



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 3894/2018

In the matter between:-

STANDARD BANK OF SOUTH AFRICA LTD

Applicant

and

BLOEMFONTEIN CELTIC FOOTBALL CLUB (PTY) LTD

Respondent

JUDGMENT BY: C. J. MUSI, JP

HEARD ON: 27 JUNE 2019

DELIVERED ON: 12 SEPTEMBER 2019

- [1] The applicant, Standard Bank of South Africa Ltd, sought an order for the provisional liquidation of the respondent, Bloemfontein Celtic Football Club (Pty) Ltd (registration number 2015/344554/07).
- [2] During December 2015 the applicant and the respondent entered into six separate home loan agreements in terms of which R 3 693 664.00 was

loaned and advanced to the respondent by the applicant. Mortgage bonds were registered as security over all six properties.

- [3] The respondent defaulted. On 25 April 2018 the applicant served notices in terms of section 129(1) of the National Credit Act¹ on the respondent in respect of each of the agreements. It also served notices in terms of section 345(1)² of the Companies Act, 61 of 1973 read with item 9 of schedule 5 of the Companies Act, 71 of 2008 in respect of each of the outstanding amounts owed by the respondent.
- [4] On 12 July 2018, in terms of the certificate of balance, the respondent owed the applicant approximately R 6 134 474.12 as a result of defaulting on the loan agreements.

¹ Act 34 of 2005. Section 129(1) and (2) provides:

- (1) If the consumer is in default under a credit agreement, the credit provider-
- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
 - (b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-
 - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and
 - (ii) meeting any further requirements set out in section 130.
- (2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order...

- ² (1) A company or body corporate shall be deemed to be unable to pay its debts if-
- (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
 - (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
 - (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct, and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or
 - (b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or
 - (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

- [5] The respondent failed to reply to the section 345(1) notices and then failed to effect payment, or to secure or compound for it, to the reasonable satisfaction of the applicant within three weeks of the service of the notices, or at all.
- [6] On 14 May 2018 the respondent's attorney responded to the respective section 129 notices. He indicated that he was instructed to try and solve the matter amicably by devising a payment plan for the outstanding arrears owed by the respondent. Furthermore, the respondent proposed to settle all the outstanding arrears on 15 June 2018. The respondent did not, however, honour this undertaking.
- [7] On 2 August 2018 the applicant instituted liquidation proceedings against the respondent on the basis that the respondent should be deemed unable to pay its debts. On 13 August 2018, the respondent filed a notice of its intention to oppose the application.
- [8] The parties had settlement discussions which resulted in them entering into a memorandum of agreement. In terms of the agreement, they recorded that the respondent was in arrears with its monthly payments of the various home loans in the amount of R 481 632. 84. They agreed that the last mentioned amount should be paid by 31 August 2018 and that the full outstanding amounts due and owing in respect of all six home loan agreements would be settled by 28 February 2019.
- [9] The respondent also signed a power of attorney in terms of which it gave the applicant the right to sell the properties on its behalf and to settle or reduce its indebtedness to the applicant in the event of its default. The parties furthermore agreed that:

2.1 If Celtic Football Club fails at any time during the six month period to make monthly payments in respect of one or more of the various home loan accounts then the full outstanding amount on all the accounts become due and payable.

2.2 In this event Celtic football agrees that Standard Bank may enrol the liquidation application, on an unopposed basis, to obtain a liquidation order, under case number 3894/2018.

- [10] They also agreed that if the respondent did not settle the full outstanding amounts by 28 February 2019, the applicant could sell the properties in terms of the power of attorney or proceed with the liquidation application on an unopposed basis as set out in paragraph 2.2 of their agreement.
- [11] The respondent paid the monthly instalments as agreed upon. However, it did not settle its full indebtedness to the applicant.
- [12] On 31 May 2019, the applicant served its supplementary founding affidavit and a notice of set down on the respondent via email, indicating that the matter had been set down for hearing on 13 June 2019.
- [13] The applicant approached this court, under the same case number, on the same papers duly supplemented, alleging that the respondent failed to make the monthly payments as agreed and furthermore that it failed to settle its indebtedness by 28 February 2019. It prayed for an order in terms of its original notice of motion.
- [14] At the hearing of the application, Mr Epstein, on behalf of the respondent, took a point *in limine* to the effect that clause 2.2 of the memorandum was contrary to public policy, therefore void, and that no effect could be given to it.
- [15] Mr P Zietsman, on behalf the applicant, contended that even though paragraph 2.2 of the memorandum might be void, the respondent had an

opportunity to oppose the application and it did indeed oppose it. He argued there was thus no prejudice suffered by the respondent.

- [16] It is trite that this court has the power to declare a contract as being contrary to public policy and to refuse to give effect to it. The power to do so should however be exercised sparingly. In Eastwood v Shepstone,³ Innes CJ stated the principle as follows:

Now this Court has the power to treat as void and to refuse in anyway to recognize contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting it its duty if it hesitated to declare such an arrangement void. What we have to look to is the tendency of the proposed transaction, not its actually proved result⁴

- [17] Smallberger JA warned against the indiscriminate and arbitrary use of the power to declare contracts contrary to public policy. In Sasfin (Pty) Ltd v Beukes⁵ he said:

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.⁶

- [18] What is the effect and tendency of paragraph 2.2 of the memorandum? First, the applicant reserved the right to re-enrol the provisional liquidation

³ 1902 TS 294.

⁴ Ibid 302.

⁵ 1989 (1) SA 1 (A).

⁶ Ibid 9B-C.

application under the same case number and based on the same ground. Second, the respondent agreed that the applicant could do so on an unopposed basis.

- [19] The memorandum effectively meant that the applicant conditionally abandoned its right to provisionally liquidate the respondent on the basis relied upon in case number 3894/2018. The applicable condition was that the respondent should strictly perform its obligations in terms of the memorandum.
- [20] It is common cause that the respondent did not comply with its obligations as stipulated in the memorandum. Under these circumstances, may the applicant fall back on the original notice of motion of 2 August 2018?
- [21] The answer to this question is to be found in Van Zyl v Niemann⁷. In that case it was held that a settlement agreement, such as the memorandum in this case, has the same effect as *res judicata*. This would exclude litigation on the same cause of action, unless the settlement agreement expressly or by express implication stipulates that in the event of non-compliance with the terms of the settlement agreement, the plaintiff or applicant may revert to the original cause of action or ground.⁸
- [22] Clause 2.2 of the memorandum ostensibly reserves the applicant's right to revert to the original cause of action in the event of non-compliance with the settlement agreement. Embedded in this clause, however, is a stipulation that the respondent agreed that the applicant could enrol the original application on an unopposed basis.

⁷ 1964 (4) SA 661 (A).

⁸ Ibid 669H – 670.

[23] The applicant effectively agreed not to oppose a future application for its liquidation in the event that it did not comply with the terms of the settlement agreement. This stipulation deprived the respondent of its right to defend any proceeding in a court of law. In Standard Bank SA Ltd v Essop,⁹ the settlement agreement contained a similar clause. It provided that 'in the event of the respondent failing to pay any amount on the due date, the applicant shall be entitled to reinstate the application for the respondent's sequestration on the unopposed motion roll and to utilize the affidavit opposed by the respondent consenting to a provisional and final order of sequestration'.

[24] Meskin J considered the clause and correctly said the following about it:

In my opinion, applicant's conduct in having purported to stipulate for these rights was, and remains, unconscionable. It has purported to empower itself, in the event of any relevant default by the respondent, deprive him of his status as a solvent person, and inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act, without any notice to him and without his being able in any event to defend himself. This conduct offends my, and in my opinion it would offend any reasonable person's, sense of what is procedurally fair and it offends my, and in my opinion would offend any reasonable person's, sense of justice.¹⁰

[25] Clause 2.2 falls squarely in the category of offensive and unconscionable agreements as described by Meskin J. It also deprives the respondent of a Constitutional right. Section 34 of our Constitution expressly gives everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court. Clause 2.2 has a tendency to deprive the respondent of that right.

[26] Mr Zietsman contended that Essop is distinguishable because it concerned sequestration and not liquidation. I disagree. The liquidation of a company

⁹ 1997 (4) SA 569 (D & CLD).

¹⁰ Ibid 575 E-G.

and the sequestration of a person have the same effect: the status of the company and that of the natural person are both changed. The sentiments expressed in Essop are in my view, with the necessary changes, applicable to the liquidation of a company.

- [27] Counsel further contended that in Essop the bank sought to change the status of the respondent without giving him notice. That is exactly what the bank tried to do in this matter. It is for that very reason that the bank included the stipulation that the respondent agreed that the bank could approach this court on an unopposed basis in the event of the respondent defaulting.
- [28] Mr Zietsman pointed out that the respondent filed an answering affidavit and that he was not prevented by the applicant from doing so. That might be so. What I have to look at, however, is the tendency of the clause and not its actually proved result. His argument is in essence that the actual defending and filing of an answering affidavit can cure an illegal agreement. I disagree. The offending agreement or clause remains illegal and cannot be transformed by expedience or pragmatism.
- [29] In my view clause 2.2 of the memorandum is and was contrary to public policy and is thus illegal. That being the case, it is void and no effect can be given to it. The applicant's attempt to revert to the notice of motion of 2 August 2018 is predicated on clause 2.2, namely that it could do so in the event of the respondent defaulting. Clause 2.2 being illegal, and that part of the agreement thus a nullity, there is no other basis for the applicant to fall back on the 2 August 2018 notice of motion.
- [30] There is another reason why this application should fail. Assuming that the agreement between the parties is legal and valid, it is clear that I should not

exercise my discretion in favour of the applicant.¹¹ I say this because the applicant was inept in granting the respondent credit and it has a less onerous, but more effective, way to recover its money, or a substantial part thereof. An exposition of the facts supports these conclusions.

[31] Mr Pakiso Lloyd Tshabalala and Mr Samuel Matlabe Tshabalala are brothers. During 2014 a company registered as 2014/144056/07 (South Africa) (Pty) Ltd (2014 Company) bought Bloemfontein Celtic Football Club. The 2014 Company traded as Bloemfontein Celtic Football Club. Mr Pakiso Tshabalala was the sole director of the 2014 Company when it bought Bloemfontein Celtic Football Club. On 14 December 2018, Mr Samuel Tshabalala replaced Mr Pakiso Tshabalala as the sole director of the 2014 Company.

[32] On 28 September 2015, a company was registered with the name Bloemfontein Celtic Football Club Pty Ltd and with registration number 2015/344554/07 (2015 Company). Mr Samuel Tshabalala is the sole director of the 2015 Company. The 2015 Company was registered, *inter alia*, to register the name and insignia of the club as trademarks. It is common cause that the 2015 Company is the respondent.

[33] During 2016, the respondent approached the applicant for loans in order to acquire the six properties that were going to be used to accommodate the players of the club. It applied for home loans equal to 100% of the purchase prices of the respective properties. During February and March 2016, the loans were granted, as requested, and mortgage bonds registered in favour of the applicant.

¹¹ Section 347(1) Companies Act, 1973 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, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.”

- [34] At the time of granting the home loans the respondent had no assets, no bank account, no income tax registration number nor any financial statements.
- [35] The applicant stated that it knew that the Tshabalala brothers were involved in three entities, namely the 2014 Company, the 2015 Company and Lezmin 2815 trading as Ikaheng Developers and Plant Hire. It further stated that it granted the loans to the 2015 Company based on an assessment made of the finances of the group. The finances of the group consisted of the financial statements of the 2014 Company, indicating that it had assets of more than R46 million, the personal income of Mr Samuel Tshabalala that was indicated as approximately R347,000,00 per month and the financial statements of Lezmin 2815.
- [36] The explanation that the money was loaned to the 2015 Company based on the finances of the group is unsatisfactory to say the least. There is no group of companies in this matter. At best for the applicant it can be said that Mr Samuel Tshabalala is involved in the three entities. I will therefore assume that it is in this context that the applicant is referring to a group. However, the money was loaned to one particular entity. The applicant did not obtain any financial statements from the respondent. No cross guarantees or sureties were requested from any other entity or person.
- [37] The applicant knew nothing about the respondent when it granted the loans. This is a clear violation of section 21A of the Financial Intelligence Centre Act (FICA)¹², which reads:

When an accountable institution engages with a prospective client to establish a business relationship as contemplated in section 21, the institution must, in addition to the steps required under section 21 and in accordance with its Risk Management and Compliance Programme, obtain information to reasonably enable the accountable

¹² Act 38 of 2001.

institution to determine whether future transactions that will be performed in the course of the business relationship concerned are consistent with the institution's knowledge of that prospective client, including information describing-

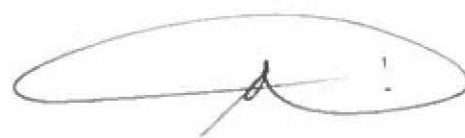
- (a) the nature of the business relationship concerned;
- (b) the intended purpose of the business relationship concerned; and
- (c) the source of the funds which that prospective client expects to use in concluding transactions in the course of the business relationship concerned.

- [38] In terms of section 1 schedule 1 of FICA a bank is an accountable institution. It is clear that the bank should have obtained all the necessary information about the respondent as a prospective client and it failed to do so.
- [39] In terms of the memorandum, the respondent gave the bank a power of attorney granting it the power to sell any or all of the six properties at its complete discretion at a purchase price and under conditions that the bank deemed appropriate. The bank, a secured creditor by virtue of the mortgage bonds, is also the only creditor of the respondent. The respondent did not do any business and therefore has no other creditors.
- [40] If the respondent is liquidated, other associated costs will have to be incurred by it. Liquidators will have to be appointed, at a fee. The properties will have to be sold by way of a public auction. Forced sales notoriously receive lower prices because the prospective buyer is aware that the properties are sold on liquidation.
- [41] Moreover, the respondent has no other assets and the applicant is its only creditor. I can conceive of no benefit for the applicant if the properties are sold by liquidators rather than the applicant, who has a power of attorney. The applicant also does not explain why it wants to follow the route of liquidation instead of using its power of attorney to sell the properties.

[42] As indicated above, I have the discretion to grant a winding up order¹³. I have decided, for the reasons stated above, not to exercise my discretion in favour of the applicant.

[43] I accordingly make the following order:

The application is dismissed with costs, including the costs of two counsel.



C.J. MUSI, JP

Appearances:

For the Plaintiff:	Adv P Zietsman SC Instructed by Honey Attorneys Bloemfontein
For the Defendant:	Adv H Epstein SC with Adv T Mabuda Instructed by Marius van Zyl Inc. Bloemfontein

¹³ See *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) 974 and *LECA Investments (Pty) Ltd v Shiers* 1978 (4) SA 703 at 705.