FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.:5095/2010

In the matter of:

FIRSTRAND BANK Applicant

and

WESTERN BREEZE TRADING 213 (PTY) LTD Respondent

JUDGEMENT BY: MOLEMELA, J

HEARD ON: 5 & 6 MARCH 2013

DELIVERED ON: 15 MARCH 2013

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[1] This is an application for the winding up of the respondent company on the basis that it is unable to pay its debts. The applicant brought the application on motion but the respondent raised several factual disputes, as a result of which this court, on the 30th August 2011, found that there was a dispute of fact pertaining to the shareholding of the respondent company and accordingly referred the matter for oral evidence. About a year and a half after this ruling, the applicant set the matter down for a hearing. Four witnesses testified at this hearing, two on behalf of the applicant and two on behalf of the respondent.

[2] It is common cause that (i) HCL Family Trust ("HCL Trust) was indebted to the applicant in the amount of R3 712 544,50 inclusive of interest, in respect of certain credit facilities that applicant had provided to it; (ii) that at the time that such indebtedness arose, one Hendrik Lamprecht ("Mr Lamprecht") was the sole director of the respondent company and the sole trustee of HCL Trust. (iii) that one of the conditions of the agreement in terms of which the applicant granted such facilities to HCL Trust was that this

indebtedness would be secured by way of a suretyship, as a result of which Mr Lamprecht signed a deed of suretyship which purported to bind the respondent as the surety of HCL Trust (exhibit “G”); that Mr Lamprecht also signed a document headed “Consent in terms of section 226 of the Companies Act, 1973” (exhibit “E11”) (hereafter referred to as “the section 226 Consent”). The section 226 consent *inter alia* stated as follows:

> “We, being all the members of the company [respondent], hereby consent to the company signing a suretyship for the liabilities of HCL Family Trust (“the debtor”) to First Rand Bank Limited in the sum of R3 500 000,00 plus such further sum or sums, of interest on that amount and all charges and costs as may from time to time become due and payable by the said debtor.”

At the bottom of this document, provision was made for shareholders of the respondent company to sign. Mr Lamprecht wrote down his name at the blank space intended for the name of shareholder and then attached his signature on the space intended for such shareholder’s signature. The same document made provision for certification of shareholders by an auditing firm. A firm by the name of CAP Charted Accountants affixed its company stamp on the space allocated for the auditor’s signature. *Ex facie* the document, the stamp was affixed on the 23rd April 2009.

[3] The respondent resisted the application for the respondent’s liquidation on the following grounds:

(i) That Mr Lamprecht was never the shareholder of the respondent;

(ii) the correct shareholder of the respondent company was Vorprecht Besigheids Trust) (“Vorprecht Trust”) and its trustees were Mr Lamprecht and one Mr Andries Vorster (“Mr Vorster”). The respondent contended that insofar as Vorster, being one of the trustees of the Vorprecht Trust did not co-sign the deed of suretyship, there was no valid consent contemplated in terms of section 226 of the Companies Act 1973 (“Companies Act”);

(iii) that there was therefore no valid suretyship that was concluded, with the result that the respondent is not indebted to the applicant in any way, such that it cannot be regarded as unable to pay its debts as contemplated in section 345(1) of the Companies Act.

[4] The respondent's defence is based on acceptance that section 226 of the Companies Act is applicable to this matter. It is apt to refer to the provisions of section 226 of the Companies Act. The relevant parts of this section provide as follows:-

> Section 226 "Prohibition of loans to, or security in connection with transactions by directors and managers.
> (1) No company shall directly or indirectly make a loan to-
> (a) any director or manager of-
> (i) the company; or
> (ii) its holding company; or
> (iii) any other company which is a subsidiary of its holding company; or
> (b) any other company or other body corporate controlled by one or more directors or managers of the company or of its holding company or of any company which is a subsidiary of its holding company; or provide any security to any person in connection with an obligation of such director, manager, company or other body corporate.
> (1A) For the purpose of subsection (1)-……..
> (1B) The provisions of subsection (1) and of paragraph (b) of subsection (1A) shall not be construed as prohibiting a company from making a loan to, or providing security to any person in connection with an obligation of, its holding company or subsidiary or a subsidiary of such holding company;
> (2) The provisions of subsection (1) shall not apply-
> (a) in respect of-
> (i) the making of a loan by a company to its own director or manager;
> (ii) the provision of security by a company in connection with an obligation of its own director or manager;
> (iii) the making of a loan by a company to any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company; or
> (iv) the provision of security by a company in connection with an obligation of any other company or other body corporate controlled by one or more of the directors or managers of the first-mentioned company,
> with the prior consent of all the members of the company or in terms of a special resolution relating to a specific transaction: Provided that in respect of any such loan made or security provided at any time before the date of commencement of the Companies Amendment Act, 1992, such consent shall be deemed to have been given if the transaction concerned has subsequently, whether before or after that date, been ratified by all the members of the company; or ………."

[5] The applicant contends that the provisions of section 226 of the Companies Act are not applicable to a trust as a trust is not a body corporate as envisaged in section 226 of the Companies Act. It was argued that since a trust does not fall in any of the categories against which a prohibition arises in section 226(1) of that Act, section 226 of the Act was not applicable *ex lege* and the applicant was accordingly not bound by its provisions, with the result

that a defence based on the lack of any proper authorisation in terms of section 226 ought to fail.

[6] I agree that it is clear from the text of this section that the ambit of its prohibition does not extend to a trust. Consequently, this section cannot, in my view, be considered to apply to the parties' agreement *ex lege.* This does not, however, detract from the fact that the applicant and respondent in their agreement, which was drafted by the applicant and in terms of which the applicant agreed to grant certain facilities to the HCL Trust, expressly agreed that the provisions of this section would be applicable. This condition was couched as follows: "With the specific provision that Western Breeze Trading 213 (Pty) Ltd provides the bank with the prior written consent of its shareholders in terms of section 226 of the Companies Act…" In my view, the parties, by their own volition, simply agreed that the respondent's suretyship would be subject to the respondent obtaining the prior written consent of its shareholders.

[7] The applicant argued that even if section 226 of the Companies Act was found to be applicable, this provision was in any event for the benefit of the applicant and the applicant could thus waive compliance therewith. In my view, there is nothing in the parties' agreement that suggests that compliance with this clause was intended only for the benefit of the applicant. As compliance with that section could also equally benefit the respondent's shareholders, a determination of whether the respondent's shareholder had given valid consent to the suretyship was therefore crucial.

[8] The applicant contended that section 226 of the Companies Act had, in any event, been complied with given that Mr Lamprecht had, in his capacity as the sole director and sole shareholder of the respondent, signed the section 226 consent. The applicant further contended that insofar as Mr Lamprecht had, by filling in his name at the space allocated for the shareholders of the respondent company, represented himself as a shareholder to the applicant, the respondent was estopped from denying that Mr Lamprecht was a shareholder of the respondent.

[9] The main dispute between the parties pertains to the respondent's shareholding as at the time the section 226 consent and the deed of suretyship were signed, i.e. 3 April 2009. Much of the respondent's denial of the validity of the consent purportedly granted by Mr Lamprecht was based on the argument that CAP Chartered Accountants were not or could not have been the auditors of the respondent company as at the date on which their stamp was affixed on the section 226 consent. One of the partners of that firm (i.e. of CAP Chartered Accountants), viz Mr Geyer, testified that that firm was indeed the respondent's auditor at that time. Significantly, this evidence was not contested at all, which led me to believe that this aspect was merely a red herring that sought to create a factual dispute. That is just a remark I make in passing. The fact of the matter is that the dispute pertaining to the respondent's shareholding could not be resolved on the papers and was accordingly referred for oral evidence. The parties subsequently adduced the evidence of four witnesses. Surprisingly, Mr Lamprecht was not one of these witnesses.

[10] The applicant's main contention is that since Mr Lamprecht was the sole trustee of HCL Trust, which was the sole shareholder of the respondent, he accordingly had the necessary authority to sign the section 226 consent on behalf of HCL Trust, which he indeed signed on the 3rd April 2009, by so doing giving valid consent for the respondent to stand suretyship. The respondent, on the other hand, denies that as at the 3rd April 2009 HCL was the sole shareholder of the respondent. According to the respondent, during 2006, the shares that were held by HCL Trust were transferred to Vorprecht Trust by virtue of a donation made by Mr Lamprecht and that consequently, all the trustees of the Vorprecht Trust (viz Mr Lamprecht and Mr Vorster) ought to have signed the section 226 consent on behalf of the Vorprecht Trust. In so far as Mr Vorster did not sign, so the argument goes, then there was no valid consent for the respondent's suretyship, with the result that there was no valid suretyship on which the respondent can be held liable for HCL Trust's indebtedness.

[11] The evidence of the four witnesses rendered the following aspects to be common cause:

(i) That neither the respondent's company secretary (Mr Vermaak) nor Mr Vorster had ever seen a signed share certificate issued to the Vorprechts Besigheids Trust ("Vorprecht Trust"), nor was there any evidence that share certificate no 2, issued to HCL Trust, was ever cancelled;

(ii) According to Vorster's evidence, the alleged shareholding of the Vorprecht Trust was never reflected in the financial statements of the Vorprecht Trust, the reason being that the Trust never had the share certificate;

(iii) Mr Lamprecht was left in total control of the recording of transactions, specifically the donation that formed the *causa* for the transfer of shares into Vorprecht Trust's name and the recording of underlying transactions (donations) in terms of which 2 farms were transferred into the respondent's name. It was further left to Mr Lamprecht to decide the time and manner in which these transactions would be recorded;

(iv) That Mr Lamprecht was the respondent's sole director until his sequestration in 2010; Mr Vorster replaced him as sole director in June 2010.

(v) All the affairs of the respondent company were left in control of Mr Lamprecht even after the alleged transfer of shares into the name of Vorprecht Trust; Whereas the shares were transferred to Vorprecht Trust in 2006 already, one of the farms was only transferred into the respondent's name only in 2009 when the bond was registered;

(vi) That Mr Lamprecht was the sole trustee of HCL Family Trust, which by the respondent's own admission, held the shares of the respondent company immediately after the respondent company was purchased from a shelf company warehouse.

[12] It is trite that in a civil trial, the question is whether the evidence adduced is, on probabilities, correct. Credibility findings are to be considered in light of proven facts. In Santam BPK v Biddulph 2004 (5) SA 586 (SCA) it was held that the proper test for a witness' credibility is not whether the witness is truthful or indeed reliable in all that he or she said, but whether, on a balance of probabilities, essential features of his / her testimony are true.

[13] Alana Fourie, a former employee of the firm Cap Chartered Accountants, testified that she would not have reflected Lamprecht as the sole shareholder in the suretyship document if she had not received a share certificate confirming such from the respondent. She conceded that she did not have a recollection of the date that appeared in the share certificate in question, the number of such share certificate or who issued or signed the said share certificate. The share certificate she was testifying about was not an annexure to the application; nor was it handed up during the proceedings. In my view, this witness did not take the case any further and behoves no further mention.

[14] Mr Gustav Geyer, testified that his firm, CAP Chartered Accountants was, at the time of the signing of the suretyship document by Mr Lamprecht, the respondent's official auditors duly appointed in compliance with the Companies Act. This aspect was borne out by the CM31 form issued by the Registrar of Companies, which was not disputed by the respondent. His evidence of his prior knowledge of Mr Lamprecht and involvement in his companies was not disputed. His evidence that he knew Mr Vorster and that he was nothing more than an employee of Lamprecht, was also not disputed. Similarly, his evidence that he returned all the respondent's documents to Mr Lamprecht was not disputed. Nothing in his evidence suggested that he was not an honest and credible witness and I accordingly regard him as such.

[15] Mr Vermaak, an auditor at the firm Vermaak & Associates, testified that in 2006 he was Mr Lamprecht's internal auditor and performed various tasks for his companies. He was the one who assisted Lamprecht with the purchase of the respondent company, which was then a shelf company. His firm was the respondent's company secretary. After the respondent company was purchased as a shelf company from one Mr Gouws in 2006, he (Mr Vermaak) transferred the shares of the respondent company from the erstwhile shareholder to HCL Family Trust and issued share certificate number 2 to that effect. In November 2006 Mr Lamprecht instructed him to

transfer the shares from HCL Family Trust to Vorprecht Trust. He thereafter issued a share-certificate in the name of Vorprecht Trust. It was share certificate number 3. He then gave this share certificate to Mr Lamprecht. He conceded that the details of the Vorprecht Trust were wrongly recorded in that share certificate as Vorprecht Familie Trust instead of Vorprecht Besigheids Trust. He also conceded that he never cancelled certificate no 2 nor saw to the signature of share certificate no 3. He did not advance any reason for this lack of compliance with statutory requirements. Under cross-examination, Mr Vermaak testified that when it came to the recording of the information in the share register, he correctly captured the details of the Vorprecht Trust. This was due to the fact that Mr Vorster had brought the error regarding the description of the trust to his attention. In 2007, on the instructions of Mr Lamprecht, he returned the respondent's file to one Nerina Boshoff at Mr Lamprecht's office. This included the respondent's share register in which the shareholder was properly recorded as Vorprecht Besigheids Trust. He returned these documents at Mr Lamprecht's instructions. He conceded that before Cap Accountants' appointment as the respondent's auditors, a firm called LDP was the respondent's duly appointed auditors.

[16] While I will not go as far as branding Vermaak a liar, I cannot say that his evidence was satisfactory. It was riddled with improbabilities and inconsistencies. I find it strange that being a qualified accountant who was engaged by the respondent as a company secretary, he issued share certificates willy nilly without adhering to the statutory requirements. There seems to have been a litany of other non-compliances. By his own admission, he issued a third certificate immediately when Mr Lamprecht told him to do so. By his own admission, he did not see to the cancellation or withdrawal of the second share certificate. He made no mention of completion of the necessary share-transfer documents, nor did he mention what the underlying transaction for the transfer of the shares from HCL Trust to Vorprecht was. Although he personally issued an unsigned share certificate no 3 in the name of Vorprecht Trust, he subsequently recorded the transfer in the share-register without ever having seen the signed share certificate.

[17] There is also a material discrepancy between his evidence and that of Mr Vorster pertaining to the contact they might have had regarding the rectification of Vorprecht Trust's particulars in the share register. He testified that Mr Vorster brought the error to his attention in 2006. This was not alluded to at all in Mr Vorster's answering affidavit, yet Mr Vermaak deposed to a confirmatory affidavit stating that he agreed with everything that Mr Vorster had stated in the answering affidavit. Supposing that this was a mere oversight, what is surprising is that Mr Vorster, who had all along being present in court when Mr Vermaak testified, offered no testimony to that effect at all. It was clear from Mr Vorster's evidence that the only contact he had with Mr Vermaak pertaining to the respondent was during the year 2010. I also find it strange that Mr Vermaak, having handed all the respondent's documentation to Mr Lamprecht in 2007, he would still happen to have possession of the unsigned share certificate no 3 the respondent's 2007 annual returns three years down the line. In my view, these improbabilities in Mr Vermaak's evidence and the material discrepancy between his evidence and that of Mr Vermaak militate against the acceptance of his evidence as the correct account of events and thus calls for the rejection of aspects of his evidence that are in dispute.

[18] As stated before, Mr Vorster, who was present in court when Mr Vermaak testified, did not testify about any interaction he had with Mr Vermaak pertaining to the issuance of the share certificate in the name of Vorprecht Trust. All that is on record from him pertaining to this particular aspect is what he stated in the answering affidavit, which was that he contacted Mr Vermaak regarding the respondent's company documents in 2010.

[19] By his own admission, Mr Vorster gave Mr Lamprecht free reign regarding what to do and the timing of what was to be done on behalf of the respondent. According to him, he simply believed that Mr Lamprecht would fulfil his promises. It is highly unlikely that he would have insisted on the rectification of Vorprecht Trust's details in 2006 as suggested by Mr Vermaak and then reverted to the supine attitude he had displayed all along. He

(Vorster) was cross-examined at length on his lack of interest in the affairs of the respondent, his lengthy explanation at no stage included a request for the rectification of the name error in the share certificate. On the contrary, his testimony was that the reason why Vorprecht Trust's interest in the respondent was not reflected in any of the Vorprecht Trust's financial statements to date was that he was waiting for a share certificate to be issued in the name of Vorprecht Trust. This is how he testified on this aspect under cross-examination as it appears on p. 79, line 3 – 9 of the record)

> "Maar die punt is u het nog nooit so 'n aandelesertifikaat in die naam van die Vorbrecht Besigheidstrust gesien nie? --- Nee
> Dit is nr. 1. Nr. 2 u het state afgeteken vir al die jare waar daardie aandele nooit getoon word as 'n bate in die Vorbrecht Besigheidstrust nie. --- Dit is korrek. **Ons het gewag vir die aandelesertifikaat**." (my emphasis)

[20] He would not have testified in the afore-mentioned manner if (i) he had seen the share certificate (ii) had picked up the error and insisted on its rectification. In my view, it can safely be concluded that Mr Vorster had not had any interaction with Mr Vermaak pertaining to the respondent's affairs before the year 2010.

[21] It must be borne in mind that Mr Vorster was not a novice when it came to financial matters. According to him, he and Mr Lamprecht met 17 years ago when he (Vorster) was working as a clerk at an auditing firm. He was at that stage charged with the preparation of financial statements and book-keeping in respect of a number of Mr Lamprecht's companies. He subsequently obtained a diploma in internal auditing. His evidence revealed that he was meticulous enough to ensure that the amount that he personally contributed for the buying of cattle on behalf of the Vorprecht Trust was reflected as a loan account in the books of the Vorprecht Trust. He conceded under cross-examination that Vorprecht Trust's shareholding in the respondent was never reflected as an asset in any of Vorprecht Trust's financial statements. I find it hard to believe that a man of his qualifications and experience would, subsequent to landing such a windfall by virtue of being one of the beneficiaries of the Vorprecht Trust, fail, from 2006 right up to the hearing of

this matter, to record such shareholding in the books of the Vorprecht Trust. After all, he was one of the trustees of the Vorprecht Trust and was actively involved in its farming operations.

[22] Although Mr Vorster was, in his evidence-in-chief and during the initial stages of cross-examination, steadfast that he did not make any enquiries from Mr Lamprecht about the issuing of shares and other compliances, with the progression of cross-examination he changed tack and asserted that he was concerned and made regular enquiries, to no avail. It is apt to quote from Mr Vorster's evidence on this aspect, which appears from p. 82 to p. 84 of the record.

> "Maar in u eedsverklaring gebruik u dit duidelik en ek gaan nie weer na daardie paragraaf verwys nie, paragraaf 10, miskien verwys ek u daarna; 'Gedurende 2005 (begin by paragraaf) het ons besluit om die boerderybedrywighede in the Vorbrecht Besigheidstrust te beoefen.'
>
> U koop toe die beeste. --- Dit is korrek.
>
> En hy stel die plase waarop die trust boer, beskikbaar. --- Korrek.
>
> Om te gebruik. --- Korrek.
>
> En hulle beetaal huur. --- Ons betaal huur.
>
> Nou skielik in 2006 gaan hy die helfte van hierdie eiendom vir u gee, want dit is letterlik waarop dit neerkom – sonder enige leningsrekenings, sonder enigiets. Hy gaan die helfte van daardie eiendom vir u gee en nie alleen dit nie, hy gaan ook die skenkingsbelasting en die oordragkoste betaal want dit is waarop dit neerkom. --- Dit was die reeling.
>
> Dit was die reeling en nie op skrif gewees nie? --- Dit was 'n mondelingse ooreenkoms.
>
> Nie een enkele skrywe wat dit uiteensit nie? --- Dit was 'n mondelingse ooreenkoms.
>
> Hy het ook nie daaraan voldoen nie vir meer as drie jaar? --- Dit is korrek.
>
> Daar is nog steeds nie 'n skrywe nie. --- Nee.
>
> Het u geweet in 2006 dat daar opdrag gegee is dat die aandele oorgedra moet word na die Vorbrecht Trust toe? --- Nee, ek het aanvaar hy sal dit doen. Dit is wat hy gesê het hy gaan doen."

[23] Furthermore, in Mr Vorster's affidavit, at par 14 on p. 106 of the record, Mr Vorster averred as follows pertaining to what transpired in 2006 after the respondent was purchased from Mr Gouws:

> "14. Al die dokumentasie van die betrokke maatskappy [respondent] is toe versend na Adriaan Vermaak 'n rekenmeester wat as sulks praktiseer as A Vermaak en Assosiate BK te Pretoria te gebou 16 Central Office Park, Jeanlaan257, Centurion met die versoek dat alle tersaaklike dokumentasie voltooi moet word sodat die Vorprecht Besigheidstrust die enigste aandeelhouer in die Respondent word en dat Lamprecht aangestel word as direkteur van die betrokke maatskappy. Dit was soos ek en Lamprecht ooreengekom het."

[24] What I find strange is why, when Mr Lamprecht and Mr Vorster had already agreed before the purchasing of the respondent that Vorprecht Trust would be the sole shareholder and that Mr Lamprecht would be sole director, would Mr Lamprecht, who had the assistance of both a firm of auditors and a professional company secretary, have instead registered HCL Family Trust as the sole shareholder, only to require that it be transferred to Vorprecht Trust in a few months time.

[25] Furthermore, if Mr Vermaak had actually informed Mr Vorster and Mr Lamprecht that the registration of the shareholding was done on the 1st November 2006, as Mr Vorster would later in his evidence have us believe, why would he thereafter be making enquiries to Mr Lamprecht about it knowing that he had already complied? This is a material inconsistency between what Vorster stated in his affidavit on 3 November 2010 and his testimony in court on the 5th March 2013.

[26] In the answering affidavit Mr Vorster created the impression that CAP Chartered Accountants were only appointed as the respondent's auditors on 13 July 2009. Mr Vorster's averments on that aspect turned out to be nothing but a red herring intended to create a dispute of fact, as Mr Geyer's evidence that CAP Chartered Accountants was appointed as the respondent's auditors on 9 April 2009 was left unchallenged. Furthermore, the respondent sought to rely on documents that were not fully completed, viz an undated transfer certificate in which he signed as a chairperson of the respondent; an incomplete and unsigned "auditor's report", a similar document dated 19 November 2008, in which Mr Lamprecht purported to sign in the same capacity of "chairman/secretary" of the respondent, accompanied by an

incomplete and unsigned "auditor's report". These documents were of no probative value and consequently no weight was attached to them.

[27] Counsel for the respondent conceded that the share certificate annexed to the respondent's papers is unsigned and does not suffice as *prima facie* evidence of the title of the Vorprecht Trust as a member of the respondent as contemplated in section 94 of the Companies Act. He, however, contended that the fact that a signed share certificate in the name of Vorprecht Trust or the respondent's share register were not furnished by the respondent did not serve to weaken the respondent's version in any way. According to the respondent, what was crucial was that Mr Lamprecht and Mr Vorster had verbally agreed that transfer would be effected and that consensus sufficed as proof. As authority for this proposition, counsel for the respondent relied on the case of **BOTHA V FICK 1995 (2) SA 750 (A).** In that case it was, *inter alia*, held that mere consensus is sufficient to constitute a cession of rights attaching to a share; that a cession of these rights takes place by means of a transfer agreement which will coincide with, or be preceded by, a *iusta causa* and that the duty of registered shareholders to deliver share certificates and completed transfer forms to a buyer is not a requirement for the validity of a cession in terms of which rights and title in relation to the shares are transferred, but stems from the sale transaction creating the obligation.

[28] I agree with the principle laid down in the case of Botha v Fick (*supra)* i.e. that mere consensus is sufficient for a valid cession of the rights attaching to a share and that registration of transfer in the share register or delivery of the share certificate to the cessionary is not necessary for acquisition of the rights of a shareholder. A shareholder's rights are indeed rights of action and the share certificate is a mere *prima facie* evidence of the member's title to the shares. The crucial question that remains for consideration in this matter is whether such consensus, which the respondent sought to prove via the evidence of Vorster and Vermaak, was proven in this matter.

[29] Significantly, there is no proof of the transaction creating the obligation, which according to Mr Vorster, was a donation. None of the series of the donations alleged by Mr Vorster were backed up by any records. We are expected to rely on Mr Vorster's say-so. I agree with the applicant's contention that donations are generally not presumed. As the underlying transaction was said to be a donation, the respondent had the evidential burden to show that these donations indeed occurred.

[30] Furthermore, the respondent did not call Mr Lamprecht as its witness but criticised the applicant for not doing so. According to the respondent, Mr Lamprecht knows he acted fraudulently and would therefore not take the witness stand for fear of self-incrimination that would make him liable for criminal prosecution. This postulation amounted to speculation as it was not supported by any facts. Even if that postulation were to be accepted as correct, it needs to be borne in mind that the information pertaining to the alleged donations is information that would have been exclusively known to the respondent. The least that the respondent could have done would have been to request Mr Lamprecht to depose to a confirmatory affidavit in which he confirmed Mr Vorster's averments. Perhaps such an affidavit would have sufficiently clarified the matter and rendered the referral of the matter for oral evidence unnecessary. Deposing to an affidavit would certainly not have rendered Mr Lamprecht vulnerable to self-incrimination as there would not have been any cross-examination.

[31] The alternative would have been for the respondent to obtain and then discover documents evidencing the donations, e.g. proof of payment of donations tax which, according to Vorster, was paid. This was not done, although it was feasible, given Vorster's evidence that a meeting was held between him, Mr Lamprecht and the respondent's legal representative, viz Mr van Zyl at the time when he (Vorster) was taking the directorship of the respondent over. I find that the respondent has not, on a preponderance of probabilities, discharged the evidential burden of proving the underlying contract of donation that formed the basis or *iusta causa* for the cession of the rights by HCL Trust in favour of Vorprecht Trust. This obviously impacts

negatively on the respondent's assertion of there having been a consensus to transfer the shareholding from HCL Trust to Vorprecht Trust.

[32] Given the views I have already expressed regarding Mr Vermaak and Mr Vorster's evidence, the probabilities are clearly highly stacked against the consensus that the respondent seeks to rely on. The probabilities are more in favour of a conclusion that the only relationship between Mr Vorster and Mr Lamprecht as at the 3rd April 2009, when Mr Lamprecht signed the section 226 consent and the deed of suretyship on behalf of the respondent, was that of co-trustees of Vorprecht Trust and nothing more and that Mr Vorster's involvement in the respondent company commenced only on the 24th June 2010 when he took over its directorship from Mr Lamprecht pursuant to his sequestration. In so far as Mr Vorster tried to create the impression that the Vorprecht Trust was the shareholder of the respondent, he has been shown to have lied. Whether these lies were because of misplaced loyalty to Mr Lamprecht or out of self-interest on the realisation that Vorprecht Trust was about to lose out on the farming operations carried out on the farms that the respondent bonded in favour of the applicant or for any other reason, is immaterial.

[33] I therefore find that as at the time that Mr Lamprecht signed the suretyship document, the only shareholder of the respondent was HCL Trust, of which Mr Lamprecht was the sole trustee. I agree with the applicant's counsel that there is no formality regarding how the shareholder is to signify his consent in a document in terms of section 226 of the Companies Act. The form in which such consent must be given is not prescribed. The content of such form is also not prescribed. Contrary to the respondent's argument, this section does not prescribe that the consent be in the form of an affidavit. Even though Mr Lamprecht filled in his own details under "shareholder", the fact is that the right person with the authority to act on behalf of the shareholder (HCL Trust), did in fact sign the document, thus signifying the prior written consent of the shareholder. This, in my view, suffices as compliance with the parties' agreement. I therefore find that the applicant has shown on a balance of probabilities that Mr Lamprecht, in his capacity as the sole trustee of the

HCL Trust, had the authority to sign the suretyship on behalf of the respondent and in fact lawfully bound the respondent in respect of HCL Trust's indebtedness. He would in any event be deemed to have given valid consent on the basis of estoppel, as correctly argued by the applicant. I disagree with the respondent's contention that reliance cannot be placed on the doctrine of estoppel because the formalities for a valid suretyship were not complied with.

[34] Terms which are essential for the material validity of a contract of suretyship are the identity of the creditor, the surety and the principal debtor as well as the identification of the principal debt. The parties' deed of suretyship complies with all these formalities. It sets out the details of the creditor (First Rand Bank (the applicant), the debtor (HCL Trust), the debt (R3 500 000.00) and the surety (Western Breeze 123 (Pty) Ltd (i.e. the respondent). The terms of the suretyship are clear and there is nothing to suggest that formalities were not complied with. Thus, the respondent's reliance on the case of **STEWART &LLOYDS OF SA LTD v CROYDON ENGINEERING & MINING SUPPLIES (PTY) LTD & OTHERS** 1981(1) SA 305 (W), was obviously misplaced.

[35] The respondent contended that no proper case for winding up was made as the debt owed to the creditor (applicant) was not its own debt as contemplated in section 345 of the Companies Act. The fallacy underlying this argument is borne out by the content of the deed of suretyship signed by Mr Lamprecht on behalf of the respondent, in terms of which the respondent bound itself as co-principal debtor and renounced the benefits of division and excussion. The very nature of a suretyship is that the surety binds himself/herself/itself as debtor to the principal creditor to render the whole or part of the performance due to the creditor (in this context payment of the debt due to the creditor) by the principal debtor if the principal debtor fails, without lawful excuse, to perform (in this context, to pay)**.** By virtue of renouncing the benefits of excussion and division vis-a-viz the creditor the surety becomes liable jointly and severally with the principal debtor. See **LAWSA (Vol 26)** at par 294 and the cases referred to in footnote no 1. The respondent's

contention therefore holds no water. Having considered all the circumstances of this case, I am satisfied that the applicant has, on a balance of probabilities, established a proper case for the granting of a winding up order.

[36] Whereas the applicant had, in its Notice of Motion, prayed for a provisional order of liquidation, at the conclusion of the hearing of oral evidence, counsel for the applicant requested this court to grant a final order on account of the discretion courts have in this regard. Although the practice in the Free State division is to first grant a provisional order of liquidation, I am of the view that the circumstances of this case warrant the granting of a final order.

[37] This conclusion is based on the following: (i) I have already found that the only shareholder of the respondent company was HCL Trust, whose sole trustee was Mr Lamprecht, the very man who signed the deed of suretyship as well as the Section 226 Consent. Mr Lamprecht is aware of this litigation and chose not to be involved in any way. (ii) The current director of the respondent deposed to an affidavit and also testified. He made no mention of other creditors. Neither did he make any averments that suggested that a final liquidation order would be prejudicial. The respondent's defence of this matter was based purely on the alleged non-indebtedness of the respondent and on no other ground. (iii) Service of the application papers was effected on the South African Revenue Services and the Master of the High Court and they chose not to file any reports. The sheriff also filed a return of service stipulating that the respondent has no employees. (iv) Although the matter was brought on motion, the application was referred for oral evidence and evidence was subsequently led. I am satisfied that issues have been fully ventilated and it is highly unlikely that further facts will be forthcoming. (v) Liquidation applications are by their nature urgent. Even though no reasons were advanced for the delay in setting the matter down for the hearing of oral evidence, the fact of the matter is that a period of 19 months, which is a relatively long period, has already passed between the judgment referring the matter for oral evidence and the hearing of oral evidence. Based on the

reasons I have alluded to, I am of the view that no practical purpose would be served by granting a provisional order.

[38] I therefore grant the following order:

38.1 The respondent company is hereby placed under final liquidation;

38.2 The respondent is ordered to pay the costs of this application.

M. B. MOLEMELA, J

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