



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Numbers: 2025-012917 & 16681/2024

In the matter between:

FIRSTRAND BANK LTD

Intervening Party

In re:

THE BODY CORPORATE OF AVIATION PARK

Applicant

and

NOZINGA FUNERAL SERVICES CC

Respondent

JUDGEMENT

Greig AJ

INTRODUCTION

[1] This is the return day of a winding up application in relation to the Respondent close corporation, Nozinga Funeral Services CC ('Nozinga'). Nozinga owns a unit in the sectional title scheme administered by the

applicant body corporate, the Body Corporate of Aviation Park ('Aviation Park').¹

[2] There is further an application to intervene brought by First Rand Bank Ltd ('FirstRand').

[3] Aviation Park relies on Nozinga's failure to pay sectional title levies and contends that Nozinga is commercially insolvent. Nozinga resists the granting of a final winding-up order, asserting that portions of the debt have prescribed and that it remains solvent.

[4] FirstRand applies to intervene as a creditor of Nozinga on the basis of arrears owing on a loan secured by a mortgage bond registered over a sectional title unit owned by Nozinga. FirstRand alleges that Nozinga has been in arrears since mid-2024. Nozinga opposes intervention, maintaining that FirstRand's interests are adequately protected and that it was prevented from keeping up to date with its loan payments by the advent of the provisional winding up order.

LITIGATION HISTORY

[5] A provisional liquidation order was granted on 30 August 2024 which set the return date for 25 October 2024. Nozinga subsequently opposed the application, and the matter was postponed to the opposed roll for hearing on Thursday, 13 February 2025.

[6] FirstRand sought leave to intervene on 4 February 2025. FirstRand's application was set down to be heard simultaneously on the return day of the main application on 13 February 2025. On 13 February 2025, both applications were postponed by Parker AJ for hearing on 28 May 2025. Nozinga opposed the intervention application, but failed to deliver an

¹ Units 1 and 8 and an exclusive use area.

answering affidavit, and FirstRand instituted chamberbook proceedings. An order in the chamberbook proceedings was granted on 15 May 2025 compelling Nozinga to deliver its answering affidavit by 22 May 2025.

[7] A further postponement followed and the matter eventually came before me on 27 November 2025.

CONDONATION APPLICATION

[8] There is before me an application in which Nozinga seeks condonation for the late filing of its answering affidavit and heads of argument in the intervention application. This application is not opposed, and the application for condonation is granted.

Aviation Park's Founding affidavit

[9] Aviation Park's claim against Nozinga is based on a arrear levies. Nozinga fell into arrears in relation to its levies owing to Aviation Park from about July 2021.

[10] On 7 February 2023 Aviation Park lodged an application for dispute resolution with the Community Schemes Ombud Service in terms of the Community Schemes Ombud Service Act.² The adjudicator appointed to resolve the dispute found that Nozinga was indebted to Aviation Park in the amount claimed but requested submissions from the parties as to Nozinga's ability to pay, and in relation to a payment plan.

[11] Based on the above, the adjudicator made an order on 13 March 2023 that Nozinga was to pay Aviation Park arrear levies in the amount of R 137,896.29 plus interest in 12 equal monthly instalments. Failure to pay any one instalment would result in the full amount becoming due and payable.

² 9 of 2011

[12] Aviation Park further sent a letter to Nozinga on 22 April 2024 in terms of section 69 of the Close Corporations Act 69 of 1984 demanding payment of outstanding levies in the amount of R 258,231.41. There was no response and accordingly Aviation Park avers that Nozinga must be deemed to be unable to pay its debts.

Nozinga's answering affidavit

[13] Nozinga firstly suggests that the debt has become prescribed since Aviation Park's notice in terms of section 69 of the Close Corporations Act claimed a specific debt of R 258,231.41 owing since July 2021.

[14] Nozinga also alleges that Aviation Park failed to comply with its own Management Rule 25 which required notices to be given 14 days after the approval of the budget in relation to the contributions and charges due to the body corporate.

[15] Nozinga says alleges that Aviation Park levied interest on overdue amounts initially at a rate of 10.25%, which increased to 12.75% in April 2024, and 24% in May 2024 but 'failed to demonstrate the basis for such astronomical increases'. In terms of Management Rule 21 (c), Aviation Park was only entitled to levy interest on unpaid amounts at a rate which did not exceed the maximum rate in terms of the National Credit Act 34 of 2005. Section 103 of that Act provides that an increase in interest rate is only permissible if the variation is by a fixed relationship to a reference rate stipulated in an agreement. Nozinga avers that Aviation Park increased the interest rate to the maximum without any resolution and contrary to section 103.

[16] Nozinga thus avers that its indebtedness to Aviation Park is bona fide disputed on reasonable grounds and accordingly that a final winding up order should be refused.

[17] Nozinga further alleges that it is ‘in a position to make payments to the applicant of due and owing amounts after deducting the portions which have prescribed.’ It says so on the basis that it has in excess of 1000 clients who ‘pay for funeral policies between R100 – R250 per month’. Although it does not yet have financial statements available, Nozinga asserts that it ‘generates an income in excess of R 250,000 per month which far exceeds its operating expenses.’

[18] Nozinga further alleges that it is factually insolvent in that it owns 3 properties which are not encumbered as well as 6 vehicles, only one of which is still being financed. Nozinga does not specify any of its liabilities but nonetheless avers that its ‘assets far exceed its liabilities and it is accordingly factually solvent.’

Aviation Park’s Replying affidavit

[19] In reply Aviation Park disputes that it did not comply with the Sectional Titles Schemes Management Act³ by failing to send out the requisite notices in terms of its Management Rule 25, and attaches copies of the notices. In any event Aviation Park avers that the notices are not a precondition to its claim for arrear levies.

[20] As to its alleged non-compliance with the National Credit Act, Aviation Park avers that the charging of such interest does not constitute an ‘incidental credit agreement’ as defined it is not a credit provider and does not supply goods or services and advance money or credit to its members. It contends that levies and interest are payable not in terms of an agreement, as defined in the National Credit Act, but rather by virtue of the provisions of the Sectional Titles Schemes Management Act.

³ 8 of 2011.

Aviation Park's further affidavit

[21] In a further affidavit,⁴ Aviation Park references the fact that there is a covering mortgage bond registered over unit 1, Aviation Park, owned by Nozinga, in favour of FirstRand in the amount of R 1,280,000, and in relation to which Nozinga was in arrears as at 19 December 2024 in the sum of R 1,098,536.27.

APPLICATION TO INTERVENE

[22] FirstRand's application to intervene is based on the same indebtedness referenced in Aviation Park's further affidavit summarised above. FirstRand avers that since at least since 28 June 2024 Nozinga has been unable to pay its debts as and when they fell due.

[23] The application to intervene was opposed by Nozinga on the basis that FirstRand does not bring a case with a distinct factual basis for liquidation. Nozinga contends that FirstRand has no need to intervene in these proceedings as its rights are protected in terms of the Companies legislation and it may lodge a claim in the liquidation in due course.⁵

[24] Nozinga does not dispute the arrears it owes to FirstRand but avers that it has been unable to service payments since the advent of its provisional liquidation. Nozinga further states that it has received a 'serious expression of interest from an investor keen to purchase Unit 6, which is bonded to FNB. [and] has also identified a prospective lessee for one of its properties, and the rental income would cover the arrears and levies.'

[25] In reply FirstRand alleges that since it is an undisputed creditor, it has a substantial interest in the matter as there is always the possibility that Aviation Park may reach a settlement, or decide not to move for a final

⁴ Application was made for the exceptional admission of the affidavit, which is granted.

⁵ It is not clear how FirstRand will do so if the provisional order is discharged.

order. It has made out a prima facie case for the respondent's winding up and is entitled to petition for it in the event that Aviation Park does not.

[26] As to Nozinga's contention that it has fallen into arrears only after the provisional winding up intervened, Nozinga admits that the first time that payment was demanded from it was during June 2024. However, the main liquidation application was issued on 29 July 2024, and the provisional winding up order only granted on 30 August 2024. The explanation proffered by Nozinga for the arrears is therefore neither bona fide nor plausible, particularly since it nonetheless made certain payments to FirstRand between October 2024 and January 2025, after it was placed in provisional liquidation.

RULING: APPLICATION TO INTERVENE

[27] An application to intervene is a sui generis procedure in insolvency. A creditor can intervene at any stage to have a provisional winding up order set aside or, where the applicant does not proceed with a winding up, or drags its feet, may obtain a winding up order in its own right and name. Such an applicant alone becomes the dominus litis and the original applicant drops out altogether thereafter. The intervening creditor must in its own right make out a case for winding up, furnish security, and comply with the other requirements as though it was originally the applicant.⁶

[28] This being the law, Nozinga's opposition premised on the fact that FirstRand does not bring a case with a distinct factual basis for liquidation, is misplaced. There is no requirement that a 'distinct factual basis' must be raised: FirstRand is entitled to intervene to protect its interests as a creditor and to pursue a winding up in its own right in the event that Aviation Park does not proceed.

⁶ *Fullard v Fullard* 1979 (1) SA 368 (T).

[29] I also agree that the contention by Nozinga that it is in arrears to FirstRand because the provisional liquidation order prevented it from servicing its loan commitments does not make sense on the timeline.

[30] I am therefore satisfied that FirstRand is a creditor and has a sufficient legal interest in this matter to intervene and, in the exercise of my discretion, grant leave to FirstRand to intervene.

DISCUSSION: FINAL LIQUIDATION

No bona fide dispute as to indebtedness

[31] The adjudicator's order has the effect of an order of the Magistrate's Court in terms of section of the Community Schemes Ombud Service Act 9 of 2011 ("the CSOS Act"). Section 56(1) provides that:

"If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgment of such Court and a clerk of such a Court must, on lodgment of a copy of the order, register it as an order in such Court".

[32] The above means, in my view, that the award is in effect a judgement of the Magistrate's Court. It is not necessary that the clerk of the Court must first 'register it as an order in such Court' before it attains that status: the section says that the order 'must be enforced as if it were a judgement of such Court'.

[33] A judgement of the Magistrates Court does not prescribe until the lapse of a period of 30 years in terms of section 11(a)(i) of the Prescription Act, and in my view the same may be said of the adjudicator's order in terms of section 54 of the CSOS Act.

[34] There was a right of appeal from the adjudicator's award in terms of section 57 of the CSOS Act. However, this right of appeal was not exercised by Nozinga within the relevant 30-day period (or at all). Nozinga's

indebtedness to Aviation Park is thus now a fact established by the imprimatur of a court order. Its existence is separate from and independent of any underlying dispute as to the correctness of the award.

[35] The above is a complete answer to the opposition raised by Nozinga to the effect that the debt to Aviation Park is bona fide disputed on the basis of prescription.

[36] However, in my view the bona fides of the dispute in relation to the indebtedness is in any event questionable on other grounds. For instance, prescription appears to have been interrupted when the respondent's agent on 31 July 2023 addressed correspondence to Aviation Park proposing a payment plan.

[37] Moreover, the allegation that the requisite notices in terms of section 3(2) of the CSOS Act were not issued is incorrect as a matter of fact. No challenge was raised by Nozinga to the authenticity or validity of these notices.

[38] The contention that Aviation Park was required to comply with section 129(1)(a) of the National Credit Act is also without merit. See in this regard *Naidoo .v ABSA Bank Ltd.*⁷

[39] Finally, and to the extent that there could be any further doubt as to Aviation Park's *locus* or case for winding up, FirstRand has in my view also independently established the requisites for a final liquidation order. The contention by Nozinga that the arrears situation with FirstRand can be explained by fact that it was placed under provisional winding up does not make sense on the common cause chronology. Even if the full amount of the

⁷ 2010 (4) SA 597 (SCA). Winding up is not an order for the enforcement of the creditor's claim, but a species of execution, affecting not only the rights of the two litigants, but also the distribution of the insolvent's property to various creditors.

arrears is not due and payable (which does not seem plausible),⁸ FirstRand remains a contingent creditor.

Commercial insolvency

[40] I am also unpersuaded that Nozinga is not commercially insolvent. Its contention that it is able to pay such portions of the debts as have not prescribed as it has more than 1000 clients who ‘pay for funeral policies between R100 – R250 per month’, and ‘an income in excess of R 250,000 per month which far exceeds its operating expenses’, is not properly substantiated.

[41] No financial statements were attached to the answering affidavit. There is no evidence as to what the quantum of the “operating expenses” may be.

[42] There is also no explanation why the amounts which has not prescribed have not been calculated and paid.

[43] Nozinga attached only one company bank statement to its answering affidavit, from First National Bank for the period 10 September 2024 to 10 October 2024.⁹ This reflects an opening balance of R 5,488.27 as at 11 September 2024. The deposits for the period amount to only R64,717.00 by my reckoning.

[44] Aviation Park also points out, correctly, that there is no substantiation for the allegation that the rental payable in relation to Unit 1 in Aviation Park, allegedly in the amount of R 17,000 per month, is being paid to Nozinga.

[45] Nozinga also claims factual solvency saying that its assets ‘far exceed its liabilities’ in that it owns 3 unencumbered properties as well as 6 vehicles,

⁸ The relevant loan agreement defines both failure to pay instalments as well as placement under provisional liquidation as "events of default" entitling FirstRand to accelerate the entire outstanding balance.

⁹ I do not deem Mr Tom’s personal bank statement as relevant and in any event it does not seem to substantiate income of R250,000 per month even in his own name.

only one of which is being financed. Once again, however, substantiation for this alleged factual solvency is thin. Assets are disclosed without values, and liabilities are omitted. In any event, even if factual solvency were established, this can only be tangentially relevant to the main enquiry which is whether Nozinga is able to pay its debts in the normal course of business as and when they fall due from income or readily realisable assets.¹⁰

Discretion

[46] The belated attempts by Nozinga during the hearing to offer various means whereby Aviation Park and FirstRand could be settled, seemingly in an effort to persuade me to exercise my discretion to refuse or delay winding up, are also not convincing.¹¹ The first such offer made in open court pertained to a property which was not owned by Nozinga. The second pertained to a property, erf 5[...] Gugulethu, which is apparently owned by Nozinga's sole member, Mr Zukile Tom, which was purchased in 1998 for R 45,000.

[47] The suggestion, as I understood it, was that the sale of these properties could soon settle the debt. But there is no affidavit attaching any deed of sale confirming the amount of the sale or the fulfilment of any conditions pertaining to it. Only copies of title deeds were handed up from bar. There is further no explanation as to why these avenues were not pursued long before the hearing.¹² If anything, these forlorn attempts at the eleventh hour to stave off a final liquidation only emphasise the penurious circumstances in which Nozinga finds itself, and the necessity that it be wound up to protect the interests of creditors and stakeholders.

¹⁰ See *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C).

¹¹ The parties' attempted during an adjournment to settle the matter, to no avail.

¹² As I have set out above the provisional order was granted on 30 August 2024 and only heard over a year later on 27 November 2025 after several postponements.

[48] Nozinga submitted that this Court has a ‘wide discretion to refuse a winding up application’, and pointed to the fact that it has a number of employees and over 1,000 clients ‘all of whom will be left without recourse should this application be granted and the prejudice they may suffer is insurmountable.’

[49] However, generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a commercially insolvent respondent company that has not discharged its debt to it. In practice, the discretion of a court to refuse a winding-up order where an unpaid creditor applies for a winding up is very narrow and rarely exercised, and then in special or unusual circumstances only.¹³ Given the financial circumstances of Nozinga the interests of clients and employees will be best served by a liquidation order. I am certainly not persuaded that any special or unusual circumstances are present in this matter to warrant exercising my discretion against a winding up.

Costs

[50] FirstRand submitted that it is be entitled to its costs as costs in the liquidation even if a liquidation order is granted at the instance of Aviation Park.¹⁴ I agree and the order I intend making will reflect this.

Conclusion

[51] Nozinga has failed to establish that its indebtedness to Aviation Park is bona fide disputed on reasonable grounds, nor has it demonstrated that it is able to pay its debts in the ordinary course of business as and when they fall due. The adjudicator’s award has long since become final and has the effect

¹³ *Afgri Operations Ltd v Hambs Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA) at para 12

¹⁴ FirstRand referred to *Silwer Heinings (Pty) Ltd v Standard Bank of South Africa Ltd* 1984 (2) SA 821 (W) and *Nel and Others NNO v The Master and Others* 2002 (3) SA 354 (SCA).

of a judgement of the Magistrates Court which does not prescribe for 30 years. The attempts by Nozinga to challenge or undermine it at this stage are legally untenable and factually unpersuasive.

[52] Independently of Aviation Park's claim, FirstRand has likewise established that Nozinga is commercially insolvent and falls to be wound up at its instance. The explanations advanced for Nozinga's arrears in relation to the loan from FirstRand lack credibility.

[53] In these circumstances, and in the absence of any special or unusual features warranting the refusal or postponement of final relief, the interests of creditors and stakeholders require that Nozinga be placed in final liquidation.

Order

[54] I accordingly make the following order:

- (a) The respondent is placed in final liquidation.
- (b) The costs of the applicant and the intervening party shall be costs in the winding up.

Greig AJ

Appearances:

For the applicant: Adv Jan-Hendrik Gous

Instructed by: L Ipser Terblanche & Donnely, Mr Adrian Ipser

For the respondent: Adv Sihloniphile Bhebhe

Instructed by: Mohau Romeo Tsusi Inc, Ms Zunurah Williams

For the intervening Party: Adv Rudi de Wet

Instructed by: De Klerk and Van Gend Inc, Ms R Coetzee