In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 1117/2013

In the matter between :

Firstrand Bank Ltd Applicant

and

Samgram Holdings (Pty) Ltd Respondent

Judgment

Lopes J

[1] The applicant, Firstrand Bank Ltd, seeks a provisional order of liquidation of the respondent, Samgram Holdings (Pty) Ltd on either one of two grounds :

(a) that the respondent is unable to pay its debts; and/or

(b) that it is just and equitable that the respondent be wound up.

[2] The applicant relies upon the provisions of s 344(f) and/or (h) read with ss 345(1)(a) and/or ss 345(1)(c) of the Companies Act, 1973 (‘the old Companies Act’),

read with item 9 of schedule 5 of the Companies Act, 2008 ('the new Companies Act').

[3] The following are common cause between the parties :

(a) that the parties concluded an FNB corporate property finance loan facility on the 4th March 2005 in respect of which the sum of R1 911 245,40 remains due owing and payable by the respondent to the applicant;

(b) a Rand Merchant Bank loan facility was concluded between the parties on the 4th August 2005, and in respect of which the sum of R2 257 866,94 remains due owing and payable by the respondent to the applicant;

(c) the respondent bound itself in favour of the applicant as surety for, and co-principal debtor with Halflyn (Pty) Ltd ('Halflyn'), the latter company having concluded a commercial property finance loan facility agreement with the applicant in respect of which the sum of R48 150 934,26 remains due owing and payable by Halflyn to the applicant;

(d) on the 31st July 2007 the respondent concluded the suretyship agreement in favour of the applicant;

(e) on the 11th April 2011 Halflyn concluded an agreement with the applicant which included an acknowledgment of the indebtedness of Halflyn to the applicant in the sum of R39 734 132,95;

(f) on the 2nd July 2013 Halflyn was placed into provisional liquidation pursuant to a judgment of Moodley J in this court;

(g) the respondent breached the corporate property finance loan facility by :

(i) failing to satisfy a judgment taken against it by the South African Revenue Services within seven days of becoming aware thereof. The judgment became effective on the 23rd July 2012;

(ii) committing an act of insolvency in terms of the Insolvency Act, 1936 by instituting business rescue proceedings which included written notice to the respondent's creditors that it was unable to pay its debts; and

(iii) compromising or attempting to compromise or defer payment of its debts by instituting business rescue proceedings;

(h) for the same reasons as set out above, the respondent breached the Rand Merchant bank loan facility;

(i) the purpose of the loans granted by the applicant to the respondent and Halflyn was to facilitate the development of a piece of land with the intention to create a private residential township;

(j) the period for the repayment of those loans has lapsed entirely;

(k) with regard to the debt owed to the applicant by Halflyn pursuant to the commercial property finance loan facility granted to it by the applicant, that loan was concluded on the 21st October 2007 and amended or extended in terms of the agreements concluded between the parties dated the 23rd September 2008, the 25th August 2009 and the 10th December 2009 ('the addenda').

[4] As the respondent has been unable to satisfy the debts owed by it to the applicant or the debt which it owes to the South African Revenue Services, the applicant submits that it has satisfied the requirements of the old Companies Act with regard to establishing the actual and commercial insolvency of the respondent.

[5] Mr *du Toit* SC who appeared on behalf of the respondent accepted that the respondent bore the onus of demonstrating on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds.

<u>See</u> : *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980 B – D.

[6] Mr *du Toit* submitted that the respondent's only defence to the corporate property finance loan facility and the Rand Merchant Bank loan facility was that the respondent's inability to repay those debts was caused by the applicant's breach of the commercial property finance loan concluded with Halflyn, when the applicant wrongfully failed to advance funds to Halflyn for the development of the property in accordance with the drawn down provisions of the commercial property finance loan.

[7] Mr *du Toit* also submitted that the provisions of the new Companies Act were applicable because the respondent was in fact a solvent company. He drew a distinction between the two measures of solvency – i.e. where the company's assets exceed its liabilities, or, where it is commercially solvent.

[8] With regard to the possibility of the respondent's assets exceeding its liabilities, the respondent relied upon a set of annual financial statements for the 2009 tax year. It is significant that the auditors who drew up those annual financial statements could not certify their accuracy or reliability. In this regard the

respondent's director, Mr Kay, who deposed to the affidavits on behalf of the respondent, was only able to rely on the suggestion that given time, the respondent would be able to discharge its indebtedness to the applicant, this by way of Mr Kay raising finance to discharge those debts. He suggests that the properties which are owned by the respondent are sufficiently valuable to provide adequate security to repay the applicant. Unfortunately, reliance is placed on the values contained in the 2009 annual financial statements referred to above. No proper or current valuation has been placed before me to demonstrate the actual current values of the properties concerned. Unfortunately the respondent has not even begun to try to demonstrate that its assets exceed its liabilities.

[9] With regard to the commercial insolvency of the respondent, Mr Kay concedes that the company is short of liquid assets and is unable to repay the debt which it owes to the South African Revenue Services or the debts owed to the applicant.

[10] With regard to the alleged breaches by the applicant of the commercial property finance loan by refusing to advance the agreed draw down amounts to Halflyn, Mr *Du Toit* conceded that the addenda would stand, and would in effect nullify the defence raised by the respondent on the basis of the*exceptionon adimpleticontractus*. Mr *du Toit* submitted that it was accordingly necessary for the respondent to establish the alternative defence relied upon by it – i.e. that the agreements were concluded under duress.

[11] The only duress to which Mr *du Toit* could point was the economic consequences which the respondent would suffer when Mr Kay signed the addenda to the commercial property finance loan to Halflyn. The suggestion is that at the stage those addenda were concluded the applicant had not advanced the draw down amounts and the only way in which the respondent could persuade the applicant to advance further (and smaller amounts than anticipated) was by Mr Kay signing variations to the commercial property finance loan. As the respondent had allowed work on the private residential development to progress, it had incurred debts to a number of service providers. Mr Kay was then faced with the option of defaulting on those debts, with the certainty of the complete collapse of the project, or in the alternative to sign the variation agreements. He chose the latter because he had no real option.

[12] Mr *Olsen* SC, who appeared for the applicant, drew my attention to the requirements which have to be established in order for a party to create a defence of economic duress. In this regard he referred to *Hendricks v Barnett* 1975 (1) SA 765 (N). This case is authority for the proposition that where improper pressure is exerted through duress of goods, it is necessary for the party claiming duress to show that he or she expressly reserved their rights when making payment. There must be an unequivocal protest, and an unexpressed mental reservation is of no avail. This judgment was approved and followed in *Kapp v T C Valuta (Pty) Ltd* 1975 (3) SA 283 (T).

[13] Applying the above requirements, there is no evidence in the respondent's affidavits of any protest whatsoever with regard to the applicant's non-payment of draw downs, at the time that the various addenda to the commercial property finance loan were agreed. Indeed, it is clear from the correspondence that when allegations of a non-release of funds by the applicant were raised – which was only in a letter addressed by the respondent's attorney to the applicant on the 17th December 2010, the parties negotiated through their attorneys and agreed to the signing of the acknowledgement of debt which was eventually signed on the 11th April 2011.

[14] In the circumstances of this matter there can be no suggestion of duress of any kind. It may well be that Mr Kay found himself in the unenviable position that, because the project was not proceeding as desired, and sales of the units were not forthcoming, combined with the effect of pressing creditors for payments of the services they had rendered, he chose to sign further agreements with the applicant. He did so in order to benefit his situation as he saw it and he cannot now allege that he was forced in any way to do so.

[15] In all the circumstances I am satisfied that the applicant has established all the requirements for a provisional liquidation order. I am also satisfied that the respondent has not in any way established that its indebtedness to the applicant is disputed on bona fide and reasonable grounds. I accordingly make the following order :

1. a rule nisi is hereby issued calling upon all persons to show cause, if any, to this court on the 27th September 2013 at 9.30am or so soon thereafter as the matter may be heard, why the respondent should not be finally wound up and why the costs of this application should not be costs in the liquidation;

2. this order is to operate with immediate effect as a provisional order winding up the respondent;

3. service of this order is to be effected :

   (a) by publication on or before the 13th September 2013 in both the Government Gazette and a daily newspaper published and circulating in KwaZulu-Natal; and

   (b) as required by the provisions of the Companies Act, 1973.

Date of hearing : 16th August 2013

Date of judgment : 26th August 2013

Counsel for the Applicant : P J Olsen SC (instructed by Edward Nathan SonnenbergsInc)

Counsel for the Repondent : J I du ToitS C (instructed by Stilwell Attorneys)