IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 6560/2023

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

25/11/2025 [redacted]

Date Signature

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**

AND

SERVILOR 83 CC **RESPONDENT**

JUDGMENT

NGOBENI J

[1] The applicant is FirstRand Bank Limited, a public company with registration number 1929/001225/06, with limited liability duly registered and incorporated in terms of the Companies Act 61 of 1973, as amended, and also a registered commercial bank in terms of the Banks Act 93 of 1990. The registered address of the applicant is 1st Floor, 4 Merchant Place, Corner Fredman Drive & Rivonia Road, Sandton. The applicant is an authorized and registered financial services and credit provider duly registered as such in terms of the National Credit Act 34 of 2005.

[2] The respondent is Servilor 83 CC. with registration number 2011/077935/23, a Close Corporation, duly registered and incorporated with the Close Corporations Act 69 of 1984, with its registered address at Simba Safaris, Middelboomspunt Farm, Lephalale, 0555, which is also the chosen *domicilium citandi et executandi*.

[3] This is an application for the winding-up of the respondent based on the reasons that the applicant, which is a creditor of the respondent in a sum of not less than R200-00 which is then due, has served on the respondent a demand, which was left at the registered office of the respondent. In the demand the applicant has requested the respondent to pay the sum

due, and the respondent has for 21 days, or three weeks thereafter neglected to pay the sum so due or to secure or compound it to the reasonable satisfaction of the applicant. The applicant alleges that the respondent is unable to pay its debts. It will become clearer in the judgment as to how the respondent is alleged to be indebted to the applicant.

[4] The respondent (Servilor) is surety and co-principal debtor to the principal debtor being, Exilite 385 CC (Exilite), which initially entered into a loan agreement with the applicant. The respondent as surety of Exilite has failed to satisfy the demand, and the applicant for the winding-up application relies on statutory provisions that the respondent is unable to pay the debt of Exilite in which it bound itself as surety.

[5] On o6 May 2021 the applicant and Exilite, duly represented by Martha Magdalena van Staden entered into a written loan agreement for the amount of R6 000 000-00. The loan amount was to be repaid back in 120 equal instalments of R72 796-56 each. The respondent on 06 May 2021 bound itself as surety and co-principal debtor jointly and severally for the payment due to the applicant of all monies owing to the applicant resulting from the said loan agreement. The amount owing as at 26 April 2023 is R5 886 023-26.

[6] The applicant further submits that when the applicant and Exilite entered into that loan agreement of R6 000 000-00, it was with the concurrence of all the creditors and the members of Exilite being Mr. and Mrs. van Staden, and the court had sanctioned a settlement between the creditors and the members of Exilite in terms of section 155 of the Companies Act 71 of 2008, for the debt to be due only after the fulfillment of certain conditions.

[7] In response to the application, one Johannes Petrus van Staden deposed to the answering affidavit stating that the indebtedness of the respondent to the applicant is disputed on the basis that the principal debt that the applicant relies on is void or invalid as Martha Magdalena van Staden (van Staden) did not have the authority to represent Exilite in concluding the loan agreement with the applicant. It is alleged that Exilite was in final liquidation on 06 May 2021. Van Staden applied for the winding up of Exilite in the Western Cape High Court (WCHC) on 7 November 2019. Exilite was placed under provisional winding up by the WCHC on 28 November 2019 and placed under final liquidation on 7 January 2020.

[8] The respondent further states that the suretyship of the respondent to the applicant is accessory to the contractual relationship between the applicant and Exilite, and in the absence of a valid agreement between

the applicant and Exilite, no liability arises from suretyship. The respondent denies any obligation to make payments to the applicant.

[9] The issue between the parties is as to whether the respondent (Servilor) should be wound up as it acted as surety for Exilite when the applicant and Exilite entered into a loan agreement of R6 000 000-00, which debt is not being serviced by the principal debtor, hence the money is now sought from the respondent who acted as surety, and as at 10 June 2023 the outstanding amount was R5 509 674-10.

[10] Section 69(1) of the Close Corporations Act[1](CCA) outlines the circumstances under which a corporation is deemed unable to pay its debts, and it states the following:

"69. (1) For the purposes of section 68(c) a corporation shall be deemed to be unable to pay its debts, if-

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or secure or compound for it to the reasonable satisfaction of the creditor,..."

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[1] 69 of 1984.

[11] The corresponding provision to section 69 of the CCA is section 345 of the (old) Companies Act 61 of 1973(Act 61 of 1973)[2]. It is common cause that the debt which the applicant claims remains unsatisfied after 21 days of demand.

[12] The applicant submits that the operation of the loan agreement was dependent on the suspensive conditions as outlined in clauses 1.1.1 to 1.4, 1.4.1 to 1.4.4, 2,2.1 and 2.2 of an arrangement between Exilite and its creditors in terms of section 155 arrangement (Arrangement) of the (new) Companies Act 71 of 2008 (Act 71 of 2008), which falls under chapter 5, part E, and deals with 'Compromise with creditors'. I will quote just two sections from the provisions of section 155 of Act 71 of 2008, as those in my view are the most relevant ones to the issues at hand, and they read as follows:

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[2] "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)...,

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process, or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company.

Part E

155 Compromise between company and creditors

"(1) This section applies to a company, irrespective of whether or not it is financially distressed as defined in section 128 (1)(f), unless it is engaged in business rescue proceedings in terms of this Chapter.

(2) The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to-

(a) every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and

(b) the Commission ***(the Commission means the Companies and Intellectual Property Commission established by section 185 – my own emphasis from the definitions)****"*

(3) – (9) ... ".

[13] It is important to mention that the said Arrangement was annexed to the answering affidavit of the respondent in this application. It is not the document upon which the application of the applicant is founded on. The main document that has been annexed to this application by the applicant

is the *'Loan Agreement between FirstRand Bank and Exilite 385 CC'*, dated 6 May 2021.

[14] The submission by the respondent is that the applicant cannot in its reply rely on the Agreement because if that was the case it should have been disclosed already by the applicant in its founding papers, because the respondent will never get an opportunity to answer to that. In that regard there is a notice filed by the respondent to strike out some sub-paragraphs of the applicant's replying affidavit on the basis that the applicant was introducing a new cause of indebtedness in the replying papers. It is not clear from the papers as to what came out of that notice of application to strike out, however that issue was again raised again in the heads of argument of the respondent on paragraph 36.

[15] Whether that notice was pursued or not, of importance is that it shows that the respondent had concerns about the reply of the applicant. The raising of the issue in the heads of argument is a clear indication that the respondent had no opportunity to raise that issue, because the respondent cannot answer or reply to the replying affidavit. That is, in my view mainly why an applicant in an application is not permitted to raise new issues in the replying affidavit, because that will prejudice the respondent.

[16] In *Motwell Plant Hire (Pty) Ltd v Janse Van Rensburg and Another*[3], the following was said on motion proceedings:

"(10) It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. An applicant must raise the issues upon which it seeks to rely in its founding affidavit by defining the issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof"

[17] In line with the concerns of the respondent, in *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*[4] the Court held that a case cannot be entertained on new grounds that are not traversed in the founding affidavit. There is a plethora of cases that support the fact that a case of the applicant must be made out in the founding affidavit not in the replying affidavit. In *Director of Hospital Services v Mistry*[5], it is simply stated that it is the founding affidavit that the court will turn to, to determine what the complainant is complaining about. It is in *Elegant Line Trading 257 CC v MEC for Transport, Eastern Cape*[6], in which the principle set forth is that the founding affidavit must in itself contain sufficient facts upon which a court may find in the applicant's favour.

[3] (56155) [2023] ZAGPJHC 939 (21 August 2023).
[4] (19548/2015) [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ) (22 June 2018).
[5] 1979 (1) SA 626 (A).
[6] (104/2022) [2022] ZAECBHC 33 (14 December 2022).

[18] In this application I believe that the first issue that I must determine is the documents upon which the claim is founded, or put differently I must determine the circumstances under which the claim is made so that I can determine if the loan agreement entered into between the applicant and Exilite is *void ab initio* or not, as alleged by the respondent. If I find that the loan agreement is valid and the respondent is failing to service that debt, it is only then that I can consider the winding up of the respondent for being unable to meet the debt that it is bound to service. Rule 18(c) of the Uniform Rules of Court (Rules) requires a plaintiff (in our case applicant) to annex a copy of any material written contract or document to the pleading upon which the claim is founded.

[19] Logic dictates that once the respondent is provided with documents upon which the claim is founded, the respondent will then be called upon to answer the case that has been brought against it. It is therefore necessary that each an every document or allegation upon which the material facts of the case are based with sufficient particularity be disclosed in the founding papers so that the respondent gets an opportunity to answer every allegation. I'm saying this with the full understanding that failure to annex a copy of an agreement relied upon

does not erase the cause of action as a litigant who relies on the contract can adduce secondary evidence of its conclusion and terms[7].

[20] The loan agreement upon which the claim against the respondent is based on is the one that is marked 'FA2' in these proceedings. The agreement was entered into on 06 May 2021, where the applicant was represented by one Philistus Selaelo Aphane and the respondent was bound as surety by its members, and there are two documents with signatures bearing the names of Martha Magdalena van Staden (paginated page 88 of the Founding Affidavit) and Johannes Pieter van Staden (paginated page 94 of the Founding Affidavit). The said two documents that I have just referred to are also dated 06 May 2021, which is the date of the loan agreement. The claim of the applicant for this application in the founding affidavit refers to only 'FA2', being the document upon which the indebtedness by the respondent is founded. The issue pertaining to the suspensive conditions were only raised in the replying affidavit.

[21] In *Van Zyl v Auto Commodities (Pty) Ltd*[8], the Supreme Court of Appeal held that a contract of suretyship is accessory to the contractual relationship and held that:

"It follows from the accessory nature of the surety's undertaking that the liability of the surety is dependent on the obligations of the principal

[7] ABSA Bank Ltd v Jenzen, Kevin Glynn (2014/877) (GLD); ABSA Bank Ltd v Grobbelaar, James (20214/7728 (GLD).
[8] (279/2020) [2021] ZASCA 38 (16 April 2020).

debtor. A consequence of this is if the principal debtor's debt is discharged, whether, by payment or release, the surety's obligation is likewise discharged. If the principal debtor's obligation is reduced by compromise, the surety's obligation is likewise reduced. If the principal debtor is afforded time to pay, that ensures the benefit of the surety. If the claim against the principal debtor prescribes, so does the claim against the surety. This will be subject to any terms of the deed of suretyship that preserve the surety's liability notwithstanding the release or discharge of, or any other benefit or remission afforded to, the principal debtor".

[22] The position that remains in this case as at 06 May 2021 is that Exilite was under liquidation, and Rynette Pieters and Daniel Sandile Ndlovu were the liquidators that were appointed after the liquidation of Exilite, and if anything had to be done with or pertaining to Exilite, that had to be done with them being the appointed liquidators. Ms. van Staden, then behind the backs of the liquidators went and entered into a loan agreement with FirstRand Bank, and I qualify my statement that she went behind the backs of the liquidators to do that, because the liquidators were not involved in that transaction.

[23] I believe that the liquidators would not have agreed to that loan agreement but would have agreed to different terms as indicated in the

section 155 Agreement entered into on 27 October 2021, at least. As to whether the bank checked the credentials of Exilite before concluding the loan agreement in question or not, it is something that is not clear before this court, and anyway I'm not asked to make a finding on that.

[24] A more or less similar situation as explained above in the preceding paragraph of this judgment as in the Exilite position, was well explained in *PG Group (Pty) Ltd v Amoretti*[9], where the court said the following:

"..., the effective date of the winding-up is 16 September 2019, when a third party filed a winding-up application against the principal debtor. The consequence of that application was that the powers of the respondent to act on behalf of the principal debtor were frozen. He no longer had the authority to act on behalf of the principal debtor, including signing any agreement on its behalf".

[25] Similarly, in the case at hand, once Exilite was placed under liquidation, Mr. and Ms. Van Staden had no powers to enter into agreements on behalf of Exilite. If I then follow the reasoning of the Supreme Court of Appeal (SCA) decision of *Van Zyl v Auto* case, *supra*, it means that the loan agreement that Firstrand Bank and Exilite entered into is void for the reason that Exilite was under liquidation at that time, and if that loan

[9] (7151/2021) [2023] ZAGPJHC 6 (9 January 2023).

agreement is void against the principal debtor, it will also be void against the surety. That has effect on the surety contract by the respondent for the same reason that I have already mentioned.

[26] Coming back to the case at hand and following the principles laid down in the cases that I have quoted above, the applicant in the case at hand should have made out its case in the founding affidavit. The issues of the settlement agreement that are raised by the applicant in its replying affidavit, if that is what the application is founded on should have been stated from the outset. The submission by the respondent that acceptance of the new facts as contained in the replying affidavit will prejudice them, has substance.

[27] The prejudice that will be suffered by the respondent due to failure to be able to respond will be dire. If the issues that are raised by the applicant from the Arrangement were raised from the outset in the founding affidavit of the applicant, the court would have had the benefit of the answer in full, from the respondent. I find it fair to deal with this case as per the initial facts that are raised in the founding affidavit, as the case of the applicant cannot be made from the replying affidavit.

[28] On costs, I do take into consideration that money did exchange hands. The judgment is based on legal principles that are applicable to these types of

contracts. It cannot therefore be said that the applicant was frivolous in bringing this application. It is for that reason that I will order that each party bears its own costs.

[29] In the result the following order is made:

(i) the application for the liquidation of the respondent is dismissed,

(ii) each party is ordered to pay its own costs.

[redacted]

J.T. NGOBENI
JUDGE OF THE HIGH COURT

Appearances

Attorney for the Applicant	: Adv. M.A. Badenhorst SC
Instructed by	: RWL Inc.
Counsel for the Respondent	: Mr. Smit
Instructed by	: De Lange & Smit Attorneys
Date of hearing	: 14 August 2025
Date of judgment	: 25 November 2025

Judgment transmitted electronically