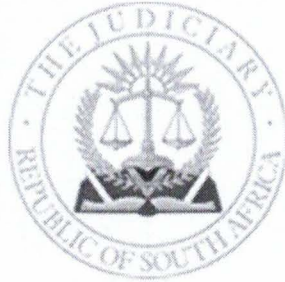


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 28966/2020

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

[16 September 2022]


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SIGNATURE

In the matter between:

**THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH AFRICA**

Applicant

and

PHOSFERT TRADING (PTY) LTD
(Registration number: 2014/133513/07)

Respondent

J U D G M E N T

MUDAU, J:

- [1] This is an application brought for an order that the respondent be provisionally, alternatively, finally wound up in terms of section 344(h) of the Companies Act 61 of 1973, and that its affairs be placed in the hands of the Master based on a

suretyship agreement. The applicant alleges that that the respondent is unable to pay its debts, alternatively, that it would be just and equitable to do so, alternatively, that the respondent is not meeting the solvency and liquidity test as set forth in Section 4 of the Companies Act 71 of 2008 ("the Act"). The applicant also alleges that several irregularities need to be investigated and transactions need to be set aside as dispositions in terms of the Insolvency Act.

Background facts

- [2] The Applicant Is the Land and Agricultural Development Bank of South Africa, a juristic entity established in terms of the Land and Agricultural Development Bank Act 15 of 2002. The Respondent is Phosfert Trading (Pty) Ltd, a company with limited liability and duly registered in accordance with the laws of the Republic of South Africa.
- [3] On 29 June 2012, the applicant and Grocapital Financial Services ("GroCap") entered into a Sale Agreement and Service Level Agreement ("SLA") whereby Grocap sold, ceded and delegated the rights, title and interest in and to its existing corporate debtors' book to the applicant. The SLA makes provision, *inter alia*, that "*all rights to sue on all undertakings and obligations in favour of GroCap, in relation to the Sale Book Debt(s) and the right to exercise all powers of GroCap in relation to the Sale Book Debt(s)*".¹
- [4] The SLA also makes provision that "*all other rights, title, interest and obligations (both present and future) in relation to the Sale Book Debt(s)*" vests with the

¹ Clause 2.2.2.2.

applicant.² On 19 September 2016, Agri Trading Services (Pty) Ltd ("ATS") entered into a facility agreement with Grocap, followed by others on 8 August 2017 and 17 November 2018, respectively. On 20 November 2018, the respondent signed a cross deed of suretyship in favour of ATS and Agri Oil Mills (Pty) Ltd ("AOM"). Consequently, the applicant contends that the respondent bound itself as surety and co-principal debtors to both ATS and AOM in favour of Grocap, the full indebtedness of both parties being now due and payable. On the same day, ATS ceded its debtors book in favour of Grocap as well as its insurance policies in favour of Grocap.

[5] On 22 November 2018, AOM entered into a facility agreement with Grocap. On 8 January 2019, an application for the liquidation of ATS was issued out in this court. A final order of liquidation of ATS was granted by this court on 28 November 2019. Subsequently, on 13 May 2021, Koen J granted an order for the provisional liquidation of AOM. The applicant contends that ATS and AOM are debtors of the applicant to the combined sum of R 122,308,995.58 as at 11 February 2019, excluding further interest and costs for which the respondent is indebted as surety in *solidum* for and co-principal debtor, jointly and severally, with each of the Agri group of companies.

[6] The surety agreement made provision, in relevant part that, a certificate signed by any manager of GroCap would be sufficient proof of any applicable rate of interest and of the amount owing in terms of the agreement or of any other fact relating to the suretyship for the purposes of judgment, including provisional

² Clause 2.2.2.6.

sentence and summary judgment, proof of claims against insolvent and deceased estates or otherwise, and if the sureties disputed the correctness of such certificate, they would bear the onus of proving the contrary. It would not be necessary to prove in such proceedings the appointment or capacity of the person signing such certificate. GroCap and the applicant have called on ATS to make payment of the total outstanding amount on 15 February 2019. ATS and AOM, and therefore the respondent as surety, have failed to pay the amounts due to the applicant despite demand. The applicant alleges that the respondent evidently does not meet the solvency and liquidity test as envisaged in the Act.

- [7] The respondent opposes the relief sought against it on a number of grounds. Properly distilled, it asserts that it is a solvent investment holding company. The respondent disputes the alleged indebtedness to the applicant. It also disputes that it undertook suretyship obligations towards GroCap. The deponent to the answering affidavit, its director, Rohit, alleges that she was induced by fraud to sign a page *“as shareholder of ATS authorising and consenting to Hugo renewing ATS's financial facilities with the bank”*. She further states that, *“when signing the identified document, I did not give any suretyship undertaking on behalf of the respondent nor was it my intention to do so”*.

The respondent's case

- [8] The respondent contends that the applicant did not make out a proper case for a just and equitable winding-up of the respondent. The respondent contends that the applicant has not proven the underlying principal debts (one in relation to ATS and the other in relation to AGM) to which the suretyship is alleged to

relate because the facility agreements upon which the applicant relies as a foundation to the principal debts, were themselves subject to suspensive conditions. According to the respondent, the applicant has not proven that such suspensive conditions were fulfilled or waived, and so has not proven that the facility agreements came into existence.

- [9] The respondent further contends that the applicant has not proven that it purchased and obtained cession of the principal debts because acquiring the principal debts constituted a transaction(s) that fell outside the applicant's powers to conclude and was therefore impermissible, invalid and unenforceable.

The law

- [10] Section 344 of the Companies Act 61 of 1973 ("the Companies Act"), *inter alia*, provides that a company may be wound up by a Court if it is unable to pay its debts or if it appears to the Court that it is just and equitable that the company should be wound up. Section 346(1)(b) of the Companies Act provides that a creditor may apply to liquidate its debtor. It is trite that an application for liquidation is not a mechanism to collect debt, but a mechanism launched where a creditor is convinced, on the available evidence, that the company is insolvent and a *concurso creditorum* must be established.

- [11] As Berman J puts it in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd*:³

"The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which

³ 1993 (4) SA 436 (C) at 440F.

a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading...”

- [12] The SCA, in *Murray NO & Others v African Global Holdings (Pty) Ltd & Others*,⁴ considered and reiterated the test for commercial insolvency. Wallis JA held as follows:

“[23] There is no definition of a solvent company in the 2008 Act. Initially this occasioned some difficulty in various high courts, as litigants sought to avoid compulsory winding-up under the 1973 Act on the grounds that they were solvent and hence could only be wound-up in terms of the 2008 Act. The confusion was set to rest by the decision of this court in *Boschpoort*. It decided that a solvent company for the purposes of the 2008 Act is a company that is commercially solvent. It matters not that its assets may exceed its liabilities if it is commercially insolvent. Conversely, it may be commercially solvent despite the fact that its liabilities exceed its assets. If it is commercially insolvent, it is liable to be wound-up in terms of the provisions of the 1973 Act and it may not be wound-up in terms of the 2008 Act”.

- [13] The high-watermark of the respondent’s case is its reliance on *iustus error* when Rohit authorised and consented to Hugo renewing ATS’s financial facilities with the bank. In our law, however, the general rule is that whoever signs a document is ordinarily taken to have assented to what appears above his or her signature

⁴ 2020 (2) SA 93 (SCA) para 23.

based upon the *caveat subscriptor*⁵ principle. The rule can be traced to the oft-cited decision in *Smith v Hughes*⁶ where it was explained that:

“If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”

Analysis

[14] The defence raised by the respondent falls on the first hurdle as Rohit concedes that the document was signed to renew ATS’s financial facilities, which includes the security demanded in the form of suretyship. I am fortified in my view in this regard because Rohit did not only sign the suretyship but also the resolution referred to therein, which unequivocally refers to and agrees to the unlimited cross suretyship. Significantly, Rohit also signed a resolution as director of the principal debtor, ATS, which also authorised the surety. Accordingly, the respondent’s version is so far-fetched and untenable that this court is justified in rejecting them on the papers.⁷

[15] Importantly, the proffered defence of *iustus error* cannot succeed and is not a basis for defence. On the respondent’s own version, Rohit was allegedly induced to sign the suretyship by her co-shareholder and not by the applicant or the cessionary. Recently, the recent Supreme Court of Appeal in *Airports*

⁵ See *Burger v Central South African Railways* 1903 TS 571.

⁶ (1871) L R 6 QB 597 at 607.

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H – 635C.

Company SA Ltd v Masiphuze Trading (Pty) Ltd and Others,⁸ a matter where the surety raised a strikingly similar defence, held:

"[25] In this case Mr Nemukula claimed that he was misled by the failure of his business associates to inform him that he was signing a deed of suretyship. If the approach of Fagan CJ is adopted and we ask whether he, as the party seeking to resile from the agreement, is to blame for the situation in which he found himself, the answer is clear. It was his own failure to check the documents that he was signing – a not particularly onerous task for an experienced businessman – that led to the situation in which he found himself. If one asks the question postulated in Sonap, whether Mr Nemukula led ACSA to believe that his declared intention to be bound by the deed of suretyship represented his actual intention, the answer must be in the affirmative. On either basis it was not open to Nemukula to rely upon the defence of *iustus error*."

[16] In the instant case, GroCap made no misrepresentation to the respondent, and there is no suggestion on the respondent's papers that GroCap knew or ought, as a reasonable person, to have known of the respondent's mistake. The necessary conclusion is that the respondent is bound by the deed of suretyship as surety for and co-principal debtor's indebtedness to Grocap under the facility agreement.

[17] As to the respondent's denial of the indebtedness, the fact that the principal debtor, ATM, has admitted under oath that it is indebted to the cedent in the amount of R 96, 713, 591.00, puts this matter to rest. The challenge is therefore

⁸ Unreported SCA decision with neutral citation (1120/2018) [2019] ZASCA 150 (22 November 2019) para 25.

not on reasonable grounds. It does not lie in the mouth of the respondent to, without adducing any evidence to the contrary, deny that the claim was ceded to the applicant. Cession does not require the consent of the debtor and is strictly an agreement between the cedent and cessionary. In our law, cession is complete when the cedent and cessionary reach finality on the act of cession.⁹

[18] As cessionary, the applicant is entitled to enforce all rights that previously vested in the cedent, including the enforcement of rights related to securities provided to the cedent as per their SLA. The respondent has not provided any countervailing evidence to dispute that the claim was in fact ceded. Accordingly, such a bald or bare denial by the respondent, does not constitute a defence as the applicant's version is, in this instance, not seriously or unambiguously addressed.¹⁰

[19] The respondent contends that the cession is void as it does not accord with the objects under Section 3 of the Land and Agricultural Development Bank Act 15 of 2002 ("the Land Bank Act"). The proposition stands to be rejected because on the respondent's own version, the business of both Agri Trading Services and Agri Oil Mills¹¹, involves the business of "the procurement of soya beans, crushing them to produce soya oil and soya cake and selling the end products into the market". This falls squarely within the objects contained in Section 3 of the Land Bank Act which provides:

⁹ *National Sorghum Breweries Ltd v Corpcapital Bank Ltd* 2006 (6) SA 208 (SCA para 1.

¹⁰ See *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13 and also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162-1163.

¹¹ Paragraph 98 on paginated page 024-21.

“3(1) The objects of the Bank are the promotion, facilitation and support of-

- (a) equitable ownership of agricultural land, in particular the increase of ownership of agricultural land by historically disadvantaged persons;
- (b) agrarian reform, land redistribution or development programmes aimed at historically disadvantaged persons or groups of such persons for the development of farming enterprises and agricultural purposes;
- (c) land access for agricultural purposes;
- (d) agricultural entrepreneurship;
- (e) the removal of the legacy of past racial and gender discrimination in the agricultural sector;
- (f) the enhancement of productivity, profitability, investment and innovation in the agricultural and rural financial systems;
- (g) programmes designed to stimulate the growth of the agricultural sector and the better use of land;
- (h) programmes designed to promote and develop the environmental sustainability of land and related natural resources;
- (i) programmes that contribute to agricultural aspects of rural development and job creation;
- (j) commercial agriculture; and
- (k) food security.

(2) The Bank must achieve its objects by—

- (a) providing financial services to promote and facilitate access to ownership of land for the development of farming enterprises and for agricultural purposes by historically disadvantaged persons;
- (b) providing financial services in support of any of its objects;
- (c) facilitating and mobilising private sector finance to the agricultural sector; and
- (d) providing such assistance as is necessary for carrying out the objects of the Bank.”

Conclusion

[20] The applicant, as liquidating creditor, only needs to prove the respondent's indebtedness of over R100.00, which it did by virtue of the contractually agreed certificates of balances over and above the principal debtor's admission under

oath. As for the dispute regarding the calculation of indebtedness, the respondent asserts without more, that it is not “*able to scrutinise the applicant’s claim indebtedness any further than to say that it appears inaccurate*”. Consequently, the respondent has failed to raise a real, material or *bona fide* dispute of fact. On the principles enunciated in *Kalil v Decotex (Pty) Ltd & Another*,¹² a provisional order is justified.

[21] Order

1. The respondent is placed under provisional liquidation;
2. All persons who have a legitimate interest are called upon to put forward their reasons why this court should not order the final winding up of the respondent on 17 October 2022 at 10h00 or so soon thereafter as the matter may be heard;
3. A copy of this order must be served on the respondent at its registered office;
4. A copy of this order shall be published forthwith once in the Government Gazette and a national newspaper;
5. A copy of this order shall be served on each known trade union;
6. A copy of this order shall be served on the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the respondent’s premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which, to the front door of the premises from which the respondent conducted any business at the time of the presentation of the application;

¹²1988 (1) SA 943 (A) at 976A-B.

7. A copy of this order shall be forwarded to each known creditor by prepaid post or by electronically receipted telefax transmission;
8. A copy of the order shall be served on the South African Revenue Service;
and
9. Costs of the application shall be costs in the liquidation.



MUDAU J
[Judge of the High Court]

APPEARANCES

For the Applicant:	Adv L van Gass
Instructed by:	VAN GREUNEN AND ASSOCIATES
For the Respondents:	Adv. W. Strobl
Instructed by:	KRAMER VILLION NORRIS INC
Date of Hearing:	27 July 2022
Date of Judgment:	15 September 2022