

SOUTH AFRICA / JUDGMENT

Blue Financial Services Limited and Another v Standard Chartered Bank Johannesburg Branch (20442/2014) [2020] ZAGPJHC 331 (11 December 2020) [2020] ZAGPJHC 331

COURT

South Gauteng High Court, Johannesburg

BEFORE

Vally, Bhoola, Twala

CASE / FILE NUMBER

20442/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No.: 20442/2014

A5080/2018

In

the matter between:

Blue
Financial Services Limited
First
Appellant
(First
respondent in court a quo)
Blue
Financial Services (South Africa)
Pty)
Ltd Second
Appellant
(Second
respondent in court a quo)
and
Standard

Chartered Bank Johannesburg
Branch Respondent
(Applicant
in court a quo)

JUDGMENT

Vally J and Bhoola AJ

INTRODUCTION

- [1] This is an appeal against the whole of the order and judgment of Makume J delivered on 31 August 2018. Leave to appeal was granted by the court a quo. The respondent (SCB) was the applicant in the court a quo and the appellants were the respondents.
- [2] SCB had claimed certain relief in the court a quo arising from a term loan agreement and a banking facility in the sum of R50 million it had extended to the first appellant, Blue Financial Services Ltd (BFS). It also claimed relief against the second appellant, Blue Financial Services (South Africa) (Pty) Ltd (BFSSA). The two appellants (collectively referred to as “Blue”) operate in the financial services sector and provide unsecured loans mainly to individual debtors.
- [3] On 14 September 2010, after it became clear that Blue was having financial difficulties in meeting its obligations as set out in the term loan agreement and banking facility (the existing facilities), a Debt Rescheduling Agreement (DRA) was concluded between the parties. The DRA included Blue, SCB and a wide variety of Blue’s creditors. The DRA was made up of a series of recapitalisation agreements including the DRA itself, subscription agreements as well as a Blue claims purchase agreement (BCPA). In terms of a subscription agreement that formed part of the DRA, Mayibuye Group (Pty) Ltd (Mayibuye) had subscribed for shares (the subscription shares) in Blue for a consideration of R 163 million. Mayibuye ceded its claims against Blue to Mapula Solutions (Pty) Ltd (Mapula). This is relevant to the postponement application discussed below.
- [4] There were three claims brought by SCB. They are
- (a) an interest claim against the BFS, alternatively BFSSA (b) a Country Cover Ratio (CCR) claim which compels BFS to issue SCB with a Ratio Certificate followed up with a monetary claim against Blue depending on the contents of the Ratio Certificate, and (c) a claim against BFSSA granting SCB unimpeded access to BFSSA’s debtors’

book in order to allow it to call up and collect debts due from BFSSA’s debtors, and have the proceeds paid into an account

designated by SCB. They are each dealt with in greater detail below.

- [5] The court a quo granted the relief sought in the interest claim ordering Blue to pay to the SCB the sum of R9 762 765.47. In relation to the CCR claim the court a quo ordered Blue to produce a Ratio Certificate as contemplated in the DRA with reference to the last meeting date being 31st December 2013, showing the value and calculation of the South African Book (the South African Book). SCB was granted a right to enable it to prove its claim against both appellants by approaching court on the same papers duly amended once it had been determined what the difference was between the value of the South African Book in terms of the Ratio Certificate and the sum of R234 million. The court a quo further ordered Blue to pay the costs of the application on an attorney and client scale.
- [6] Aggrieved at the order Blue asks this court to overturn it in its entirety. Its contentions in essence are that:
- a. In regard to the interest claim it has no self-standing obligation to pay SCB interest. The DRA required interest payments to be made by BFS to SCB prior to the contractually regulated End Date of the DRA. This date was accelerated to 6 September 2013. SCB claimed interest for the period April to 6 September 2013;
 - b. It has no obligation to provide the CCR Certificate; and,
 - c. SCB has no right to access the BFSSA's books of account to call-up and collect debts in satisfaction of BFS's guarantee in favour of SCB. Instead, SCB was limited to the Distribution Principles in terms of the DRA, making it unnecessary to list the debtors of the second appellant.
- [7] Those contentions relate to the merits of the appeal. However, Blue had at the hearing of the appeal moved for the hearing to be postponed pending the finalisation of an action in another matter. It is necessary to deal with that motion before engaging with the merits of the appeal.

THE APPLICATION FOR POSTPONEMENT OF THE APPEAL

- [8] Blue brought an application for a postponement of the hearing of this appeal. It was initially sought by way of correspondence to the presiding judge. When it was pointed out to their attorneys that such an approach was irregular, Blue filed a notice of motion with a supporting affidavit. The application was only brought a few days before the hearing was to take place. SCB opposed the application. The application was considered on the day set down for the hearing. After hearing the parties, an order was issued dismissing the application with costs, including costs of two counsel where two counsel were employed. These are the reasons for that order.
- [9] The application according to Blue is premised on the fact that the resolution of this appeal lies largely on the interpretation of the DRA, which is a complex commercial agreement. The same issue, it was contended, is currently directly engaged in an action pending before Lamont J, and the outcome of that action will have a direct and material impact on this appeal. The plaintiff in the action is Mapula Solutions (Pty) Ltd (the Mapula action). It seeks

relief against SCB and other defendant banks (African Banking Corporation of Zambia, African Banking Corporation of Botswana and Standard Chartered Bank Botswana). The defendants are all parties to the DRA. The efficacy and enforceability of the DRA is directly in issue in the action. Mapula is the cessionary of the rights derived from the DRA by Mayibuye, which was a party to a subscription agreement forming part of the DRA.

- [10] The rationale for the postponement is that SCB has in the Mapula action pleaded that the DRA was “never unconditional or enforceable”.

In this appeal SCB has adopted a diametrically opposite view. The divergent approaches adopted by SCB (in this appeal and the Mapula

action) will cause it prejudice, submits Blue. It will have the potential effect of the DRA being found to be unconditional by this court – which is what the court a quo has already accepted – but conditional by the trial court. Blue therefore submits that if this appeal is allowed to proceed, and the Mapula action also proceeds in due course, SCB would as a result have advanced two opposing factual propositions in two different courts in the same division. This it says bears the risk of creating an untenable situation. And, if the risk were to materialise then one of the fundamental principles of the common law, encapsulated in the concept *res judicata*, which is designed to prevent a multiplicity of actions between the same parties on the same facts and issues, would have been

flouted.[1] To prevent the risk from materialising Blue asks this court to withhold the hearing of the appeal until the Mapula action (pending before Lamont J but for which a trial date has yet to be allocated), is finalised.

- [11] In support of its assertions Blue relied on the following dictum in Whittaker:

“The court has the greatest latitude in granting amendments, and it is very necessary that it should have. The objective of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts” [2] (emphasis added).

- [12] The problem with the submission is that the issue of conditionality of the DRA was not decided by the court a quo, nor is it a relevant in this appeal. SCB has pinned its colours to the mast in this matter. Its case has been that the DRA is unconditional. Blue agreed. The court a quo decided the matter accordingly. And, it is common cause that the facts as set out in the papers before the court a quo and now before this court are the only facts upon which the appeal can be adjudicated. This, it must be remembered, is an appeal “in the ordinary strict sense” and not a “wide appeal”:

“... [There are] three types of appeals that may fall under the word “appeal” [which] are an appeal in the wide sense, an appeal in the ordinary strict sense and a review. An appeal in the wide sense involves the appellate body or court having a complete re-hearing and making a fresh determination on the merits with or without additional evidence or information. Another type of appeal is an appeal in the

ordinary strict sense. This type of appeal is a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given and in which the only determination is whether the decision was right or wrong. The third type of appeal is a review which is limited to a re-hearing with or without additional evidence or information to determine, not whether or not the decision under appeal was correct but whether the arbiters had exercised their powers and discretion honestly and properly.”[3]

- [13] Hence, it is not, and cannot be, gainsaid by Blue that this court will not be considering the conditionality of the DRA, as that it was not an issue before the court a quo and is not an issue before this court. This court, like the court a quo, will accept that which is common cause – that the DRA is unconditional and binding on both parties.
- [14] Mapula we know is the plaintiff in the matter before Lamont J. It is not a party to this matter. So are some of the defendants in the Mapula action. The outcome of this appeal is not binding on any of them. The outcome of that action is irrelevant to this appeal. The facts that are to be proved in that action are not the same as the facts that served in the court a quo and which serve before this court.
- [15] It is true that in the case before us SCB pleaded in the alternative that the DRA was conditional, but it abandoned that plea. Thus it was not an issue before the court a quo and naturally is not an issue before this court. The issue may or may not arise in the action before Lamont J, but that is certainly no bar to this court proceeding with the appeal.
- [16] The full record before the court a quo has been filed as have the respective heads of arguments of both parties, and both parties have complied fully with the relevant practice directives. Hence, save for the introduction of a new claim – concerning the issue as to whether the DRA was conditional or not – all else remains the same as that before the court a quo. In the circumstances, the matter is ripe for hearing. It cannot remotely be said that there exists a good cause to postpone the

hearing. Accordingly, we hold that the application for postponement should be dismissed with costs.

THE MERITS OF THE APPEAL

The interest claim

- [17] Blue emphasised the purpose of the DRA, which was to avoid the liquidation of any entity in the Blue Group and to create a business model which was based on the understanding that (a) the liquidation process would be both expensive and inefficient, (b) the creditors (including SCB) chose to participate in the DRA – which would allow for the restructuring of Blue - in the expectation of receiving more than would be realised in a liquidation, and (c) the creditors envisaged that, with the refinancing and introduction of Mayibuye, the restructured business of Blue would be more efficient and in time be able to turn a profit. By itself there is nothing controversial in Blue highlighting this basic underlying purpose of the DRA.

[18] The purpose of the DRA was to recapitalise the debt incurred by Blue under the existing facilities, which resulted in SCB becoming a substantial creditor of Blue. The DRA had an Effective Date and End Date, and also provided for the Lenders (including SCB) to accelerate the End Date should an accelerated event occur. The Effective Date was 1 January 2011 and the DRA was expected to endure for three years until the End Date. It is common cause that the End Date was accelerated to 6 September 2013 as a result of the inability of Blue to collect sufficient cash from what is termed Included Claims in the DRA.

[19] The period between the Effective Date and the End Date was referred to in the DRA as the Rescheduling Period, as it envisaged an increase in collection of debts due to Blue during this period. It is common cause that during the Rescheduling Period:

- a. The only payments to which SCB was contractually entitled was agreed interest on its Effective Date Outstandings (this was the amount effectively owing by Blue to SCB on the Effective Date). That payment however was subject to sufficient cash being generated on the Included Claims.
- b. SCB was not entitled to receive payment of any other amounts on its Effective Date Outstandings.

[20] In the court a quo SCB claimed interest that was outstanding on the agreed Effective Date Outstandings in terms of the existing facilities at the rate of prime plus 1.5% during the Rescheduling Period up and until the End Date (referred to as “Standstill Interest”).

[21] Despite the complex nature of the DRA and its associated agreements, the claim is quite simple. It is based on clauses 3.5.6 of the DRA read with clause 7.4, which read:

“3.5.6 No principal payments will be made under the Existing Facilities for a period of 3 (three) years (“the Stand Still period”),

but interest which accrues on the Existing Facilities will be paid during that period.

...

7.4 During the Rescheduling Period the Effective Date Outstandings which each Borrower owes to each Lender shall accrue interest at the applicable Existing Facility Rate. The aforesaid interest shall be calculated in the manner set out in the applicable Existing Facility Agreement and shall be paid at the times envisaged in that Existing Facility Agreement.

[22] In terms of clause 3.5.6 Blue is obliged to pay accrued interest on the Existing Facilities. The Existing Facilities is defined in clause 2.1.52. It refers to credit facilities which lenders, including SCB, have made available to Blue. There is no debate that the capital sum owed by Blue to SCB forms part of the Existing Facilities. The interest that is due is calculated at the Existing Facility Rate which is defined in clause 2.1.54. In terms of clause 7.4 the Effective Date Outstandings shall accrue interest during the Rescheduling Period. The Effective Date Outstandings is defined in clause 2.1.45. as follows:

““Effective Date Outstandings” means in relation to each Borrower and each Lender- the aggregate of all the July Balances owing by that Borrower to that Lender, plus any interest which accrues under the applicable Existing Facility during the period (the Interim Period”) which commences on 1 August 2010 and which ends on the day before the Effective Date, irrespective of whether or not (in

terms of the applicable Existing Facility Agreement) any such interest is payable during the Interim Period; minus any interest

payments actually made by the applicable Borrower to the applicable Lender during the Interim Period on account of the interest which accrues to the applicable Existing Facility during that period, provided that the Effective Date Outstandings of the Secured Lenders shall reduce by any principal amounts paid to them by the Group under the provisions of clause 12.9”

This clause (clause 2.1.45) ensures that accrued interest as well as paid interest are taken into account in the calculation of the Effective Date Outstandings. Thus read together the only meaningful interpretation is interest shall accrue on the Effective Date Outstandings during the Rescheduling Period which is the period between the Effective Date and the End Date. There is no dispute

between the parties that SCB’s claim for interest falls within the Rescheduling Period

[23] Only one conclusion can be drawn from these clauses: Blue’s debt to the Lenders, including SCB, is restructured in such a manner that Blue is relieved of any payments towards liquidating the principal amount for a period of three years, but Blue will continue to pay the interest payments during this period – the Rescheduling Period - and interest payments due but not paid will remain due and will be added to the principal amount when the next interest payment is calculated.

[24] This interpretation of the DRA makes complete business sense. SCB and the other lenders are in the business of lending money for a profit. Interest is their income. While they were keen to prevent the liquidation of Blue, they were equally keen on receiving their income, and they did so by accepting a moratorium on payments towards liquidating the principal debt. The interpretation finds support in the conduct of Blue. It is common cause that Blue has since the conclusion of the DRA honoured its obligations in terms of these clauses to pay interest to SCB during the Rescheduling Period. Realising this, Blue contended that the interest due is to be converted into equity. But then Blue does not explain why it made some interest payments. The contention is not only inconsistent with the clear unequivocal terms of the DRA, in addition, it would make no business sense for the lenders to suspend payment of the capital sum and take the return on the loan (interest) as equity. They may just as well convert the principal sum owing - and not just the interest payments – into equity. Such an arrangement would also be advantageous for Blue. But that is not what they agreed. The DRA, as its title suggests, is a debt rescheduling agreement and not a debt to equity conversion agreement. Blue’s submission simply lacks all merit.

- [25] Further, Blue was not able to gainsay that failure on its part to pay interest due would constitute an “Acceleration Event”.
- [26] Blue submitted that SCB’s reliance on clauses 3.5.6 and 7.4 is misplaced in that the clauses must be seen in the context of the whole agreement. It is trite that clauses in an agreement must always be interpreted in the context of the whole agreement. But there is nothing in the agreement that detracts from the natural meaning that can and has to be accorded to these and other related clauses referred to above. They are clear, crisp and avoid ambiguity. And, more importantly, they form part of the core of the DRA which is focused on the existing debt of Blue through the terms “Effective Date”, “Effective Date Outstandings”, “Rescheduling Period”, “End Date” and “Accelerated Event.” All of them point to the temporary nature of the DRA. After all the DRA was, it is common cause, designed to avoid liquidation and restore Blue’s financial health to the point that it became a self-standing profitable business. It was anticipated that this would take three years.
- [27] The court a quo came to the same conclusion as we do above. We therefore find no misdirection on its part. The appeal with regard to the order concerning interest payments fails.

The CCR claim

- [28] SCB sought relief relating to various CCRs. The CCR has specific reference in the DRA. There is a different CCR for the different countries in which Blue operates. To understand it one need only look at the definition for one country. They are really a calculation of the book debts held by Blue in each country. The South African CCR is defined in clauses 12.1.2 and 12.4. The clauses combined produce the following definition:

“Country Cover Ratio means, on each Measuring Date and in respect of South Africa shall be the aggregate, on the Measuring Date, of all principal amounts owing to Borrowers who are Residents of South Africa on account of any Performing Included Claims owing by Debtors who are Residents of South Africa, and the Effective Date Outstandings which the Borrowers who are Residents of South Africa owe to the applicable Country Lenders.”

- [29] The information necessary to calculate the CCR remains exclusively in the hands of Blue. SCB require them in order to exercise their rights to receive certain payments in terms of the DRA. The amount of monies due to them can only be determined after the CCR has been calculated. In terms of the DRA Blue is obliged to keep the South African Cover Ratio at R234m. Should the ratio fall below this amount, then in terms of clause 12.9.2. SCB is entitled to payment of the difference between R234m and the actual CCR. Once

the actual South African Cover Ratio is calculated SCB can, if this amount falls below R234m, pursue its claim for payment of the

difference between the actual value of the South African Book and R234m. SCB also seeks interest on the difference. Absent the

information SCB cannot enforce payment of any amount due to it.

[30] Blue does not dispute that it is required to maintain the CCR at R234m. It says that it does not owe any monies in terms of the CCRs. But this can only be determined after it has provided the information sought by SCB. It therefore does not have a defence to the relief sought. This is what the court a quo found. Nothing presented to us in this appeal shows that it was wrong. Accordingly, the appeal with regard to the order requiring it to furnish the information sought by SCB fails. Similarly with third claim of SCB. It is really related to the second claim. As the appeal against the orders dealing with the second claim fails so should the related orders – the unimpeded access given to SCB to Blue's debtors' book so as to enable SCB to determine whether it has a claim in terms of the CCR obligation of Blue and the postponement of the claims, if any, for payment arising from Blue's failure to comply with the obligation.

COSTS

[31] The parties adopted the view that costs should follow the result. Blue was ordered to pay costs of a single counsel on an attorney and client scale. It was not contended before us that the court a quo erred in this regard. The parties agreed that the costs of the appeal should follow the result of the appeal. In our view this should be on the party and party scale but should include the costs of senior counsel.

ORDER

[32] The following order is made:

- a. The application for postponement of the appeal is dismissed.
- b. The appeal is dismissed.
- c. Costs of the application for postponement and of the appeal shall be paid jointly and severally by the appellants and shall include the costs of senior counsel.

Vally J

Gauteng High Court (Witwatersrand Local Division)

Twala J

Bhoola A J

Date of hearing: 2 November 2020

Date of judgment: 11 December 2020

For the appellants: A R G Mundell SC

Instructed by: Meiring and partners Inc t/a MAP Attorneys

For the respondent: J P Daniels SC with K Premhid

Instructed by: Norton Role Fulbright South Africa Inc.

- [1] See *Evans v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838-839; *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dhome Corporation and Others* 2020 (1) SA 327 (CC) at [69].
- [2] *Whittaker v Roos and Another*; *Morant v Roos and Another* 1911 TPD 1092 at 1102-1103.
- [3] *National Union of Metalworkers of South Africa obo M Fohlisa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd)* 2017
- (7) BCLR 851 (CC) at [135]. See the cases cited therein. The locus classicus on this issue remains the dictum in *Tikly v Johannes* NO 1963
- (2) SA 588 (T) at 590G-H

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