

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Mirror Ball Investments 65 CC (58758/2009)

[2010] ZAGPPHC 590 (19 March 2010)

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COURT

North Gauteng High Court, Pretoria

BEFORE

P.M Dolamo

CASE / FILE NUMBER

58758/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

Case No: 58758/2009

Date: 19 March 2010

In the matter

between:

FIRSTRAND BANK

LIMITED.....APPLICANT

(Registration No.

1929/001225/06)

And

MIRROR BALL

INVESTMENTS 65

CC.....RESPONDENT

JUDGMENT

DOLAMO, AJ.

- [1] The Applicant applied for the liquidation of the Respondent, a close corporation, on the basis that it was deemed to be unable to pay its debts. The Applicant is relying on the provisions of Section 68(c) read with Section 69(1)(a) of the Close Corporation Act 69 of 1984 (I shall hereinafter referred to this Act as simply the “Act”). In terms of Section 69(1), a corporation is deemed to be unable to pay its debts for purposes of Section 68(c) if it is

indebted to a creditor in a sum of not less than R200.00 then due and has served on the corporation a demand requiring the corporation to pay the sum so due and the corporation has for 21 days thereafter neglected to pay the said sum or to secure or compound for it, to the reasonable satisfaction of the creditor.

- [2] The application is resisted by the respondent. The latter's main contentions is that the applicant vacillated between two entirely different and divergent causes of action and that for this reason alone the application should be dismissed with costs. The Respondent also disputed the validity of the claim for payment of the sum of R2300 801.09 being the second amount claimed on the ground that it was premature since, at that time there was no compliance with the condition set out in clause 8.2 embodied in the written Second Agreement . The Respondent also raised other defences to the application. The Respondent claimed as a defence that the Applicant did not comply with clause 12.1.1 of the second agreement which requires it to give written notice of any default before instituting action to enforce its rights if the Respondent had remained in default after the expiry of a period of seven days from the date of the notice. Respondent also challenged the application on the basis that the Applicant's Section 69 of the Act notice did not comply with the requirements of that section.
- [3] I shall briefly outline the background to the parties' agreements, the dispute relating to payment in terms thereof and the basis of Respondent's contentions as set out supra, as a prelude to answering the question whether the applicant had made out a prima facie case for an order for the winding up of the Respondent.
- [4] On the 17th September 2007 the Applicant, a commercial banking institution, and the Respondent entered into a loan agreement in terms of which a sum of R4,710,018.00 was loaned and advanced to the Respondent. This agreement is referred to as the loan agreement or the first agreement interchangeably. This amount was to have been repaid by the Respondent within six months of the registration of a bond by the Respondent in favour of the Applicant over a property which the Respondent had purchased with the proceeds of the loan. The envisaged mortgage bond was indeed registered on the 7th October
2007. On the 6th March 2008 the Applicant and the Respondent entered into another agreement called the loan facility agreement or the second agreement,

which would also interchangeably be referred to as such, in terms of which the Respondent was granted a loan facility of R43 232 351.00. This amount was to have been made available to the Respondent in terms of a drawdown schedule, the exact terms of which need not be stated for purposes of determining the issues in this application. The loan facility and interest, costs and capitalized fees had to have been repaid by the Respondent within sixteen months, as reflected on the repayment schedule. The Respondent would have been in default if, inter alia , it failed to pay, punctually, any amount payable to the applicant in terms of the loan facility agreement and fail to remedy such breach within seven days of being given written notice to do so. The loan facility agreement was said to constitute the entire agreement between the parties regarding this

subject matter. The applicant alleged that in terms of this loan facility agreement it had made payment to the Respondent of the sum of R4,710,018.00 (which amount is said to have already been paid to the Respondent in terms of the first loan agreement) and a further sum of R2,280,000.00 which amount was said to have been paid to the Applicant as a non-refundable administration fee. In my view the latter amount is nothing more than a transaction facilitation fee or commission which was earned by the Applicant from the transaction and debited to the account of the Respondent.

- [5] It is a matter of common cause that the Applicant did not make any further funds available to the Respondent. The reason, according to the Applicant, was that the Respondent failed to comply with numerous condition of the loan facility which conditions are set out in a schedule to the Loan facility agreement. This is disputed by the Respondent who claim to have complied with most if not all of the conditions stipulated by the Applicant. Another source of concern for the Applicant was the escalation of the amount of interest capitalized on the outstanding balance. This prompted the Applicant to direct correspondence to the Respondent setting out the outstanding conditions and calling upon the Respondent to remedy the situation. These were followed by a letter to Respondent, dated the 23rd March 2009, demanding full payment of the outstanding balance by not later than the 10th July 2009, and added, perhaps ex abundanti cautela, that the said letter did not amend the terms of the agreement of the 17th September 2007 (i.e the first agreement). Another letter, dated the 29th April 2009 followed, calling upon the Respondent to make payment of the full amount owing which at that stage stood at R6092 542.28. The latter letter elicited a response from the Respondent who, through its then attorneys, wrote back stating, inter alia, that the Respondent denied that any amount was due and payable to the Applicant as claimed in the letters and that the capital and interest would have become payable only sixteen months from the commencement of phase one. Paragraph 2 of this letter read as follows:

“Our client further deny that the second loan agreement has never come into effect. It is also denied that the second agreement did not come into effect on the grounds “as conditions pertaining to availability of these funds have never been met”, as alleged by you in your letter of 24 March

2009. This agreement came into effect and is still in force. This agreement substituted the first agreement and the first agreement is therefore of no force and effect. This was confirmed by your Mr Carl van Blerk at a meeting held on the 18th of February 2009.”

- [6] It appears that Respondent's view at that time was that since no amount were advanced to it in terms of the second agreement that at that time of the demand for payment no amount was due and payable to the Applicant. The Applicant retorted by stating in a letter dated the 9th June 2009 that, if the Respondent's contention that the loan facility agreement substituted the loan agreement was true (which was still not conceded by the Applicant), then the full outstanding balance of the loan, including the non-refundable administration fee, would become due and payable within sixteen months from the date of the second loan agreement and that the contention that the outstanding balance would only become due and payable within sixteen months from the commencement of the first phase was not

supported by the second loan agreement. Demand for payment, on or before 6th July 2009, was then made. There was no further response from the Respondent. Consequently the Applicant caused a Section 69(1) (of the Act) notice to be served on the Respondent on the 23rd July 2009. The application for winding up of the Respondent was launched on the 22nd September 2009 when there was no response to the notice.

- [7] In its founding papers the Applicant stated in paragraph twenty three that its claim against the Respondent was for the payment of monies loaned and advanced to the Respondent in terms of the loan facility agreement. This version was disputed by the Respondent. The Respondent contended that the Applicant was wrong in stating that the Respondent was owed sums of money advanced as a loan in terms of the second loan agreement and that it was vacillating between two courses of action since in the Section 69 of the Act notice, it relied on the second loan agreement whereas in the founding affidavit, it relied on the first loan agreement. As to the non refundable administration fee it maintained that this amount was not due and payable since neither of the occurrences contemplated in clauses 8.2 of the second agreement were met. The Respondent further contended that the Applicant failed to comply with the provision of clause 12.1.1 in that it did not comply with its obligation to notify the Respondent of its failure to pay the alleged outstanding amounts, and the Respondent had failed to respond within seven days of such notice, before acquiring the right to enforce payment of the amounts. The Respondent also claimed compliance “with most if not all of those conditions”

which were special conditions for drawing amounts in terms of the second loan agreement.

- [8] I shall now turn to deal seriatim within the Respondent’s submissions.

- [9] The first submission is that the Applicant is vacillating between two entirely different and divergent causes of action, in support of the defence that the application stands to be dismissed on this basis, Mr Ferreira submitted that the Applicant in liquidation proceedings cannot succeed if it had not made it clear in its approach on which cause of action it relied. According to this argument the Applicant’s papers, if it were pleadings in action proceedings would have been excipiable for failing to disclose a cause of action. Mr Smit, on behalf of the Applicant, on the other hand, submitted that liquidation proceedings are different to action proceedings and referred the court, in support of this proposition, to the judgment of Trengove AJ in *Investec Bank Ltd and Another v Mutemeri and Another* 2010(1) S.A 265. The distinction Mr Smit sought to draw between the two proceedings appears in paragraph

- [29] of the Investec judgment which reads as follows:

- [29] In *Collett v Priest* 1931 AD 290 the Appellate Division considered whether a sequestration order made by the Eastern Districts Local Division could be taken on appeal to the Cape Provincial Division of the Supreme Court. The relevant statute permitted appeals from the one to the other in ‘any civil suit’. The Appellant Division held that a civil suit was a legal Proceeding in which one party sues for or claims something from another’ and that it did not include an application for sequestration . De Villiers CJ explained at 299 why it could not

be said that an application for sequestration was a proceeding by which one party sued for a claimed something from another:

‘The order placing a person's estate under sequestration cannot fittingly be described as an order for a debt due by the debtor to the creditor. Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting the machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor. The order sequestrating his estate affects the civil status of the debtor and results in vesting his estate in the Master. No doubt before an order so serious in its consequences to the debtor is given the court satisfies itself as to the correctness of the allegations in the petition. It may for example have to determine whether the debtor owes the money as alleged in the petition. But while the court has to determine whether the allegations are correct, there is no claim by the creditor against the debtor to pay him what is due nor is the court asked to give any judgment, decree or order against the debtor upon any such claim.’

[10] I align myself with the views expressed in the above decision. I cannot, as a result agree with the submission that the Applicant did not disclose a claim which will entitle it to bring the application. The first cause of action is based on a loan. It is not in dispute that the sum of R4,710,018.00 was loaned and advanced to the Respondent. There was at that time only one written agreement between the parties, which was the agreement of the 17th September 2007. Later, and on or about the 6th March 2008, the parties entered into another agreement. In terms of this agreement the Respondent was provided with credit facilities for which he was charged the sum of R2 280,000.00. As I have already indicated supra this amount was nothing more than a commission earned by the Applicant out of this transaction. There were no funds advanced to the Respondent at that stage. The fact remains, however, that the loan made and advanced to the Respondent was done in terms of the first loan agreement and was already paid to it at the time when the second agreement was entered into. What the second agreement did was to, in addition to extending credit facilities to the Respondent, novate the first agreement. But that there was novation is also disputed by the Respondent. Support for this submission, according to the Respondent, is to be found in the letters of the Applicant dated 23rd March 2009 and 9th June 2009 respectively. In the first letter the Applicant stated that “letter does not amend any of the terms and conditions of this loan agreement entered into on the 17th September 2007, which remains in full force and effect” and in the second latter that it was not conceding that there was substitution. Since these letters came after the conclusion of the second agreement, the contention was that there was no substitution because it was evident therefrom that the parties were not *ad idem*. I am of the view that in the latter letter the Applicant, in responding to the Respondent’s letter of the 6th May 2009 that the first agreement was substituted by the second agreement, the applicant was. without conceding that there was

substitution, merely dealing with the repayment of the loan from the Respondent's point of view (that the loan would only become due and payable within 16 months from the commencement of the first phase). The issue of novation was not pertinently dealt with as it was not the focal point, the focus being on the repayment of the loan.

[11] While I agree with the submission that a novation is an agreement, generally between two parties, and that, for the agreement to come into existence, there must be consensus or a meeting of the minds between the contracting parties, I do not agree, with due respect, that there was no agreement of substitution of the earlier agreement by the latter in the sense of "the termination of an earlier obligation by the creation of a later (new) one in its place...".¹ It is trite that an agreement can either be express, tacit or implied. I am of the view that the conduct of the parties in the

circumstances of this case clearly indicate that tacitly they agreed that the second agreement replaced the first. So much is clear from the conduct of the Applicant that, while he was not willing to concede that there was substitution at the stage when he wrote the letters of the 23rd March 2009 and 9th June 2009 respectively, he subsequently came to accept, by conduct, that indeed the second agreement had replaced the first one. This may not have been sufficiently unequivocal but was nevertheless enough to bring a tacit agreement of substitution in place. I find support for this proposition in the following passage in *The Law of Contract in South Africa*: by Christie RH 5th Edition on page 87:

"It should be noted that conduct which would otherwise not be sufficiently unequivocal to amount to acceptance of an offer may be

made unequivocal by the offeree's own prior statement of how his conduct is to be regarded. So in *Garde v Brink* 1907 EDC 50:

Garde obtained from Brink a horse on trial, saying "If the horse suits me. I will keep him; if he does not. I'll return him this evening." Kotze JP's simple decision was "As the defendant did not return the horse the first evening, he must be taken to have accepted it."

Having provided a glossary of his own future conduct, the offeree cannot complain if he is taken at his word..."

While this at first blush may appear to apply to the Applicant rather than the Respondent it is, in my view, equally applicable to the Respondent when sight is not lost of the fact that it was the Respondent who first brought up the question of substitution. The applicant from thereon, by conduct, accepted the Respondent's conclusion that there was substitution. The Respondent cannot turn around and dispute his own position. The submission by Mr Ferreira that the legal opinion by the then attorneys of the Respondent regarding substitution was wrong is, with due respect, unconvincing.

[12] The second claim upon which the Applicant seeks liquidation of the Respondent is based on the so-called “non-refundable administration fee.” The origin of this amount is to be found in clause 8 of the second loan agreement concluded on the 6th March 2008. Clause 8.2 of this agreement provides that:

“The initial fees, which include value-added tax where applicable, are due on date of signature and payable on the date of first advance of the loan amount or on date of registration of any mortgage bond which ever occurs first, unless there is an unreasonable delay in the registration of any mortgage bond in which event it shall be payable on demand. You have the option to capitalise the initial fees and repay the mentioned fees in accordance with clause 4 of this agreement”

[13] It is common cause that the Respondent had not drawn down any amount nor was any mortgage bond registered in terms of the second agreement. Neither of the occurrences contemplated in clause 8.2 of the second agreement had occurred. I agree with Mr Ferreira therefore that the claim is premature and the applicant cannot rely thereon for purpose of Section 69(1) of the Act.

[14] The Respondent is also challenging the Applicant’s right to bring the application based on the aforesaid causes of action on the ground that there was no compliance with clause 12.1.1 of the second agreement. This is the clause that provides that the Respondent would be in default in the event it failed to pay punctually any amount payable to the Applicant in terms of the second agreement and not remedy such failure within seven days of notice having been given to do so. I find this objection to be without any merit. In my view, the letter of the Applicant, dated the 29th April 2009, met the requirements of clause 12.1.1. This objection does not warrant any further attention and is dismissed.

[15] Lastly the Respondent is attacking the application for its winding up on the basis that there was no compliance with the requirements of Section 69(1) in that the notice therein provided for did not come to the notice of any of its members. The notice in question was served at the registered office. This according to the Applicant was done by the sheriff and the return of service was attached to the founding affidavits. This is compliance with the requirement of Section 69 of the Act. This defence, furthermore, was not pursued in the heads of argument or in the submissions in court and no further intention were to point to it.

[16] An applicant for a winding up order is required to establish a prima facie case. Where the application is opposed, as in the present case, the Applicant will succeed only when it is able to show that on all the papers before court a prima facie case entitling it to the order prayed for has been established on a balance of probabilities. On the other hand, if the Respondent shows on a balance of probabilities that its indebtedness to the Applicant is disputed on bona fide and reasonable grounds the application will be refused. See in this respect the judgment of Van Rensburg J in *Van Zyl No v Look Good Clothing CC* [1996] ALL SA 305 (SE) at 312 (F - G). The question in casu is whether the Defendant has raised a bona fide and

reasonable dispute of its indebtedness to the Applicant. The onus will be on the Respondent to show not that it is not indebted to the Applicant but merely that the indebtedness is disputed on bona fide and reasonable ground [(Kalil v Decotex (Pty) Ltd and Another 1988(1) S.A 943 (A) @ 980 (C-D)]. I have not been convinced that the Respondent has succeeded in showing that it was disputing the Applicant's claim on bona fide and reasonable grounds. The defences raised were of a technical nature and did not address the substance of the claim being the subject matter of the application of its merits. The issue raised as defences, in my view, can be relegated to immaterial technical

objections. The Applicant, on the other, had on a balance of probabilities established a prima facie case entitling it to the order sought.

[17] In the result I make the following order:

17.1 The Respondent Close Corporation is hereby placed under provisional winding up in the hands of the Master of the High Court.

17.2 A Rule Nisi is hereby issued calling upon all interested persons to show cause, if any, to this Court on the 20th

day of April 2010 at 10:00:

17.2.1 why the Respondent Close Corporation should not be placed under a final winding up order, and;

17.2.2 why the costs of this application should not be costs in the liquidation.

17.3 Service of this order be effected as follows:

17.3.1 by publication in the Government Gazette on or before the 9th April 2010;

17.3.2 by publication once in the Beeld newspaper; and

17.3.3 on the Respondent Close Corporation at its registered office.

P.M DOLAMO

ACTING JUDGE OF THE HIGH COURT

HEARD ON THE : 10 MARCH 2010

DATE OF JUDGMENT : 19 MARCH 2010

APPLICANT'S ATT : ADAMS AND ADAMS

APPLICANT'S ADV : ADV D VETTEN

RESPONDANTS ATT : EFSTRATIOU & VISAGIE ATT

DEFENDANT'S ADV : ADV A C FERREIRA SC

1 Law of South Africa. Second Edition Lexisnexis Butterworth 2006 Vol 19 Page 161

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