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**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 5098/2022**

|     |                                 |
|-----|---------------------------------|
| (1) | REPORTABLE: NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO                     |

**31 July 2024**

In the matter between:

**FIRSTRAND BANK LIMITED  
(FIRST NATIONAL BANK DIVISION)**

Applicant

and

**KELIANA GROUP (PTY) LTD**

Respondent

**NONHLANHLA RUTH MAVIE**

Intervening Party

**JUDGMENT**

**Mdalana-Mayisela J**

*Introduction*

[1] This is an application for the final winding-up of the respondent on the ground that it is unable to pay its debts as contemplated by section 344(f), read with 345(1)(c) of the Companies Act 61 of 1973 (“the Companies Act”). On 13 June 2023, Mudau J exercising his discretion granted a provisional winding-up order against the respondent and issued a *rule nisi* returnable on 4 September 2023. The rule nisi was extended by me to 29 January 2024, and it was further extended to the date of delivery of this judgment. The final winding-up application is opposed by the respondent and intervening party.

[2] The applicant is FirstRand Bank Limited, a public company which is duly registered and incorporated with limited liability according to the company laws of the Republic of South Africa and is registered as a Bank in terms of the Banks Act 94 of 1990. The respondent is Keliana Management Company (Pty) Ltd, a company duly registered and incorporated with limited liability in accordance with the company laws of the Republic of South Africa, with its registered address situated at 15 Jubilee Road Parktown, Johannesburg. The intervening party is Ms Nonhlanhla Ruth Mavie (“Mavie”), a sole director of the respondent, and a surety and co-principal debtor for all debts that are owing to the applicant by the respondent.

[3] Mavie has brought an application for leave to intervene in the final winding-up proceedings on the ground that she has a direct and substantial interest. The application for leave to intervene is not opposed by the applicant. I considered the application for leave to intervene and I found that by virtue of her directorship at the respondent, she has the necessary *locus standi* demonstrating direct and substantial interest in the liquidation application. I granted the application for leave to intervene.

### *Background*

[4] The background facts are common cause between the parties. During March 2018, the applicant and respondent concluded a written Structured Loan Credit Facility agreement under account number 3 000 015 099 274 (“Credit Facility agreement”) in terms whereof the applicant made a loan facility available to the respondent in a maximum amount of R30 000 000.00.

[5] As a continuing covering security for the respondent's indebtedness under the credit facility agreement, the applicant holds in its favour the first covering mortgage bond over Portion 9 of Erf 4[...] S[...] township for aforesaid R30 000 000.00, interest, and an additional sum of R6 000 000.00 being in respect of all costs of whatever nature which the applicant may incur in preserving and realising the mortgage property; a cession of an insurance policy covering the mortgage bond; and limited suretyship by Mavie.

[6] The terms of the credit facility agreement were, *inter alia*, that:

[6.1] The applicant would be entitled to levy interest on the loan facility at applicant's prime interest rate from time to time less 0,95% per annum, which at inception of the loan facility amounted to 9.3%. The respondent agreed to repay the amount due to the applicant in 120 monthly instalments. These payments were to be made on the first day of every month. The monthly instalments would fluctuate having regard to such matters as the loan facility sum outstanding from time to time, the extent to which the capital available to the respondent to draw against has amortised and any variation in the applicant's interest prime rate. Should the maximum loan facility amount be advanced, and the applicant's interest prime rate remained constant, the instalment amount would be R385 140.18.

[6.2] In the event of default occurring, the applicant shall be entitled, in its sole and absolute discretion, without notice to the respondent and without prejudice to any of its rights under the credit facility agreement or at law:

[6.2.1] to cancel the credit facility agreement and there upon recover such damages from the respondent; and/or

[6.2.2] to withdraw the loan facility; and/or to suspend any unutilised portion of the maximum facility sum or other amount under the credit facility agreement; and/or

[6.2.3] to require that the respondent repay the total amount of all amounts which may then be owing by the respondent to the applicant under the credit facility agreement, which upon the applicant exercising such election, shall become immediately due, owing and payable by the respondent to the applicant; and/or to enforce performance of the

terms of the credit facility agreement, including payment of all amounts due to it under the credit facility agreement.

[6.3] A certificate signed by any authorized representative of the applicant, whose appointment or authority it shall not be necessary to prove, as to the existence of and the total amount of the respondent's indebtedness to the applicant in terms of the loan facility from time to time including the rate of interest owing together with such other amount(s), that such amount(s) are due and payable, and as to any other fact or matter relating to the respondent's indebtedness to the applicant from time to time which shall, in the absence of error, be final and binding on the applicant and respondent. Such a certificate shall upon its mere production be sufficient for purpose of enabling the applicant to obtain any judgment against the respondent in the legal proceedings.

[6.4] No addition or variation or consensual cancellation or novation of the credit facility agreement and no waiver of any right arising from the credit facility agreement, or its breach or termination shall be of any force or effect unless reduced to writing and signed by all parties or their duly authorized representatives.

[7] It is common cause that the applicant duly performed in terms of the credit facility agreement and lent and advanced the maximum loan facility sum to the respondent. The respondent's indebtedness to the applicant is not disputed. There is also no dispute about the amount of indebtedness.

[8] It is also common cause that the respondent breached the terms of the credit facility agreement in failing to make monthly repayments. The applicant addressed a letter of demand advising the respondent that it was in breach of the terms and conditions of the credit facility agreement in that the following events of default have occurred:

[8.1] The respondent was in arrears of its loan facility in an amount of R712 663.40 as of 23 August 2021; and

[8.2] The loan facility was approved- subject to the sale and transfer of Ptn 2 of Erf 6[...] H[...] within 12 months of registration. Should the sale and transfer not occur within this period the respondent was required to reduce the loan

facility to R25 000 000.00 by paying R5 000 000.00. The aforesaid condition was not met by the respondent. The loan facility was also not reduced by the respondent.

[9] In the aforesaid letter of demand the applicant afforded the respondent 10 days to remedy the breach, failing which the full outstanding balance of the loan facility would immediately become due and payable. The respondent failed to remedy the breach within the said 10 days.

[10] In terms of the certificate of balance dated 1 October 2021, the respondent was in arrears of its loan facility in an amount of R1 076 193.15. On 25 October 2021, the applicant addressed a letter of demand in terms of section 345 of the Companies Act advising the respondent that as a result of its default of the credit facility agreement, and as provided for in clause 14, the applicant has elected to cancel the credit facility agreement, withdraw the loan facility and demand that the respondent pay within 3 weeks of the delivery of the demand the full outstanding balance of the loan facility in the sum of R27 325 034.91 together with interest at the rate of 6.05% per annum, calculated daily and compounded monthly in arrears from 2 October 2021 to date of payment, failing which the applicant would apply for the liquidation of the respondent. The respondent failed to pay the full outstanding balance of the loan facility together with interest. As of 31 January 2022, the respondent was in arrears in the amount of R1 997 130.67.

[11] On 1 February 2022, the applicant issued combined summons against Mavie in her capacity as surety ("the action"). On 25 February 2022, the applicant brought the winding-up application. The respondent opposed the winding-up application and delivered the counter - application asking for the credit facility agreement to be declared void due to the incidence of *force majeure*, *alternatively* that the terms of the credit facility agreement be suspended for a period of 24 months from 26 March 2020 to 1 July 2022, and that the monthly repayments over the said period be suspended.

[12] The applicant filed a section 346(4A)(b) affidavit confirming service of the liquidation application on the Master of this Court, the sixteen employees of the

respondent and South African Revenue Services. The liquidation application and counter - application were argued before Mudau J. He found that the respondent has not made out a case for the relief sought in the counter – application. Further, he found that there was a prima facie case in favour of the applicant justifying a provisional order of winding-up. He granted the provisional order and *rule nisi* returnable on 4 September 2023. He directed that the order be published in the Government Gazette and The Star newspaper. The applicant has complied with the directive of Mudau J regarding publishing of a provisional winding-up order.

### *Issues*

[13] I was advised by the legal representatives of the parties that none of the issues decided by Mudau J would be argued on the return day of the winding-up application. The parties could not agree on the issues to be determined on the return day.

[14] According to the applicant, the issues that arise for determination on the return date are the following:

[14.1] Whether the respondent has proven solvency; and

[14.2] Whether the respondent's legal representative should be ordered to pay the applicant's costs *de bonis propriis* on the attorney and own client scale as a result of the manner they have conducted themselves.

[15] The respondent submitted that the issues that remain for consideration on the return date are as follows:

[15.1] Whether the winding-up proceedings should be stayed pending the finalization of the action brought by the applicant against Mavie in her capacity as surety;

[15.2] Whether the respondent's indebtedness is bona fide disputed; and

[15.3] Whether the credit facility agreement was subject to suspensive conditions that were not fulfilled. If they were not fulfilled, whether the applicant is the respondent's creditor.

### *Lis alibi pendens*

[16] The applicant instituted the action against Mavie based on a deed of suretyship concluded in favour of the applicant for the amounts owing and due by the respondent. The action is still pending. The respondent raised a point *in limine* before Mudau J that the action is *lis alibi pendens*. After the argument on the *lis alibi pendens* issue, Mudau J<sup>1</sup> concluded as follows:

*“Prima facie, it is vexatious to bring two actions in respect of the same subject matter. In this instance however, is the applicant correctly pointed out, the action instituted against the surety is premised upon a different cause of action to that of liquidation, which is to collect the outstanding debt against the surety which debt the surety is liable for in solidum with the respondent. The application before this Court is statutory for the purposes of liquidating the respondent pursuant to the section 345 letter, and the respondent’s failure to act thereupon. Moreover, the action instituted is not between the same parties as that of the application before this Court. In this instance, the respondent is a legal entity with obligations separate from those of the director in her personal capacity. Accordingly, the lis pendens defence is without merit.*

[17] After the respondent filed a plea in the action proceedings, the applicant applied for a summary judgment which was heard by Mia J. On 4 September 2023, I was requested to extend the rule nisi to 29 January 2024 pending Mia J’s reserved judgment as the related issue of the suspensive condition was also raised for determination before her. On 29 January 2024 Mia J delivered her judgment refusing summary judgment and granting Mavie leave to defend. It was submitted on behalf of Mavie that the decision by Mia J granting Mavie leave to defend the action disposed of the winding-up application, and that it is an abuse of the Court process to proceed with the winding-up application in the face of Mia J’s order.

[18] I do not agree with this submission. The action is between applicant and Mavie. The summary judgment application was also between applicant and Mavie. The respondent was not a party in the summary judgment proceedings. The winding-up application is between the applicant and respondent. Mavie is not the respondent in

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<sup>11</sup> FirstRand Bank Limited v Keliana Group (Pty) Ltd case no. 5098/2022 (delivered on 13 June 2023).

the winding-up application. She is an intervening party. I agree with Mudau J's finding that the parties and the cause of action in the winding-up application are not the same as in the action.

[19] Furthermore, Mia J did not refer the related issue of the suspensive condition to trial. On the said issue, she found that<sup>2</sup>:

*“..It was also clear that the suspensive conditions must have been fulfilled as it required documents to be furnished before the registration of the bond. There was no contention that the documents were not furnished, thus it follows that the suspensive conditions were complied with. There is no evidence to support the view that there was non-compliance with the suspensive conditions. The defendant's reliance on this defence is misplaced, as it was a requirement that the documents be provided to ensure registration of the mortgage bond.”*

[20] Mia J granted Mavie leave to defend the action because the amount claimed in the combined summons differs from the amount stated in the draft order prepared by the applicant. The decision of Mia J to grant Mavie leave to defend the action has no bearing on the winding-up application. I agree with the applicant that the action and winding-up application are not dependent on each other and can be adjudicated upon separately. I conclude that the defence of *lis alibi pendens* raised by the respondent on the return date is not sustainable and it must fail.

### *Suspensive conditions*

[21] The respondent contended that the credit facility agreement was subject to suspensive conditions in clauses 4.4, 4.7, 5.4.1, 5.4.2, 5.3 and 5.7 and therefore, the credit facility agreement has lapsed because the suspensive conditions were not fulfilled. I have considered the aforesaid clauses, and I do not intend to repeat their contents herein. In my view, the aforesaid clauses are not suspensive conditions in that they do not suspend the operation of all or some of the obligations flowing from the credit facility agreement pending the occurrence or non-occurrence of a specific

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<sup>2</sup> FirstRand Bank Limited v Mavie Nonhlanhla Ruth case no. 3707/2022 (delivered on 29 January 2024).



uncertain future event, but they are terms and conditions. Furthermore, Mavie is the sole director of the respondent. She represented the respondent during the conclusion of the credit facility agreement, and she signed on behalf of the respondent.

[22] In any event, in clauses 5.8 and 5.9 of the credit facility agreement, the parties agreed as follows:

*“5.8 despite what is set out above, the bank may, in its sole discretion make payment of any amount of the maximum facility amount to the borrower or any person on its instructions prior to the bank receiving all of the documents referred to above. If it does so, this will not mean that the bank has waived the requirements referred to above and the borrower will still be required to provide the documents referred to in the tables above immediately, once such payment has been made.*

*5.9 Should the borrower fail to provide any of the documents refer to the tables to the bank, this will constitute an event of default in terms of the agreement and entitle the bank in addition to any other entitlements it enjoys in terms of the agreement to immediately call up all amounts which have been made available to the borrower or to any person on the borrower’s instructions inclusive of all interest and charges owing by the borrower to the bank.”*

[23] For the reasons stated above, I find that the respondent’s defence of non-fulfilment of the suspensive conditions is without merit and it must fail.

*Is the respondent’s indebtedness bona fide disputed*

[24] It was submitted on behalf of the respondent that the final winding-up application should be dismissed because the indebtedness of the respondent is *bona fide* disputed. The respondent relied on the decision in *Badenhorst v Northern Construction Enterprises Ltd*<sup>3</sup> where it was held that liquidation proceedings are inappropriate for resolving a dispute as to the existence of a debt.

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<sup>3</sup> 1956 (2) SA 346 (T) at 347-8.

[25] It is common cause between the parties that the respondent is indebted to the applicant for a sum not less R100.00 which is due and payable. The respondent is opposing a final winding-up on the basis, *inter alia*, that the parties entered into a settlement agreement for the restructuring of the loan facility. A copy of the alleged settlement agreement is attached to the respondent's pleadings. It was signed on behalf of the respondent. It was not signed on behalf of the applicant.

[26] The respondent relying on *Pillay and Another v Shaik and Others*<sup>4</sup> submitted that the Court should hold that the alleged settlement agreement is binding on the parties although it was not approved and signed by the applicant. In *Pillay* matter the Supreme Court of Appeal held that although the acceptance by the developers of the appellants' offers did not comply with the prescribed mode of acceptance, they had conducted themselves in such a manner as to induce the reasonable belief on the part of the appellants that they were accepting the offers according to the prescribed mode. The SCA held, further, that it followed that the trial court correctly held, on the basis of the doctrine of quasi-mutual- assent, that the developers were bound by the agreements in respect of the units purchased by the appellants.

[27] It is common cause that the alleged settlement agreement was not signed by the applicant because it would only approve and sign same on condition that the respondent provided it with a special power of attorney which would permit it to sell the mortgage property, and the respondent failed to provide same. In my view the alleged settlement agreement was simply a negotiation document, and it is not binding on the parties.

[28] In the circumstances of this case, the reliance by the respondent on *Pillay* matter is misplaced, because the SCA held, further, that:

*"it was clear that, in the absence of a statute which prescribed writing signed by the parties or their authorized representatives as an essential requisite for the creation of a contractual obligation (something that did not apply here), an agreement between parties which satisfied all the other requirements for contractual validity would be held not to have given rise to contractual*

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<sup>4</sup>2009 (4) SA 74.

*obligations only if there was a pre-existing contract between the parties which prescribed compliance with a formality or formalities before a binding contract could come into existence.”*

[29] In this case clause 20.15 of the credit facility agreement provides that no addition or variation or consensual cancellation or novation of the credit facility agreement and no waiver of any right arising from the credit facility agreement or its breach or termination shall be of any force or effect unless reduced to writing and signed by all parties or their duly authorized representatives. It follows that, on the basis of clause 20.15 of the credit facility agreement, the applicant is not bound by the alleged settlement agreement.

[30] I find that the respondent's indebtedness to the applicant is not bona fide disputed. The amount of indebtedness is also not disputed.

*Has the respondent proved solvency*

[31] The respondent bears onus to prove both commercial and factual solvency. In *Body Corporate Santa Fe Sectional Title Scheme No 61/1994 v Bassonia Four Zero Seven CC*<sup>5</sup> the Court held:

*“[31] The second school of thought, however, differs in its application, and in this we are guided by Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another Case where the court disagreed with the above holding that:*

*‘I respectfully disagree with the ratio decidendi, insofar as it relates to the issue at hand, in both the well-reasoned judgments in HBT and Set-Mak Civils. The misconception of requiring a creditor to prove insolvency before being able to rely on ch 14 of the previous Act is apparent merely from the provisions of s 345, read with s 344 of the 1973 Act, which clearly does not provide for factual insolvency, merely deemed inability to pay its debts (and also if it is proved to the satisfaction of the court that the company is unable to pay its debts). The section has always brought about a peculiar consequence, namely that the debtor was deemed to be unable to pay its debts, although it*

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<sup>5</sup> 2018 (3) SA 451 (GJ)

*may well be able to pay other debts. One of the grounds available to such debtor to oppose the application for winding up on this basis was to prove solvency. Then the court still retained its discretion.'*

*The court went further and held that:*

*'As matters stand, to my mind, both s 69 of the Close Corporations Act and s 345 of the previous Act are still deeming provisions. I will henceforth refer only to s 345 and that must be read to include s 69 of the Close Corporations Act. If any of the statutory elements are satisfied, for example the non-payment after being duly served with a demand in terms of s 345, the company is deemed to be unable to pay its debts and the company may, as in the previous disposition, be wound up solely on this ground. Such applicant is entitled to seek a winding-up order on that basis. The court retains its discretion. Should the respondent however prove that it is solvent, then (and only then) the applicant will obviously have to satisfy the requirements of ss 79(2) and 81 of the 2008 Act.'*

[32] It is common cause that the applicant complied with its obligations and advanced credit to the respondent. In terms of the credit facility agreement, the respondent agreed to repay the amount due to the applicant by making payments to the applicant of 120 monthly instalments. The respondent breached the repayment terms of the credit facility agreement and fell into arrears. It is common cause that the applicant sent a letter of demand in terms of section 345(1)(a) of the Companies Act, and the respondent failed to satisfy a debt. When the winding-up application was instituted, the respondent was in arrears in the amount of R712 663.40. It is also common cause that when the application was heard before Mudau J, the arrears had escalated to more than R1 997 130.67. Mudau J, after considering evidence tendered by the respondent in relation to its gross profit and operating costs concluded that on its own version the respondent is operating at a loss.

[33] The respondent has failed to provide evidence on the return date showing that it is able to pay its debts as and when they fall due. It has failed to discharge the burden of proof placed upon it to show that it is solvent. I am satisfied that the applicant has discharged the onus on a balance of probabilities placed upon it to

prove that the respondent is unable to pay its debts. In the premises, the provisional winding-up order must be made final.

### Costs

[34] The applicant is successful in the winding-up application, and it therefore is entitled to costs. The credit facility agreement entitles the applicant to recover legal costs incurred in connection with the enforcement of any of its rights under the credit facility agreement on the attorney and client scale.

[35] The applicant in its replying affidavit to respondent's further affidavit sought an order that the legal representatives of the respondent be ordered to pay the costs of the winding-up application *de bonis propriis* on the attorney and client scale because they failed to raise certain defences in the answering affidavit or to supplement it before the provisional order was granted.

[36] It is common cause that some of the issues raised by the respondent on the return date were not raised in the respondent's answering affidavit. The explanation given by the respondent is that a new legal team was appointed just few days before Mudau J heard the application, and he was not inclined to grant postponement of the matter. As a result, the new legal team argued the winding-up application before Mudau J on the papers that were already filed by the previous legal team. The applicant disputed that Mudau J refused a postponement application. It stated no application for postponement was made by the respondent's new legal team. After the matter was adjourned to allow them access to CaseLines, they advised Mudau J that they were ready to argue the merits.

[37] Without condoning the respondent's conduct of introducing new defences on the return date that were available to it before the provisional order was granted, I am of the view that such conduct is not prejudicing the applicant, because after the provisional order was granted the respondent and/or other parties with direct and substantial interest were entitled to produce evidence showing cause why the provisional order should not be made final. I have considered the papers and

submissions made by counsel, and I am not persuaded that the punitive costs order sought by the applicant is justifiable.

### **Order**

[38] The following order is made:

1. The application for leave to intervene in the liquidation proceedings is granted.
2. The respondent company is hereby placed under final winding-up.
3. The costs of the final winding-up application are costs in the liquidation.

**MMP Mdalana-Mayisela J**  
**Judge of the High Court**  
**Gauteng Division,**  
**Johannesburg**

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be on 31 July 2024.

Appearances:

|                                         |                       |
|-----------------------------------------|-----------------------|
| For the Applicant:                      | Adv N Alli            |
| Instructed by:                          | Jay Mthobi Inc        |
| For the respondent & Intervening Party: | Adv P Mbana           |
| Instructed by:                          | SA Maninjwa Attorneys |