alleges that the respondent failed to respond to the demand and furthermore failed to make payment of the arrears amount. As of 1 October 2021, the instalments due and the arrears represented an amount of R 1 076 193.15.

[10] By 1 October 2021, the respondent was and remained indebted to the applicant in the amount of R27 280 749.01, together with interest thereon at the rate of 6.05% per annum calculated daily and compounded monthly in arrears from 2 October 2021. as per the certificate of balance signed by a manager of the applicant's Recoveries Department consistent with their agreement.

- [11] On 25 October 2021, the applicant addressed a letter in terms of section 345(1)(a) of the Companies Act to the respondent demanding payment of the aforesaid amount, failing which winding-up proceedings would be launched. However, the respondent failed to pay. The applicant also alleged that the respondent failed to make payment to the City of Johannesburg with regards to rates, taxes and other charges and is currently indebted to the City of Johannesburg in the amount of R291 802.70. as evidenced by annexure "DPF8", a Tax Invoice by the City of Johannesburg, dated 17 January 2022. The applicant submits that it will be in the interests of the respondent's general body of creditors for the respondent to be placed under a winding-up order.
- [12] The affidavit setting out the various grounds opposing this application was served on the applicant on 3 June 2022 and therefore late by months. The answering affidavit has been deposed to by the respondent's sole director, surety, and co-principal debtor in respect of all debts that are owed by the respondent to the applicant. It is trite that the power of the court to condone non-compliance with its own Rules is subject to the requirement and safeguard that good cause must be shown.⁶ Also, our courts have consistently said that an element of good cause is that the respondent must demonstrate that it has a *bona fide* case. In this matter however condonation, was in argument, not opposed and instead, abandoned. Accordingly, I do not find it necessary to deal with the condonation application for reasons that are apparent from the order below.
- [13] The respondent initially contended that the applicant should be compelled into mediating the matter pursuant to Rule 41A of the Uniform Rules and proposed a settlement arrangement as opposed to liquidation, which approach was correctly abandoned at the hearing of this application. In any event, Uniform Rule 41A is a voluntary process and can only be triggered by agreement between parties to a dispute.
- [14] The deponent to the answering affidavit, Mrs Mavie takes issue that the applicant first issued summons against her personally on 1 February 2022, in her capacity

⁶ See *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463H.

as the surety for the loan. It is further alleged that “the action involves the same debt, claimed on the same agreement, in terms of the same factual matrix, between the same parties”.⁷ Mrs Mavie contends that, as the sole director of the respondent, their destinies are intertwined. The defence of *lis alibi pendens* depends on the existence of a pending earlier action. The overriding principle is that it is *prima facie* vexatious to bring two actions regarding the same subject matter between the same parties. It is trite that the requisites for a valid plea of *lis pendens* are that the proceedings must be between the same parties and thing. Also, that it must arise from the exact cause of action.⁸

[15] *Prima facie*, it is vexatious to bring two actions in respect of the same subject matter. In this instance however, as the applicant correctly pointed out, the action instituted against the surety is premised upon a different cause of action to that of liquidation, which is to collect the outstanding debt against the surety which debt the surety is liable for *in solidum* with the respondent. The application before this Court is statutory for the purposes of liquidating the respondent pursuant to the section 345 letter, and the respondent’s failure to act thereupon. Moreover, the action instituted is not between the same parties as that of the application before this Court. In this instance, the respondent is a legal entity with obligations separate from those of the director in her personal capacity. Accordingly, the *lis pendens* defence is without merit.

[16] On the version of the respondent, its business prospects demonstrate that “the income of the business will re-establish itself on the same level if not higher than which it was prior to interruptions caused by COVID-19. Moreover, by way of example, the respondent asserts that the letter of demand, “DPE 4(1)”, was issued on the 23 August 2021 for an amount of R 712 663.40. The amount in DPE 4(1) was for the months of July 2021 and August 2021. Given that the monthly payment was R 385 140.14, the demand was an arrears of less than 2 months, even though the Respondent had not generated any income since March 2020.

⁷ Answering Affidavit at para 111.

⁸ See *Williams v Shub* 1976 (4) SA 567 (C) at 570C.

- [17] In opposing this application on merit and by way of summary, the respondent contends, *inter alia*, that the reason for the breach stems from the resultant effect of the COVID-19 pandemic on its business resulting in cash flow problems and therefore, it should be excused from non-payment. By way of a counterclaim, the respondent contends that because of the global COVID-19 pandemic, restrictions imposed by government prohibited trade in its industry which resulted in the arrears. The respondent contends that it is not insolvent, which is evidenced by a comparative assessment of the value of the company's assets and liabilities. The respondent attached annexure "AA6" titled, "Assumptions, Revenue Growth, Inflation, and Gross Profit Margin". *Prima facie* the document, the author is unknown. There is no confirmatory affidavit in support of AA6. Accordingly, AA6 constitutes hearsay evidence.
- [18] In any event, if one was to be charitable and consider AA6, the gross profit as at February 2022 is R4 059 479. Considering that the operating costs are the sum of R5 772 092. On its own version therefore, the respondent is operating at a loss. The 2023 figures are assumptions or projections and do not help the respondent. The respondent alleges that the property concerned is valued at R40 million but failed to attach any proof whatsoever in the form of independent valuations of the property in support of this allegation. It follows accordingly that the suggestion of placing R40 million as the value of the property is nothing more than mere speculation.
- [19] By its own admission however, as per "AA7", which is the bank statement attached to the answering affidavit, in the period between 31 October 2019 and March 2020, the respondent missed several debit orders (by way of example, 31 October 2019, 30 November 2019 and 10 February 2020). The respondent relied with reference to this Court's decision in *Freestone Property Investments*.⁹ The court considered the effect of the declaration of the state of disaster and its associated regulations on the lease agreements as an issue to be determined in the context of the doctrine of supervening impossibility of performance. Reliance on *Freestone Property Investments* is misplaced.

⁹ *Freestone Property Investment (Pty) Ltd v Remake Consultants and Another* 2021 (6) SA 470 (GJ) ("*Freestone Property Investments*").

[20] The respondent was already in breach of its payment obligations to the applicant before it made it clear with reference to the authorities cited therein that “[o]ur law is settled that a *vis major* or *casus fortuitus* that makes it uneconomical or no longer commercially attractive for a party to carry out its payment obligations cannot constitute a basis to be excused from performance”.¹⁰ As to the respondent’s indebtedness to the applicant, this is not disputed on any grounds whatsoever. Neither is there any material dispute about the amount of indebtedness. The court’s discretion to refuse an order is limited because a creditor with an unpaid debt is entitled *ex debito justitiae* to an order of winding-up.¹¹ Section 347 of the Companies Act, 1973 stipulates the powers of a court upon considering an application. The relevant portion provides:

“The court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just . . .”.

[21] On the affidavits, there is a *prima facie* case in favour of the applicant, justifying a provisional order of winding-up in the absence of a rebuttal and upon the application of the rule in *Plascon-Evans*.¹²

[22] Section 346(A)(1)¹³ requires that the application papers be furnished to various people, namely, every registered trade union that represents the employees; the employees themselves; SARS; and the company unless the application is made by the company. There's an affidavit that has been filed by the applicant's attorneys whereby it is confirmed that the necessary statutory requirements have been fulfilled.

Order

¹⁰ Id at para 23.

¹¹ *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597E–F.

¹² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD).

¹³ Companies Act 61 of 1973 at (a)–(d).

[23] The following order is made:

- 23.1 A provisional winding-up order is granted against the respondent returnable on 4 September 2023.
- 23.2 This order is to be published in the Government Gazette and The Star Newspaper. Service on the registered office is dispensed with.
- 23.3 The costs of this application will be costs in the liquidation of the respondent.



T P Mudau
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 02 May 2023

Date of Judgment: 13 June 2023

APPEARANCES

For the Applicant: Adv. N Alli

Instructed by: Jay Mothobi Inc

For the Respondents: Adv. Makhambeni

Instructed by: SA Maninjwa Attorneys