



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

3/3/2015

CASE NO: 95264/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
03-March-2017	
DATE	SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

VIKING STEEL DIVISION CC

Respondent

JUDGMENT

MANAMELA, AJ

Introduction

[1] This application was issued on an urgent basis on 27 November 2015 by the applicant, a commercial bank (Firststrand), for the liquidation (either provisional or final) of the respondent (Viking). As alternative to liquidation, Firststrand requested the Court to interdict Viking from transacting (save for making deposits) in respect of some specified bank account of Viking, pending an application or action to be brought by Firststrand regarding ownership of or entitlement to the funds in the bank account. On 08 December 2015, the Court granted the alternative relief and from the papers it appears that such was by agreement between the parties, pending a determination of the ownership of or entitlement to the funds in Viking's bank account.

[2] However, only a prayer for liquidation is currently pursued. Firststrand is pursuing the current liquidation application on the basis that it is just and equitable under the circumstances for this Court to liquidate Viking. Viking did not only oppose the liquidation application, but launched a counterapplication. In the counterapplication, Viking requests this Court to order the transfer of the impugned funds to the liquidators of an entity called Profin Trading 35 CC (Profin).¹ Profin and its liquidators are not taking any part in these proceedings.

[3] Firststrand filed its answering affidavit to the counterapplication, out of time. The answering affidavit incorporates the replying affidavit in the liquidation application (the replying affidavit). Viking contends that the replying affidavit should be ignored as it was not accompanied by condonation application. I allowed the affidavit to form part of the papers

¹ See pars 1-2 of the notice of motion on indexed pp 164-167.

before the Court and undertook to furnish reasons for the ruling at the same time as the main ruling on the issues. I will therefore commence with the reasons for this ruling, before I turn to the issues in the liquidation and counter applications.

[4] It is also submitted in the written heads of argument that there is a fourth or further affidavit, besides the founding, opposing and replying affidavits, but counsel were in agreement that this affidavit is not dealt with anywhere in the papers. It was also not dealt with at the hearing on the matter and therefore it will not be entertained for purposes of the outcome of this matter.

Late delivery of Firstrand's replying affidavit (the first point in limine)

[5] The issue of the late delivery of the replying affidavit was raised by Viking as one of its two points *in limine* (the first point *in limine*). The second point *in limine* was with regard to the authority of the deponent to Firstrand's founding affidavit and will be dealt with later below. Viking submitted that its opposing affidavit, incorporating the counterapplication, was served on 20 April 2016. This, it is submitted, was in terms of an order of this Court granted on 30 March 2016. Firstrand only served its replying affidavit on 20 June 2016, after Viking had actually delivered its practice note and heads of argument on 06 June 2016. Therefore, the replying affidavit was some 32 days late. It is submitted on behalf of Viking that the affidavit should be disregarded. This is also because the same affidavit did not contain any application for condonation for its late delivery. Therefore, the matter should be determined on the basis of the founding affidavit and opposing affidavits. Effectively, this would mean that the facts

contained in the opposing affidavit stand undisputed and ought to be accepted. This will also mean that the counterapplication would also be determined on an unopposed basis.

[6] Mr J Vorster, appearing for Firststrand, passionately relied on the decision in the matter of *Pangbourne Properties Ltd v Pulse Moving CC and Another*² for his submissions that the replying affidavit ought to be allowed in. He submitted that the facts in that decision were at all fours with those in this matter and in that decision the Court admitted the affidavit in the interests of justice. He even submitted that this Court is bound by the *Pangbourne* decision. Further, he raised the fact that no prejudice was shown by Viking relating to the late delivery of the affidavit. In my view *Pangbourne* does not avail Firststrand, as in *Pangbourne* both the answering and replying affidavits were delivered late. This is not the situation in this matter. Mr JC Klopper, appearing for Viking, submitted that the non-compliance is made worse by the fact that there is not even an attempt at condonation. I agree. A party who has not complied with the rules of Court ought to try and explain to the Court whose rules he failed or neglected to comply with the reasons therefor and why this ought to be overlooked. To conduct himself or herself otherwise and brazenly assert that there is no prejudice to his or her opponent, may be considered to reflect hallmarks of wilful disregard of the rules. This ought not to be countenanced.

[7] It is always regrettable when litigants who enjoy legal representation choose not to obey or comply with the rules and practice directives of the Court. Yes, the Court should always frown at any signal of transgression, minuscule or gigantic, and ensure that its disapproval is felt by all transgressors, by, for example, excluding the non-compliant material or admitting

² 2013 (3) SA 140 (GSJ).

same as part of the papers with imposition of a costs order. But, most of the time the wrath of the Court, so to speak, is borne by the litigant clients, who are simply victims of their own choices in legal representation. It is against this background that, I decided to allow the replying affidavit. Even more so, I considered it rather prudent to have the full complement of the available affidavits. This, in my view, is in the interests of justice.³ However, I will ensure that this exercise of discretion by the Court is not without consequences by granting the appropriate costs order regarding the replying affidavit.

Authority of the deponent to the founding affidavit (the second point in limine)

[8] Viking raised another point in *limine*. It submitted that the deponent to Firststrand's founding papers is only an employee and not a "member" and as such requires explicit authorisation by way of resolution. It is also submitted that the resolution and other documents filed do not prove authority of the deponent. I hasten to point out that there is no merit in this contention. The issue of authority of a deponent to affidavits before a Court is settled law in terms of legal authorities.⁴ The authority of the deponent to an affidavit is irrelevant.⁵ What is of relevance is the authorisation of the actual legal proceedings in the form of an application.⁶

[9] Where the challenge extends to the attorneys involved in the institution of the legal proceedings, a proper route or procedure to follow is that provided in terms of rule 7 of the

³See generally Cilliers AC, Loots C and Nel HC *Herbstein and van Winsen The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5th edition (Juta Cape Town 2009) at pp 723-724.

⁴ See *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

⁵ See *Eskom v Soweto City Council* 1992 (2) SA 703 (WLD) at 705E-706C.

⁶ See *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA).

Uniform Rules of this Court.⁷ Therefore, there will be no merit in this form of challenge and no further attention will be devoted to this issue.

Relevant background (in brief)

[10] The brief background to this matter is as follows. During or about November 2014, Firstrand and Profin entered into an agreement in terms of which Firstrand agreed to provide Profin with debtor finance in an amount of R2.4 million. In terms of the debtor finance facility agreement, any and all rights which Profin had towards its debtors were ceded to Firstrand. Firstrand terminated the debtor finance agreement at some stage due to monies due to Profin from Profin's debtors having been paid to Viking. It now asserts that Viking is indebted to Firstrand for the collected debtors and applies for Viking's liquidation. Profin was at some stage placed in liquidation.

[11] It is also common cause that Firstrand is entitled to receive payments made by the debtors of Profin in terms of debtor finance agreement with Profin.⁸ It is also not in dispute that the payments meant for Profin were incorrectly made to Viking.

Firstrand's case

[12] Viking challenges the standing of Firstrand in bringing the liquidation application. Firstrand submits that it is a creditor of Viking and therefore it is entitled to bring a winding-

⁷ Rule 7(1) of the Uniform rules reads: "(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

⁸ See par 21 of the founding affidavit on indexed page 14.

up or liquidation application, specifically on the ground that it was just and equitable to do so, as contemplated in section 346(1)(b) of the Companies Act 61 of 1973 (the 1973 Companies Act). Whether or not Firstrand is a creditor of Viking is one of the issues to be determined in this matter and will be dealt with below.

[13] Firstrand submits that its debtor finance agreement incorporated an out-and-out cession in respect of the debtors of Profin.⁹ It is submitted in this regard that Firstrand, as a cessionary, has become the legal holder of the personal rights of Profin and can now realise the incorporeal property in its own name. In other words, that Firstrand can directly claim payment from the debtors in the books of Profin, as the cedent. The submission is further expanded by stating that the cessionary becomes the legal holder of the claims and will also not become a creditor of the insolvent estate of the cedent, and cedent merely acquires a reversionary right against the estate of cessionary, which entails that the claims (rights) must be ceded back to the original cedent after satisfaction of the underlying debt (i.e. after the cessionary has collected enough book debts to satisfy the debt of the cedent).¹⁰ I will revert to this below.

Just and equitable wind-up of Viking due to allegations of fraud

[14] As indicated above, Firstrand submits that it is just and equitable to wind-up Viking due to allegations of perpetration of fraud on Viking's part. The location of these submissions is in electronic mail correspondences exchanged between Firstrand's functionaries and Viking's member. I consider the following material in this regard:

⁹ See Bertelsmann E et al Mars *The Law of Insolvency in South Africa* 9th ed (Juta CapeTown 2008) at pp2-3.

¹⁰ See *Mercatrust Bpk v Keepers Hosiery Suid-Afrika (Emds) Bpk* 1980 (3) SA 311 (W).

“Ek sal sien dat ons vir jou die volledige lys stuur van gelde wat verkeerdelik in VSD [i.e. Viking] se rekening in betaal is.”¹¹

[underlining added for emphasis]

and:

“Daar is absoluut geen manier waarop een van ons kliente so kontant betaal het nie. Dit was ‘n fout aan ons kant, dit moes nie so ingelees gewees het nie, ek het geen idee wat daar gebeur het nie. Ek het nie die transaksie geprocess nie, en verneem dit was ChrisChe wie ek weg gejaag het wat iets probeer het op Pastel en nie besef het wat sy doen nie.

Van my kant af het ek dit onmiddelik reg gestel toe ek die report gesien het van die kasboek.”¹²

[15] Firststrand submits that the statements above confirm questionable conduct in the way in which Viking or its business is being conducted and justifies an order for the liquidation of Viking by this Court. Firststrand submits that the statements create a basis for winding up in terms of section 344(h) of the 1973 Companies Act.

¹¹ See par 20 of the founding affidavit on indexed p 14; annexure “FA6” on indexed p 57.

¹² See par 21 of the founding affidavit on indexed p 14; annexure “FA7” on indexed p 58.

[16] It is submitted in this regard that illegality of the objects of the company and fraud committed in connection therewith justify winding-up on the just and equitable principle.¹³ It is further submitted that the circumstances of this matter are such that Viking is an instrument in suspicious transactions and potential fraud perpetrated by its sole member, being the deponent to the opposing affidavit in cahoots with Profin.¹⁴ The aforesaid sole member is married to one Mr FA Du Plessis, who was also a member of Viking until 12 October 2015, when he resigned.¹⁵

[17] As stated above, the undue receipt of the funds of Profin has been acknowledged by Viking. The payment of the undue funds was made shortly before the voluntary liquidation of Profin.¹⁶

[18] It is submitted that under the above-mentioned circumstances, it is just and equitable that this Court order the winding-up of Viking. I will revert to this after discussing Viking's response and counterapplication.

Viking's case

[19] Viking disputed that it is insolvent or that it ought to be wound-up. It also submitted that Firstrand appears to have abandoned its alternative relief for an interdict, whether interim

¹³ See *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350 C-H; and *Thunder Cats Investments 92 (Pty) Ltd & Another v Nkonjane Economic Prospecting and Investment (Pty) Ltd & Others* (847/12) [2013] ZASCA 164 at par 16.

¹⁴ See par 7 of the founding affidavit on indexed p 10; par 29 of the founding affidavit on indexed p 17.

¹⁵ See par 10 of the founding affidavit on indexed p 18.

¹⁶ See par 17 of the founding affidavit on indexed p 13.

or final, although it failed to satisfy the requirements necessary to prove an interdict, be it interim or final. I don't think anything turns on the latter aspect.

[20] Viking admits that money was incorrectly deposited into its bank account, but submits that this money remains secured as the bank account is currently suspended following the order of this Court granted on 08 December 2015.

[21] Further, it is submitted that the provisions of section 344(h) of the 1973 Companies Act do not apply to insolvent companies, but the provisions of item 9(2) of schedule 5 of the Companies Act 71 of 2008 (the 2008 Companies Act). The latter is set to regulate the limited application of section 344 of the 1973 Companies Act as from 01 May 2011. It is further argued that item 9(2) of schedule 5 of the 2008 Companies Act explicitly states that sections 343, 344, 346 and 348 to 353 of the 1973 Companies Act do not apply to the winding-up of solvent companies.

[22] It is submitted that Viking is a solvent company as confirmed by its financial statements included as part of the papers. This argument is expanded to include that, Firstrand did not challenge the solvency of Viking or even allege that Viking is insolvent in the first place. There is no factual allegation on behalf of Firstrand that Viking is insolvent and actually Viking specifically submits that it is not insolvent. It is submitted that this is not disputed by Firstrand.

[23] Is also submitted that the current application for liquidation constitutes an abuse of the process of this Court, as there is a *bona fide* dispute and that liquidation is therefore untenable under the circumstances.¹⁷

[24] It is submitted that there is a dispute of facts confirmed by the following:

[24.1] Firststrand alleges that the amount that was incorrectly deposited is R684 000.00, whereas in terms of Viking's calculations the incorrectly deposited amount is R507 367.43. However, Firststrand did not provide proof of its calculation of the aforesaid amount, be it in the founding or replying affidavit, whereas Viking did provide a reconciliation using source documents for its calculation.

[24.2] an employee of Firststrand (from FNB Brits branch) investigated the matter in 2015, but thereafter allowed Viking to withdraw some money leaving only a balance of R588 598.85 in the suspended bank account.¹⁸ Viking submits that the contention that this employee made a mistake is unreasonable, as the employee is based on the ground and actually worked with the impugned bank accounts on a daily basis and will know what amount was incorrectly deposited, as opposed to Cawood, the deponent to Firststrand's affidavit based at the recoveries department of Firststrand in Pretoria.

¹⁷ *Pillay v Frier* 1913 CPD 433 at 436; *Laeveldse Kooperasie Bpk v Joubert* 1980(3) SA 1117 (T) at 1120; *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) at 116C - G and 119F-H.

¹⁸ See par 25.6 of the opposing affidavit on indexed pp 114 -115.

[24.3] further it is submitted that an inference should be drawn from the fact that there is no disclosure of the nature and outcome of the preliminary investigation embarked upon by Cawood.¹⁹

Viking's Counterapplication

[25] Viking prays, in terms of the counterapplication, that an amount of R507 367.43 be paid to the liquidators of Profin and the balance be held in trust by Viking's attorneys of record pending an action or application for payment by Firstrand within a prescribed time period and if not, for the remaining balance to be paid to Viking.²⁰ The counterapplication is opposed by Firstrand.

[26] According to Viking's calculation, only an amount of R507 367.43 was incorrectly deposited into the suspended bank account and Viking disputes that more than this amount was incorrectly deposited, hence the tender for repayment of this amount.

[27] Viking explains that the reason for the counterapplication as being due to the intransigence on the part of Firstrand, which it is submitted frustrated the attempts by Viking to finalise the arrangements for payment of the amount of R507 367.43 of the total amount currently held in the bank account to the liquidators of Profin or to Firstrand, if so ordered by this Court. It is submitted Viking actually made the tender or proposal incessantly, but in vain.

¹⁹ See par 15 of the founding affidavit on indexed p 12.

²⁰ See par 2 of the respondent supplementary heads of argument.

[28] Is further submitted that liquidation application is not possible where the claim is disputed on *bona fide* grounds by Viking and that in terms of what is called the *Badenhorst* rule, the onus is not on Viking to show that it is not indebted to Firstrand, but Viking has to merely show that the indebtedness is disputed on *bona fide* and reasonable grounds.²¹ Winding-up proceedings are not appropriate when the alleged creditor's claim is reasonably disputed as the insolvency procedure is not designed for resolution of disputes as to the existence or non-existence of debts.²²

Legal principles and the facts (a discussion)

[29] As indicated above, the liquidation application is based on section 344(h) of the Companies Act 61 of 1973 (the 1973 Companies Act).²³ This provision reads as follows in the material part:

“A company may be wound up by the Court if-

(a) ...

...

(h) it appears to the Court that it is just and equitable that the company should be wound up.”

[30] Firstrand submits that it is just and equitable for this Court to wind-up Viking, as it is an instrument of suspicious transactions and potential fraud. I have dealt with the allegations

²¹ See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H-348B; *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 980B-981A; *Payslip Investment Holdings CC v Y2K TEC Ltd* 2001 (4) SA 781 (CPD) at 783E- I.

²² *Robson v Wax Works (Pty) Ltd and Others* 2001 (3) SA 1122 (CPD) as pars [13] – [17]; *Sonnenberg McLoughlin v Spiro* 2004 (1) SA 90 (C) at 96B-C; *Helderberg Laboratories CC v Solar Technologies* 2008 (2) 627 (CPD) at pars [21]- [23].

²³ See par 9 of the founding affidavit on indexed p 10; par 16 of the applicant's heads of argument.

above and the explanations by Viking that the payments were erroneously (*verkeerdelik*) made.²⁴

[31] I do not agree that it would be just and equitable to wind-up Viking on the basis that the monies transferred or the transfer of money meant for Profin were paid into Viking's bank account. There is no sufficient basis for this conclusion, particularly when considering the explanations proffered by Viking. Firststrand has not succeeded in casting doubt on the veracity of the explanations.

[32] Although fraud may serve as ground for winding-up a company on the just and equitable principle,²⁵ there is no sufficient evidence available to this Court in this matter to conclude that there was perpetration or commission of fraud. Nothing indicates that Viking wanted to defraud Firststrand or anyone by the receipt of payments from debtors of Profin. I agree that at first blush the situation raises eyebrows, but this is not enough to sustain a drastic debt-recovery mechanism of liquidation. Therefore, the liquidation application would fail.

Commercial Insolvency

[33] During argument, counsel for Firststrand also made submissions to the effect that Viking was insolvent due to loans indicated in its papers and ought to be liquidated on this ground. The Court was referred, in this regard, to the absence of evidence indicating how Viking is paying its loans and whether the bank statements indicated any solvency.²⁶ Without necessarily implying that Firststrand or its counsel was entitled to expand the case to be met by Viking in

²⁴ See par 20 of the founding affidavit on indexed p 14; annexure "FA6" to the founding affidavit on indexed p 57.

²⁵ See *Kyle v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T).

²⁶ See par 34.3 of the opposing affidavit on indexed p 122.

legal argument, I hasten to point out that commercial insolvency is the requirement for liquidation of companies, as opposed to factual insolvency applicable to natural persons and partnerships. Therefore, this road will not avail Firstrand for the liquidation of Viking. I am not implying that the submissions were meritorious with regard to a case of factual insolvency. There is no need for me to pronounce on this.

Reasonable dispute of claim

[34] The *Badenhorst* rule referred to above is still very much part of our law and ought to have been borne in mind in this matter. It has been recently applied in the decision of *GAP Merchant Recycling CC v Goal Reach Trading 55 CC*,²⁷ where the Court had this to say regarding this rule:

“[20] The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the ‘Badenhorst rule’, after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347H – 348C.”

Counterapplication

[35] The counterapplication by Viking is crafted in such a way that it assumes that there will be a finding that Firstrand is not entitled to the money and therefore the main application is unsuccessful on this basis. This is not my finding. It may well be that Firstrand will somewhat

²⁷ 2016 (1) SA 261 (WCC).

succeed in getting the money to be paid over to it. All that is decided here is that liquidation application is ill-conceived.

[36] Be that as it may, I do not find merit in the counterapplication. There appears no reason under the current circumstances to transfer the money to the liquidators of Profin. However, in my view, the counterapplication appears to have been conceived with noble intentions towards amicable resolution of this matter. This will be significant with regard to the issue of costs.

Costs

[37] Therefore, the above being my finding, there is no need for me to determine the other issues raised in the papers as they have been rendered superfluous. The main application for liquidation fails and costs will follow this outcome.

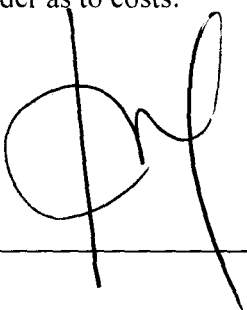
[38] The counterapplication also fails as indicated above. However, I do not consider it to be in the interests of justice to mulct Viking with any costs in this regard. The counterapplication actually represents a noble gesture on the part of Viking aimed towards practical resolution of this matter. Viking would not have benefitted from payment of the monies to Profin as prayed for in the counterapplication. This ought to be encouraged. This is so despite my dismissal of the counterapplication. Therefore, I will grant no order as to costs with regard to the counterapplication.

[39] However, as explained above, I will mark the disapproval of this Court with regard to non-compliance in the delivery of the replying affidavit, by granting a costs order on the scale of attorney and client in this regard.

Order

[40] In the premises, I make the following order:

- (a) the application is dismissed with costs;
- (b) the costs in (a) hereof relating to the replying affidavit are payable on an attorney and client scale;
- (c) the counterapplication is dismissed without any order as to costs.

A handwritten signature in black ink, consisting of a large circle followed by a vertical line and a loop, positioned above a horizontal line.

K. La M. Manamela

Acting Judge of the High Court

DATE OF HEARING	:	05 DECEMBER 2016
DATE OF JUDGMENT	:	03 MARCH 2017

Appearances:

For the Applicant	:	Adv J Vorster
Instructed by	:	Rorich Wolmarans & Luderitz Inc Pretoria
For the Respondent	:	Adv JC Kloppe
Instructed by	:	Olivier, Cronje & Stiglingh, c/o DBM Attorneys, Pretoria