REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 073704/2025

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: ~~YES~~

16 March 2026 [redacted]

DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

31 WATERFALL PROPRIETY LIMITED Respondent

J U D G M E N T

JANSE VAN NIEUWENHUIZEN J

[1] This is the return day of a provisional liquidation order granted on 19 September 2025.

Applicant's claim

[2] The facts underlying the relief claimed by the applicant are largely common cause between the parties. The applicant, a commercial bank, advanced R 12 400 000, 00 to the respondent in terms of a written loan agreement dated 23 July 2024. The respondent had to repay the loan in monthly instalments of R 176 115, 53 over a period of 120 months.

[3] The respondent failed to pay the monthly instalments, and on 9 May 2025, the arrears amounted to R 418 027, 38. The failure to pay the monthly instalments is, in terms of clause 14.2.2 of the standard terms and conditions applicable to the agreement, an event of default.

[4] Once an event of default occurs, the applicant may, in terms of clause 14.3.1, upon notice, accelerate the amount due under the agreement. On 13 February 2025, the applicant gave written notice to the respondent of its decision to accelerate payment of the respondent's indebtedness under the agreement and demanded payment of the outstanding amount of R 12 593 351, 69.

[5] The respondent did not respond to the notice and on 4 April 2025 had only paid an amount of R 210 000, 00 in reduction of the debt. On 4 April 2025, the applicant's attorneys emailed a letter of demand in terms of section 345(1)(a)(i) of the 1973 Companies Act to the email address of Mr Diwan, the director of the respondent at the time. The letter was also served by the Sheriff at the respondent's registered address.

[6] Thereafter and up until 6 May 2025, the respondent made further payments of R 236 000, 00. The further payments did not satisfy the outstanding debt, and this application was issued during June 2025.

Respondent's defences and discussion

[7] In opposing the liquidation application, the respondent denied allegations in the founding affidavit with little or no justification for the denial. Mr Marques, counsel

for the respondent, to his credit, indicated that he will not be making any submissions in respect of these unjustified denials. In the result, I propose to deal very briefly with the issues raised by the denials.

Personal knowledge

[8] Karen Joanne Cawood ("Cawood"), a Commercial Recoveries Manager in the employment of the applicant, deposed to the founding affidavit and provided detailed facts in support of her allegation that she has the requisite personal knowledge to depose to the affidavit on behalf of the applicant. Her averments in this regard appear from the founding affidavit, and I do not deem it necessary to repeat the allegations herein. The respondent denied that Cawood had personal knowledge of the facts contained in the founding affidavit.

[9] In *Firstrand Bank Ltd v Kruger and others* 2017 (1) SA 533 (GJ) (*"Kruger"*) at 540D – F, the court stated that the following persons will ordinarily have the requisite personal knowledge to depose to an affidavit on behalf of a credit grantor:

"(a) the evidence of a person who exercises custody and control of the documents in issue to introduce them into evidence through the founding affidavit provided such allegation is made, or appears from the contents of the affidavit as a whole, [3] and provided the agreements are attached and are alleged to be true copies. [4] This would usually be a bank manager or an official holding the position of a recoveries manager; [5]

(b) the evidence of a person who has personal knowledge of the current status of the credit receiver's account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance. This would be subject to the terms of the agreement which may permit a certificate of indebtedness to constitute prima facie proof, provided it is signed by a designated official at the financial institution and provided further that the court is otherwise satisfied that such person would, in the ordinary course, have personally accessed the records, accounts and other relevant records of the respondent and provided the

certificate is otherwise reliable. See generally Saldulker JA in Rees para 14; Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 424E – F; and Wallis J (at the time) in Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another H 2010 (5) SA 112 (KZP) para 13, approving the requirement in Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd and Others 1999 (4) SA 229 (C) at 235A – C that the deponent at least has personal knowledge of certain of the relevant facts;"

[10] The facts upon which Cawood relies in support of her averment that she has personal knowledge of the allegations in the founding affidavit fall squarely within the test enunciated in Kruger. I am satisfied that Cawood has the requisite personal knowledge to depose the founding affidavit.

Securitisation

[11] The respondent denied that the applicant is the current legal holder of the loan agreement and averred that the applicant actively engages in the practice of securitisation without informing consumers or obtaining their consent. Although Abdul Aziz Boolay ("Boolay"), the respondent's current director and deponent to the respondent's answering affidavit, readily admitted that he has no personal knowledge of whether the applicant remains the legal holder of the agreement, he insisted that the applicant must prove it is.

[12] Mr Horn, counsel for the applicant, submitted that our law does not generally require a party to prove the negative. Should the respondent contend that the applicant had parted with its rights under the loan agreement, it bears the onus to prove it.

[13] I agree. The denial is without any legal foundation and is ill-conceived.

Jurisdiction

[14] Although the respondent's registered address is situated at 52 Bloed Street, Pretoria, Gauteng, the respondent stated that it has never conducted business

at the address and therefore the court does not have jurisdiction to hear and adjudicate the matter. The denial has no legal foundation. By virtue of the fact that the respondent's registered address falls within the area of jurisdiction of this court, the court has jurisdiction to hear the matter.

National Credit Act, 34 of 2005

[15] The respondent averred that the National Credit Act ("the Act) applies to the loan agreement and that the applicant's failure to comply with the provisions of the Act is fatal to the application.

[16] The applicant denies that the Act is applicable on the following grounds:

16.1 the respondent is a juristic person with assets or annual turnover, at the time of concluding the loan agreement, that exceeded the R 1 million threshold determined by the Minister, as contemplated in section 4(1)(a)(i) of the Act; alternatively

16.2 the loan agreement is a large agreement, and the respondent is a juristic person as envisaged in section 4(1)(b) of the Act. A large agreement is, in terms of section 9(4) of the Act, a mortgage loan agreement or credit transaction with a principal debt in excess of R 250 000, 00.

[17] The respondent's contention that the Act applies is clearly wrong.

[18] I pause to mention that the respondent also averred that the provisional order was granted irregularly. This is one point that Mr Marques, to his credit, did not pursue.

[19] I proceed to consider the substantial defences raised by the applicant in opposition of the liquidation application.

Notice of acceleration not properly pleaded

[20] In paragraph 30 of the founding affidavit, Cawood stated the following: *"The demand was sent by email to the address specified on the first page of the loan agreement, in compliance with clauses 18.1.2 and 18.2.3 of the standard terms nd conditions applicable to the loan agreement."* It is common cause that the demand is the notice of acceleration and that it was sent to the email address that appears as a contact on page 1 of the agreement.

[21] Clause 18.1.2 reflects the respondent's *domicilium citandi et executandi* as *"the contact details specified on page 1 of this Agreement"* and clause 18.2.3 read with clause 18.2 provides that any notice sent by email will be deemed to have been duly received by the respondent on the date on which the notice was transmitted.

[22] Notwithstanding the fact that the notice of acceleration was patently delivered in terms of the provisions of the loan agreement, Mr Marques submitted that Cawood's failure to refer to clauses 18.2 and 18.2.3 in paragraph 19 of the founding affidavit, prohibits her from relying on the clauses in paragraph 30. Paragraph 18 of the founding affidavit states that the general terms and conditions of the loan agreement are incorporated in the affidavit, and in paragraph 19 Cawood sets out the material terms and conditions of the loan agreement.

[23] The submission that all the terms of the agreement that the applicant relies on in order to establish its case must be contained in one paragraph is legally incomprehensible.

Non-payment of an amount due in terms of the loan agreement is not an event of default

[24] Mr Marques' submission in this regard was difficult to follow, but if I understood him correctly, it is based on a proper interpretation of clause 14 of the loan agreement.

[25] It is therefore apposite to examine the clause in more detail.

"14 ***<u>EVENTS OF DEFAULT</u>***

14.1 An Event of Default ***shall*** *occur if* ***any of the following events,*** *each of which* ***shall be severable and distinct from the others,*** *occurs….*

[own emphasis]

14.2 The Events of Default occur if the Borrower and/or Security Providers as the case may be:

……

14.2.2 fails to pay any amount due in terms of the Agreement;

………

14.2.8 fails to comply with or maintain any of the ***Financial Covenants*** *contemplated in the Loan Schedule, provided that-*

14.2.8.1 subject to clause 14.2.8.2 (Remedial Plan) below, the Borrower shall have 30 days from the date of any written notice given by FNB to the Borrower notifying the Borrower of such breach, to either remedy the breach in respect of that ***Financial Covenant*** *or to provide FNB with a written remedial plan detailing how it will remedy the* ***Financial Covenant*** *…* (own emphasis)

[26] The clause further provides that failure by the borrower to remedy the breach, to provide a remedial plan, or to comply with the provisions of the approved remedial plan shall entitle the applicant to exercise its remedies under clause 14.3, which include an acceleration notice.

[27] *"Financial Covenants"* is defined as *"the conditions envisaged in the Financial Covenants clause of the Loan Schedule".* I pause to mention that the loan schedule does not contain a Financial Covenants clause.

[28] Mr Marques submitted that the loan agreement, properly interpreted, provides that in the instance of an event of default in terms of clause 14.2.2 (failure to pay an amount due), the applicant is compelled to comply with the provisions of clause 14.2.8.1. It is only in the event that the borrower does not comply with

the 30 day notice, that the applicant may exercise its right to accelerate the amount owing.

[29] The submission is legally untenable. On a plain reading of clause 14.1, the words *"each of which shall be severable and distinct from the others"* negate any notion that the event of default pertaining to Financial Covenants is applicable to a failure to pay and should first be exhausted before the applicant may exercise the remedies contained in clause 14.3.

[30] When the aforesaid insurmountable difficulty was pointed out to Mr. Marques, he did not refer to any legal principle to support his submission, but merely stated that it was his instructions to make the submission. Mr. Markques' conduct in this regard is unacceptable and does not meet the standards of conduct expected from officers of the court.

Discretion

[31] The respondent submitted that the facts in *casu* call for a discretion to be exercised under section 347 of the 1973 Companies Act. The circumstances under which the discretion will be exercised were succinctly summarised in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* 2022 (1) SA 91 (SCA), at para [12]:

"[12] Notwithstanding its awareness of the fact that its discretion must be exercised judicially, the court a quo did not keep in view the specific principle that, generally speaking, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt. Different considerations may apply where business rescue proceedings are being considered in terms of part A of ch 6 of the new Companies Act 71 of 2008. Those considerations are not relevant to these proceedings. The court a quo also did not heed the principle that, in practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a 'very narrow one' that is rarely exercised and then in special or unusual circumstances only." (footnotes omitted)

[32] The respondent listed the following special and/or unusual circumstances:

32.1 the unfortunate default arose during the time when the respondent company's shares were in the process of being bought by a new buyer;

32.2 the *bona fide* new buyer was unaware of the fact that the respondent company was in default to the applicant;

32.3 the respondent is factually solvent;

32.4 the respondent company is a going concern;

32.5 the applicant is secured to the hilt;

32.6 the respondent has immovable property which can be executed upon to purge the debt;

32.7 the new purchaser has already authorised a debit order; and

32.8 is willing to sign a personal suretyship in his name if need be.

[33] As stated in *Afgri,* the applicant has a right, *ex debito justitiae*, to a winding-up order against the respondent in circumstances where the respondent is unable to discharge its debt. Most of the circumstances listed by the respondent suggest that the applicant should have chosen an alternative method to collect the unpaid debt. The respondent, however, failed to provide any facts substantiating its belief that the suggested alternatives are viable options to meet the outstanding debt.

[34] I do not understand special and unusual circumstances to mean that a debtor may dictate to a creditor which cause of action it should utilise to collect an unpaid debt. In my view, these alternative methods do not constitute special or unusual circumstances.

[35] It is unfortunate that the default occurred whilst the shareholding was in the process of being sold. This is sadly a commercial reality of unscrupulous business dealings and does not constitute a special or unusual circumstance.

Conclusion

[36] In the result, the applicant has satisfied the requirements of section 345(1)(a)(i) and is entitled to a final winding-up order.

ORDER:

1. The order is confirmed.

[redacted]

N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date of hearing: 10 March 2026

Judgment delivered: 16 March 2026

Appearances:

For the applicant:	Adv Horn
Attorneys for the applicant:	Werksmans Attorneys
For the respondent	Adv Marques
Attorneys for the respondent:	Liddle & Associates Inc