

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited t/a Wesbank v Luvhomba Legal Axe CC (67452/2015) [2017] ZAGPPHC 844 (3 November 2017) [2017] ZAGPPHC 844

COURT
North Gauteng High Court, Pretoria

BEFORE
M J Teffo

CASE / FILE NUMBER
67452/2015

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 67452/2015
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED
3/11/2017
In

the matter between:

FIRSTRAND
BANK LIMITED
t/a
WESBANK Applicant
and
LUVHOMBA
LEGAL AXE
CC Respondent

JUDGMENT

TEFFO, J:

INTRODUCTION

- [1] This is an application for the final winding-up of the respondent. The application was brought in terms of section 344(f) of the Companies Act, 61 of 1973 (the "Old Companies Act"), read with item 9 of Schedule 5 of the Companies Act, 71 of 2008 (the "New Companies Act") and sections 66 and 69 of the Close Corporations Act, 69 of 1984 (the "Close Corporations Act") on the basis that the respondent is unable to pay its debts.
- [2] The respondent is a close corporation. It is represented in these proceedings by its sole member, Mr Tuwani Matthews Mulaudzi. Mr Mulaudzi is not a qualified legal practitioner.
- [3] The application is opposed.
- [4] At the commencement of the proceedings the court exercised its discretion and allowed Mr Mulaudzi to represent the respondent in these proceedings (see *Navy Two CC v Industrial Zone Ltd* [2006] 3 All SA 363 (SCA)).
- [5] The court also condoned the late filing of the respondent's heads of argument and the applicant's replying affidavit.

BACKGROUND

- [6] The applicant alleges that it is a creditor of the respondent in terms of several agreements. In this application it relies on two primary agreements which were allegedly entered into in October and November 2014. Copies of the agreements have been annexed to the applicant's founding affidavit.
 - 6.1 In terms of the Wesbank Auto Card Agreement (the "auto card agreement") the respondent was entitled to the use of a credit card issued by Wesbank.
 - 6.2 There was also the Master Rental Agreement (the "master rental agreement") which related to a CCTV access control system. This agreement was, according to the applicant, concluded between an entity called the Rental Company Trust and the respondent. Shortly after its conclusion, the rights in terms of the agreement were ceded to the applicant. The cession document has also been attached to the founding affidavit.
- [7] The applicant further alleged that the respondent fell into arrears with its payments in terms of the two agreements. Certificates of balance indicating the arrears and the amounts owing are attached to the papers.
- [8] The applicant's attorneys of record served a letter of demand for payment on the respondent at its registered office in July 2015 and the respondent failed to pay same.

- [9] The application which was opposed was heard by Mullins AJ and on 1 June 2016 he granted an order for the provisional winding-up of the respondent. He also issued a rule nisi calling upon the interested parties to show cause why the respondent should not be finally liquidated. The respondent was also afforded a further opportunity to place facts before the court in substantiation of its defence.
- [10] It appears from the judgment that the reason for granting the respondent a further opportunity to file an additional affidavit was that at the time it deposed to the opposing affidavit, it was not legally represented. Mullins AJ found the denials of the respondent to the allegations made by the applicant in its founding papers as merely bald, bare and entirely unconvincing. According to the learned Judge the respondent failed to establish genuine disputes of fact in respect of its indebtedness to the applicant and its consequent inability to pay, hence he afforded the respondent an opportunity to substantiate its defence as at the time the matter was argued, the respondent had obtained legal representation. Although the respondent was legally represented when the matter was argued, no heads were filed on its behalf.
- [11] The respondent filed a supplementary affidavit and the applicant also filed a replying affidavit.
- [12] The issue for determination is whether the applicant is entitled to an order finally winding-up the respondent.
- [13] Section 69(1) of the Close Corporations Act provides that a corporation is deemed to be unable to pay its debts if a demand is delivered to it and payment thereof is not effected or a compromise entered into within 21 (twenty-one) days thereafter.
- [14] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona tide and reasonable grounds. Where, however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona tide and reasonable grounds (see *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-348 and *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980D).
- [15] The Supreme Court of Appeal in *Afgri Operations Limited v Hamba Fleet (Pty) Limited* handed down on 24 March 2017, Case No. 542/2016 unreported, at paragraph [12] of the judgment, remarked as follows:

"...Generally speaking an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged its debt. (see *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733, *Service Trade Supplies Ltd v Dasco & Sons Ltd* 1962 (3) SA 424 (T) at 4288-D to which reference was made, with approval, by this court in *Sammel & Others v President Brand Gold Mining Company Ltd* 1969 (3) SA 629 (A) at 662F) ... In practice, the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefore is a 'very narrow one' that is rarely exercised and in special or unusual circumstances

only. (see *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd*; *First Rand v Evans* 2011 (4) SA 597 (KZD) para 28)."

THE PARTIES' CONTENTIONS

[16] In its supplementary affidavit deposed to by Mr Mulaudzi, the respondent raises the following issues in substantiation of its

defence:

16.1 It denies having concluded any agreement with the applicant.

16.2 Mr Mulaudzi denies having signed the agreements on behalf of the respondent.

16.3 He contends that he always insists on having his names spelt and written correctly as "Tuwani Matthews" and not as it appears on the Master Rental Agreement as "Matthews Tuwani".

16.4 It has not received any goods from the applicant that arose from any of the agreements

[17] Mr Mulaudzi submitted that the fact that the respondent denies liability, the existence of the contracts and/or the delivery of the goods as alleged, is evident that there are disputes of facts, hence Mullins AJ directed a supplementary affidavit to be filed.

[18] On the other hand the applicant contends that the only reason why a provisional order was granted, was to afford the respondent an opportunity to substantiate its defence to the applicant's claim.

[19] The applicant also contends that notwithstanding the fact that at the time of deposing to the supplementary affidavit, the respondent was legally represented, it merely in no more than a sentence, without any substantiating proof, denies that it is unable to pay its debts.

[20] It contended that Mr Mulaudzi was a party to the agreements and he signed them on behalf of the respondent.

[21] According to the applicant, Mr Pieter-Heinrich Eckard, represented it when the conclusion of the Wesbank Auto Card Agreement with Mr Mulaudzi, on behalf of the respondent, was negotiated. He also witnessed the signing of the aforesaid agreement and the schedules thereto by Mr Mulaudzi on behalf of the respondent. Mr Eckard confirms Mr Mulaudzi's signature on the auto card agreement. He also identifies him by his identity document.

[22] It was further contended that prior to the conclusion of the auto card agreement between the parties, various email correspondence were exchanged between them, and Mr Mulaudzi on behalf of the respondent was a party to the said correspondence. Mr Mulaudzi, who deposed to the opposing and supplementary affidavits on behalf of the respondent, is one and the same Mr Mulaudzi who engaged with the applicant in the aforesaid correspondence.

[23] The applicant has attached annexures "RA3" to "RA10" to its replying affidavit in support of its contention that Mr Mulaudzi's names are in fact written as "MatthewsTuwani" and not as Tuwani Matthews"

[24] The applicant contends that the facilities in terms of the auto card payment were supplied to the respondent. It utilised them but fell into substantial arrears in respect thereof. Proof of the arrears is contained in the certificate of balance attached to the founding papers.

WHETHER THERE ARE ANY DISPUTES OF FACT INCAPABLE OF RESOLUTION ON THE PAPERS

[25] It was argued on behalf of the respondent that there are material disputes of facts which cannot be resolved on the papers.

MR MULAUDZI'S DENIAL OF SIGNING THE AGREEMENTS AND THE RESPONDENT BEING A PARTY TO THE AGREEMENTS

[26] In support of its contention that the respondent has been a party to the auto card agreement and that Mr Mulaudzi its sole member, signed the auto card agreement, the applicant attached Mr Eckard's affidavit to the replying affidavit. In his affidavit Mr Eckard confirms that he was the representative of the applicant and Mr Mulaudzi represented the respondent when the conclusion of the auto card agreement was negotiated. The affidavit also confirms that he witnessed the signing of the aforesaid auto card agreement and the schedules related thereto by Mr Mulaudzi on behalf of the respondents Mr Eckard also identifies Mr Mulaudzi by his identity document which has been attached to the replying affidavit as annexure "RA3" on page 246, vol 2 of the papers.

[27] Over and above all this the applicant attached the email correspondence over the period 29 August 2016 until November 2016 on pages 179 to 245 of the papers.

[28] On page 197 there are two email correspondences, one dated 27 August 2014 at the bottom from Eckard Pieter (PEckard@wesbank.co.za sent at 02:21 pm to mulaudzim@luvhombagroup.co.za, subject: Wesbank Fleet Card Offering. There is another email on the top of the page dated 29 August 2014 from Thokozile Kali, email address, reception@luvhombagroup.co.za sent at 15:46 to Eckhard Pieter, subject Wesbank Fleet Card Offering. Paragraph 6 of the email correspondence from Mr Peter Eckard to Mr Mulaudzi dated 27 August 2014 reads:

"The WesBank Auto Card will give you better control of your fleet expenses and will take away the monthly paper work of having to collate all your individual slips, and will provide daily early warning reports on transactions that have exceptions i.e. tank capacity exceeded, multiple fill-ups, etc."

[29] On page 185 at the bottom there is an email correspondence from Tuwani Matthews Mulaudzi dated 21 October 2014 to Heather Kali-

Reception cc Pieter- Heinrich Eckard; Marnus Maritz at 08:48 am, subject: Wesbank Fleet Card Offering where Mr Mulaudzi requests Ms Kali to urgently send the signed copies of the attached financials to Heinrich. Ms Thokozile Kali, who has been referred to as the office manager of Luvhomba Group, Luvhomba House, 92 Bourke Street, Sunnyside, Pretoria on the email correspondence, replied to the email correspondence from Mr Mulaudzi on the same date at 09:09 and sent the documents as requested to Mr Heinrich Eckard of the applicant.

[30] On page 194 in an email correspondence from Ms Thokozile Kali of Luvhomba group dated 13 November 2014 and sent to Eckard Pieter,

subject: Wesbank Fleet Card Offering, she confirms that the fuel intake of the Range Rover is petrol and all the email correspondence

go on to page 245.

[31] On page 198 in an email correspondence from Ms Kali dated 17 November 2014 sent to Mr Eckard of the applicant at 08:44, Mr Eckard is requested to add another motor vehicle to the fleet, to wit, a 2013 VW Caddy kombi 2.02 white with registration letters and numbers CY 43 DC GP.

[32] It is evident in my view from the above correspondence that Mr Mulaudzi personally engaged with the applicant in negotiating the conclusion of the Wesbank Auto Card Agreement. The email correspondence between Mr Mulaudzi and Ms Kali clearly shows that Mr Mulaudzi instructed Ms Heather Thokozile Kali to engage the applicant and also provide it with certain documentation which he signed when negotiating and concluding the Wesbank Auto Card Agreement. The signature on page 199 (the new card order for) for adding the 2013 VW Caddy Kombi 2.02, white, with registration letters and numbers at the bottom, of Mr M T Mulaudzi is the same as those on pages 206, 207, 41 (the auto card agreement) 44, 45 and 47 (the master rental agreement.)

[33] There is no other evidence to gainsay the evidence which has been attached by the applicant and the allegations confirmed by Mr Eckard in his affidavit. Where could Mr Eckard have obtained the personal information of Mr Mulaudzi from other than from him or Ms Kali through him. Mr Mulaudzi has not substantiated his defence to the allegations to prove that the respondent has not entered into an auto card agreement with the applicant. He conceded in his papers that he is the only T M Mulaudzi at the respondent but failed to explain why his signature and personal information appears in the founding papers of the applicant. He did not even attach his identity document to disprove the allegations by the respondent.

[34] The insistence by Mr Mulaudzi that he always spells and writes his names as "Tuwani Matthews" and not "Matthews Tuwani" is in my view immaterial for the following reasons: While on the company search report on pages 21 and 22, the rental agreement page 181, the document called "fleet services division need analysis, page 184, the income statement at 31 July 2014, etc, the names "MatthewsTuwani" have been used, it is not true that he always

insists on the use of the names "Tuwani Matthews ". The applicant attached a copy of his identity document where the names "Matthews Tuwani" have been used. Nowhere in the papers has Mr Mulaudzi furnished a different identity document which bears the names in the sequence that he always insists it should be. He has never denied that the identity document attached to the papers is his and that he has a different one and/or a different identity number.

- [35] If he does not know "Mr Matthews Tuwani Mulaudzi why does the name "Tuwani Matthews Mulaudzi" of Luvhomba Group appear in the email correspondence between Ms Kali of Luvhomba Group, Mr Eckard of the applicant and Marnus Maritz (see an email correspondence from Mr Mulaudzi on 21 October 2014 sent to Ms Kali and the other at 08:48). If he has never represented the respondent in the negotiations and when the contract was entered into why did he communicate with Mr Eckard and why the subject
- "Wesbank Fleet Card Offering" on the email correspondence. The same names "Tuwani Matthews" also appear on page 186 of the papers. In my view this argument does not take the respondent's case any further. It is untenable and rejected as false.

MS THOKOZILE KALI WAS AN EMPLOYEE OF THE RESPONDENT INSTRUCTED TO COMMUNICATE WITH THE APPLICANT BY MR MULAUDZI - THE MASTER RENTAL AGREEMENT

- [36] While Mr Mulaudzi disputes also the handwriting on the Master Rental Agreement, at paragraph 5.3 of the supplementary affidavit, he contends that "the person who purportedly witnessed the contract, is one Heather Thokozile Kali, seemingly known to the applicant and may be the best person to identify the person who allegedly represented the respondent".
- [37] It is clear from the email correspondence referred to above that Ms Kali was and has been an employee of the respondent at the time of the negotiations and when the Wesbank auto card agreement was entered into between the parties. In all the email correspondences she has been referred to as the office manager of Luvhomba Group, the Luvhomba house. Her email address is reception@luvhombagroup.co.za I have already found that the email correspondences between the parties show that Ms Kali was instructed by Mr Mulaudzi to engage

with Mr Eckard of the applicant and furnish him with certain documents that he signed (see paragraph 32 above).

- [38] It is unconvincing that Mr Mulaudzi well knowing that Ms Kali was one of the employees of the respondent whom he instructed to engage with the applicant now asserts that he does not know her and expects the applicant to identify her as the person who according to it represented the respondent.

NON-RECEIPT OF GOODS

[39] Paragraphs 8, 10 and 11 of the respondent's answering affidavit read:

"8. The respondents are not aware of the type of goods which were purportedly delivered or in fact if any goods were delivered to them at all.

10. The respondents cannot confirm whether, if there was indeed goods delivered to the respondent and such goods were delivered in terms of an agreement duly entered into by representatives of the applicant and the respondent, the amount claimed is justifiable.
11. Applicant claims to have delivered the goods, but does not provide the above honourable court with proof of delivery of such goods or if anyone representing the respondents received and signed for such goods. More importantly, respondent denies that it is unable to pay its debts and applicant is put to the proof thereof. If anything, applicant's attorneys caused a letter to be issued to the respondent demanding payment and that was it."

[40] At paragraph 6 of the supplementary affidavit the following averments have been made:

"6. The Respondent has not received any goods from the Respondent (sic) that arose from any of the above alleged agreement.

6.1 I checked all the records of the Respondent and could not find any invoice/receipt or proof of delivery notice made by the applicant to the respondent during the corresponding period.

6.2 The applicant has also failed to annex and attach any documentary proof of the alleged goods delivered to the respondent and which

forms the subject matter of the amount owed."

[41] I take it that the respondent mistakenly referred to the respondent instead of the applicant when it stated that it has not received any goods from the respondent that arose from any of the alleged agreements.

[42] There can be no doubt from the email correspondence exchanged from the parties referred to above that the facilities in terms of the auto card agreement were made available to the respondent, it utilized them and fell into arrears in respect thereof.

[43] In the answering and supplementary affidavits, the respondent did not say anything about the facilities, whether they were indeed made available to him and he utilized them.

[44] At paragraph 11.4 of the applicant's replying affidavit it refers to annexure "FA5" to the founding affidavit, pages 47-50 and contends that Mr Mulaudzi duly signed the delivery receipts. If one looks at what Mr Mulaudzi alleges in the respondent's supplementary affidavit at paragraphs 6.1 and 6.2 referred to at paragraph [40] of the judgment, something does not add up. For Mr Mulaudzi to aver that no documentary proof of delivery of the goods has been attached while it was annexed to the founding affidavit and well- knowing that he indeed signed it, is an indication that he boldly disputes the allegations without fully substantiating his defence. He says nothing in the respondent's papers about the delivery receipts annexed to the founding papers of the applicant yet he states in paragraph 6.1 of the

supplementary affidavit that he checked all the records of the respondent. He could not find any invoice/receipt or proof of delivery notice made by the applicant to the respondent during the corresponding period.

[45] The applicant has attached the certificate of balance to prove the respondent's indebtedness to it.

[46] Further to this no document or sufficient detail has been provided by the respondent to disprove the allegation that it is unable to pay its debts. Mr Mulaudzi concedes that the demand was served on the respondent. There has not been any proof of payment of the amount demanded from the respondent and the period of 21 days as prescribed in section 69 of the Close Corporations Act has lapsed.

[47] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and another*

[2008] ZASCA 6; 2008 (3) SA 371 (SCA) at paragraph [13] of the judgment at 375G-I, the court said:

"A real, genuine and bona fide dispute of fact could exist only where the court was satisfied that the party who purported to raise the dispute had, in his affidavit, seriously and unambiguously addressed the fact said to be disputed. When the facts averred were such that the disputing party necessarily possessed knowledge of them and was able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rested his case on a bare or ambiguous denial, the court would generally have difficulty in finding that the test was satisfied."

[48] I am not persuaded that the disputes of fact raised by the respondent are real, genuine and bona fide disputes of fact for the reasons I advanced above. In my view they are mere bare denials which do not sufficiently deal with the facts averred.

[49] I am also of the view that the applicant has prima facie established the respondent's indebtedness to it but the respondent has under the circumstances failed to show that this indebtedness is disputed on bona fide and reasonable grounds.

[50] The applicant has complied with the provisional winding-up order dated 1 June 2016. A copy of the court order was published in the Government Gazette and a copy of the advertisement dated 24 May 2016 was attached to the papers. Ms Mpanza, the deponent to the affidavit confirming compliance with the court order on behalf of the applicant further submits that the applicant is not aware of any other creditors of the respondents

[51] Consequently the application succeeds.

[52] In the result I grant the following order:

52.1 The estate of the respondent is placed under final winding-up.

52.2 The costs of the application shall be costs in the winding-up of the respondent's estate.

M J TEFFO

JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: C A du Plessis

Instructed by: Rossouws Lesie Inc

For the Respondent: Mr T M Mulaudzi

(A sole member of the CC)

Instructed by: Not legally represented

Date heard: 22 May 2017

Date handed down: 3 November 2017

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