FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 4470/2010

In the matter between:-

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

WATERWHEEL INVESTMENTS 107 (PTY) LTD Defendant

HEARD ON: 28 OCTOBER 2010

DELIVERED ON: 18 NOVEMBER 2010

JUDGMENT

RADEBE AJ:

[1] The applicant seeks a final order for the winding up of the respondent on the following basis:

(a) that the respondent is *de facto* insolvent;

(b) that the respondent is deemed to be insolvent by virtue of the provisions of section 344(f) read with section 345(1)(a) and (c) of the Companies Act, 61 of 1973 (as amended);

(c) that it is just and equitable to do so;

(d) that the respondent is unable to pay its debts.

[2] The respondent did not file any opposing affidavit although the parties had, by consent, obtained an order directing the respondent to file its opposing affidavit by 13 October 2010. When the application was heard on 28 October 2010, the respondent asked the court to adjudicate the matter on the technicalities and points of law only, and on the basis of the applicant's founding affidavit only.

[3] The applicant alleges that this Honourable Court has jurisdiction to adjudicate upon the matter, as the registered address is situated within its area of jurisdiction. The service address where the sheriff effected service upon the respondent is undoubtedly situated within the jurisdiction of this Honourable Court, being at 52 Aliwal Street, Arboretum, Bloemfontein. The respondent has not shown by way of affidavit that it has a different address as its principal place of business.

[4] The applicant alleges that the respondent owes it an amount of R7 258 923.37, with interest on the said amount calculated at 9,65% p.a. from 22 July 2010 to date of payment, as shown in the certificate of balance – annexure "LC3" to the founding affidavit. The indebtedness of the

respondent, so alleges applicant, is based upon the documents annexed to the founding affidavit as “LC2A” – Letter of grant of home loan facility of an amount of R11 000 000.00 (Eleven Million Rand) to the respondent by the applicant and “LC2B” – Continuing Covering Mortgage Bond No. B000012327/2007 registered in favour of the applicant (mortgagee) by the respondent (mortgagor) registered on 15 June 2007 to secure the indebtedness of the respondent to the applicant.

[5] The material terms of the Mortgage Bond as set out in paragraph 8.1 and 8.4 of the founding affidavit and paragraph 1.1 and 1.1.3 of annexure “LC2B” are as follows:

> “8.1 The Respondent is truly and lawfully indebted and firmly bound unto and on behalf of the Applicant and/or its successors in title for the sum of R11 000 000.00 (Eleven Million Rand) from whatsoever cause arising, including but not restricted to:-
>
> 8.1.1 existing, future and contingent indebtedness;
>
> 8.1.2 .....
>
> 8.1.3 Indebtedness arising from monies lent or advanced, or to be lent or advanced.....
>
> 8.2 .....

8.3 ....."

[6] A certificate signed by any of the Bank's managers, whose appointment need to be proved, will, on its mere production, be proof, unless the contrary is proved, of the following stated in the certificate:

"6.1 the amount due to the Bank at any time ('**debt**');

6.2 the fact that the debt is due and payable;

6.3 the rate of interest payable;

6.4 the date from which the interest is calculated; and

6.5 any other matter relating to the Mortgagor's indebtedness secured by this bond."

The respondent has not filed any affidavit to prove the contrary to clause 6 of the Mortgage Bond (annexure "LA2B").

[7] The applicant further alleges that the respondent has failed to effect payment as it was obliged to do under the mortgage bond. The demand for payment of the balance outstanding, as said above, is shown in annexure "LC6" of the founding affidavit. The respondent has not denied that it owes the amount stated therein and has not indicated to this court

whether the amount is wrong or is not owed, save for arguing that the letter of grant (annexure “LC2A”) states that a home loan of R11 000 000.00 was approved.

[8] Counsel for the respondent argued that the amount of R7 258 923.36 plus interest, as shown in the Certificate of Balance as well as in annexure “LC6”, is neither due and payable and is not claimable by the applicant from the respondent as the Continuing Covering Mortgage Bond (“LC2B”) does not provide for the payment of any amounts, instalments or monthly repayments.

[9] On the contrary, the applicant argues that, the respondent passed the First Mortgage Bond over the property, Erf 1494 Ladybrand Ext 7, district Ladybrand, Province of Free State; and that the respondent agreed with all the terms of the said bond “LAC2B”). Applicant argues that the respondent agreed that if it failed to observe or perform any of the provisions of the bond or failed to pay any amount which may be legally claimable by the applicant, then all amounts secured by the bond shall at the applicant’s option, become immediately due and payable in full.

[10] As stated in paragraph [1] of this judgment, the applicant brought this application on the basis of, *inter alia*, section 344(f) read with section 345(1)(a) and (c) of the Companies Act (as amended); inability to pay its debt; and, that it is just and equitable to place the respondent under liquidation.

[11] Section 345 of the Companies Act stipulates the following:

> "**345 When company deemed unable to pay its debts**
>
> (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 ... (not applicable in this case) and the company of 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 ... (not applicable in this case)
>
> *(c)* it is proved to the satisfaction of the Court that the company is unable to pay its debts."

[12] The amount owed is shown in annexure "LC3", which is a Certificate of Balance. I am persuaded to come to the conclusion that this certificate complies in all material respects with the provisions in clause 6 of the Mortgage Bond. The amount stated therein is above R100.00 and therefore satisfies the provisions of section 345(1)(a). If read with the letter in annexure "LC6", addressed by Stupel and Berman Inc, acting for the applicant, the said amount became due, owing and payable on 28 July 2010. The respondent undoubtedly has for three weeks thereafter neglected to pay the said sum.

[13] Respondent's counsel takes the point that the said amount is secured by a continuing covering mortgage bond and that there are no instalments specified, but does not advance any reasons why it has not paid any part of the arrears which are shown to be R7 258 923.37. Respondent's failure to put his case before court properly by way of an answering affidavit

was, in my view, fatal. The technical points that the respondent advance, do not take its case anywhere as it does not address the questions of whether the amount is owing or not and is owed to the applicant. In fact, respondent argues that the amount advanced, was a building loan and not a home loan and that the said amount is not due and payable. This type of argument is totally contrary to the Mortgage Bond ("LC2B") passed by the respondent in favour of the applicant.

[14] I refer to page 38 of the indexed papers where the details of the monthly instalments of R122 295.76, at 12,5% p.a. are specified. Further, on page 39 to 59 of the indexed papers, "the principal applicants" details are given and the respondent clearly signed for a home loan application. All of these are part of "LC2A".

[15] The only reasonable inference that can be drawn is that the respondent is unable to pay its debts, despite being demanded to do so on 28 July 2010; that it is in terms of section 344(f) read with section 345(1)(a) and (c) of the Companies Act, deemed to be insolvent.

[16] For the record, a fresh security bond dated 25 October 2010 has been placed before court.

[17] In the circumstances I come to the conclusion that the applicant has shown sufficient grounds for the provisional liquidation of the respondent company. I therefore give the following order:

ORDER:

1. The respondent company is hereby placed under provisional liquidation in the hands of the Master of the High Court.
2. A provisional order is hereby issue calling upon all interested parties to show cause, if any, to the court on the 6th day of January 2011 at 09h30 why a final order of liquidation should not be granted against respondent company.
3. Service of this rule, and a copy of the notice of motion and annexures must be effected on the respondent company at its registered office, or its principal place of business within the courts' jurisdiction.
4. This order must, without delay, be published in "Die Volksblad" and The Government Gazette.

5. A copy of the winding-up order must be served on-

    5.1 Every registered trade union that as far as the sheriff can reasonably ascertain, represents any of the employees of the respondent company.

    5.2 The employees of the respondent company by affixing a copy of the application and provisional order on any notice board to which the employees have access inside the respondent company's premises or if there is no access to the premises by the employees, by affixing a copy to the front gate or front door of the premises from which the respondent company conducted any business.

    5.3 The South African Revenue Services.

6. The sheriff must ascertain whether the employees of the respondent are represented by a Trade Union and whether there is a notice board on the premises to which the employees have access.

MADAME JUSTICE N.H. RADEBE, AJ
18 November 2010

On behalf of applicant:	Adv. A. Williams Instructed by: Stupel & Berman c/o Lovius Block Attorneys 31 First Avenue BLOEMFONTEIN
On behalf of respondent:	Adv. C. Snyman Instructed by: Kramer Weihmann & Joubert Inc 149 St Andrew Street BLOEMFONTEIN Ref.: JL WEIHMANN/svn/C07405

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