

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 5095/10

In the matter between:-

FIRSTRAND BANK LTD

Applicant

and

WESTERN BREEZE TRADING 213 (PTY) LTD

Respondent

HEARD ON: 04 AUGUST 2011

DELIVERED ON: 30 AUGUST 2011

MOLEMELA, J

[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 respondent denies that it is indebted to the applicant and avers that applicant failed to comply with the provisions of section 226 of the Companies Act 61 of 1973 ("the Companies Act").

[2] The applicant relies on the indebtedness of HCL Familie Trust and a suretyship signed in its favour in terms whereof the respondent bound itself as surety and co-principal debtor for the indebtedness of HCL Familie Trust. It is common cause that the suretyship was signed by one H C Lamprecht, who, according to the applicant, was both the sole director and the sole shareholder of the respondent company. As its authority for the averment that Lamprecht was the sole shareholder the applicant relies on a certificate to that effect, purportedly made by the auditors of the respondent company, viz CAP Chartered accountants. The respondent contends that Lamprecht was not authorised to sign the suretyship as contemplated in section 226 of the Companies Act 61 of 1973 ("the Companies Act"), as he was not the shareholder of the respondent. According to the respondent, the only

shareholder of the respondent has always been a trust known as the Vorprecht Besigheids Trust, of which Lamprecht and one Vorster were the trustees.

[3] It was argued on behalf of the applicant that a trust is not a body corporate as envisaged in section 226 of the Companies Act and thus does not fall in any of the categories against which a prohibition arises in terms of section 226(1) of the Companies Act, the effect of which is that the provisions of section 226(1) of the Companies Act are not applicable. It was further argued that insofar as the afore-said section does not apply *ex lege*, then the respondent's defence of non-compliance with that section must fail. The applicant further argued that even if section 226 of the Companies Act was applicable, it had in any event been complied with as Lamprecht had, in his capacity as the sole shareholder of the respondent, signed a written consent of shareholders in terms of section 226 of the Companies Act under the heading "Name of Shareholder (all shareholders to sign)". Below his signature was a certificate made by the respondent's auditors, viz CAP Chartered Accountants, in terms of which they certified that "according to the company's register the above is a full list of all the members of the company."

[4] Much of the respondent's denial of the validity of the consent signed by Lamprecht is based on an argument that CAP Chartered Accountants were not or could not have been the auditors of the company at the time and that Lamprecht was not the respondent's shareholder. In its replying affidavit the appellant makes reference to a search that was made at the Companies Registration Office and attached letters from the Companies Registration Office properly certified by them, confirming that CAP Chartered Accountants were registered from the 9th of April 2009 until the 5th of July 2010, thus being the auditors at the time that the consent in terms of section 226 was certified. At the hearing of the application, the respondent's counsel argued that the certificate purporting to have been made by CAP Chartered Accountants did not bear a signature and instead a stamp was affixed without furnishing the details of the person that affixed it.

[5] The agreement on which the applicant relies made repeated reference to the granting of consent as contemplated in section 226 of the Companies Act. The applicant purportedly secured compliance therewith by virtue of the consent signed by Lamprecht. I am of the view that a proper determination of this application warrants the determination of the membership of the respondent company as at the time of the signature of the agreement. Was Mr H C Lamprecht the sole shareholder of the respondent when he signed the suretyship in favour of the applicant? There is, in my view, a genuine dispute of fact on this aspect. Unfortunately the company secretary is very vague on it, as he does not even disclose the date at which the Vorprecht Besigheid Trust allegedly became the shareholder.

[6] Furthermore, it is indeed so that not a single document reflecting the respondent's membership fact was placed before the court. In this regard, both Vorster and Vermaak (the company secretary) did not aver that a share certificate in favour of the Vorprecht Besigheidstrust was ever signed. No properly signed share certificate was produced. It is also noteworthy that there is no explanation put forward by the company secretary or by Vorster as to what happened to the company documents, including the register. The share certificate which was annexed to the papers as annexure "PAV2" is unsigned and reflects that it is share certificate no 3 and no averments are made regarding share certificate 1 and 2. Nothing was placed before Court indicating that the director in fact authorised the transfer of the shares and no resolution which is normally prepared was provided. The one item that could be of much assistance in this regard would be the share register or a copy of a properly signed certificate. None of the parties furnished me with such documents. The one person who can possibly shed more light on this aspect is none other than H C Lamprecht, who unfortunately did not depose to any affidavit in this application.

[7] In my view, this dispute of fact is not soluble on the papers as they stand and can only be resolved by oral evidence. Mr. Pretorius argued that the matter ought to be dismissed and not be referred for oral evidence, as the dispute was foreseeable given the correspondence that was exchanged

between the parties prior to the launching of the application. I agree with Mr. Leathern SC's argument that the respondent failed to properly articulate the dispute in the correspondence it directed to the applicant. In my view, the dispute of fact was thus not foreseeable under the circumstances. Given the view I hold of this matter, it is not necessary to make any pronouncement on the other submissions that have been made.

[8] I, therefore, make the following order:-

1. The application is referred for the hearing of oral evidence at a time to be arranged with the Registrar, on the question whether H C Lamprecht was the sole shareholder of the respondent company during April 2009.
2. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in para 3 hereof.
3. Save in the case of the deponents to the affidavits filed or record, neither party shall be entitled to call any witness unless:
 - (a) it has served on the other party at least 14 days before the day appointed for the hearing (in the case of a witness to be called by the respondent) and at least 10 days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person or the document he is required to produce is set out; or
 - (b) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

4. Either party may subpoena any person to give evidence or to produce any document at the hearing, whether such person has consented to furnish a statement or not.
5. The fact that a party has served a statement in terms of para 3 hereof, or has subpoena a witness, shall not oblige such party to call the witness concerned.
6. Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in para 1 thereof, which are or have at any time been in the possession or under the control of such party.
7. The provisions of Rule of Court 37 shall apply.
8. The incidence of the costs incurred up to now shall be determined after the hearing of oral evidence.

M.B. MOLEMELA, J

On behalf of the applicant: Adv. D.M. Leathern SC
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On behalf of the respondent: Adv. B. Pretorius
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