

SOUTH AFRICA / JUDGMENT

FirstRand Bank Ltd ta First National Bank v Global Connect Trading (Pty) Ltd (4487/2020) [2021] ZAFSHC 68 (18 March 2021) [2021] ZAFSHC 68

COURT

Free State High Court, Bloemfontein

BEFORE

M.A. Mathebula

CASE / FILE NUMBER

4487/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4487/2020

In the matter between:

FIRSTRAND BANK LIMITED ta FIRST NATIONAL BANK Applicant

and

GLOBAL CONNECT TRADING (PTY) LTD

Respondent

HEARD ON: 18 MARCH 2021

CORAM:

MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 25 MARCH 2021. The date and time for hand-down is deemed to be 25 MARCH 2021 at 13:30

Introduction

- [1] The applicant is seeking an order for the provisional liquidation of the respondent. The application is predicated on the contentious claim that the respondent is commercially insolvent and unable to pay its debts as they became due in the normal course of business. Therefore, the respondent must be deemed unable to pay its debts as stipulated in section 345 of Act 61 of 1973 read with Schedule 5, Item 9 of Act 71 of 2008.

Facts

- [2] On 6 June 2019 the parties entered into an overdraft facility agreement in terms of which the sum of R7 500 000.00 was loaned and advanced to the respondent subject to the terms and conditions (referred to as transaction documents) and general terms and conditions set forth in Annexure “A” of the facility agreement. According to the signed document the facility agreement, transaction documents and Annexure A shall be read together and apply to all facilities. The disputed amount due and payable appearing on the certificate of balance dated 29 July 2020 is R8 136 325.04. As a form of security covering bonds were registered over several immovable properties and cession of loan accounts. The total value of the immovable properties as per the valuation provided by the applicant is R9 950 000.00.
- [3] The liquidation proceedings were triggered by the respondent defaulting on payments as provided in clause 4.3 of the facility agreement. The respondent failed to make payments of R25 000.00 per month for the period June till August 2019 and R45 000.00 per month for the period September until December 2019. On 4 March 2020 the applicant caused a letter calling up the facility to be sent to the respondent in respect of the loan amount. The respondent through its attorneys of record, requested a certificate of balance and an extension to remedy the breach. The applicant through its attorneys of record insisted on the payment of the outstanding balance. An exchange of several letters laced with uncollegial undertones and intransigent posture could not solve the impasse. On 19 November 2020, the applicant instituted the legal proceedings before me.

Submissions

- [4] Counsel for the applicant argued quiet correctly, that the test was whether the respondent is capable to pay its debts in the normal course of business. He pointed out that the facility agreement was anchored on special conditions as well as general terms and conditions. The monitoring conditions refers to those conditions that the respondent must comply with to ensure ongoing availability of the approved facilities. He submitted that the respondent did not comply with any of the conditions contained in clause 4.3, 3.7, 4.8 and 4.9. This aspect is common cause. Given these set of circumstances the applicant was justified to withdraw the facilities and demand payment of the outstanding amount. He also referred to clause 4.11 of the general conditions that the respondent committed a breach by failing to make a scheduled payment within two (2) business days of such being due.

- [5] In response, counsel for the respondent submitted that the respondent does not deny the existence of the agreement and the breach. He pointed out that such breach was limited to the amount of R255 000.00 as per clause 4.3 of the monitoring conditions. He argued that the respondent was not afforded the opportunity to remedy the breach by paying the aforementioned amount. In a rather heavy handed manner, as alleged in the answering affidavit and orally submitted, the applicant claimed the repayment of the accelerated amount. The applicant demanded the payment within five (5) days alternatively six
- (6) months which was impossible given the existence of the national state of disaster regulations. The cornerstone of the defence raised on behalf of the respondent is that the amount claimed is not due and payable.
- [6] In order to illustrate the unfairness of the applicant he referred to the insistence to accept a proposal to pay only if the respondent sign an acknowledgement of debt and mandate to sell the immovable properties on non-negotiated terms and conditions. The desired repayment amount, it was argued, was unreasonable because the respondent was not making any sales of alcohol products.
- [7] The omnipotent powers were prejudicial because the applicant would be bestowed with the power to sell the properties at any amount it chooses without reserve prices and away from judicial scrutiny. The respondent essentially prays for reasonable time to remedy the breach ie an opportunity to pay the sum of R 255 000.00. Thereafter an amicable solution should be found to avoid liquidation proceedings and these include marketing and selling the immovable properties to reduce the balance of the facility.

Discussion

- [8] The central question is whether or not the respondent is able to pay its debts. In this matter the respondent admits a debt for more than the threshold of R100.00. The respondent admits that a breach has been committed and prays for more time to remedy it. Despite the lapse of a substantial period of time, since the breach was committed, the respondent does not disclose how and when payment will be made. This is an admission that the respondent is unable to pay the debt in the normal course of business. The respondent goes further to disclose that it has no cash assets to service the debt because of not doing any sales as a result of the economic meltdown caused by the pandemic. Such sales were prohibited at various alert levels. On the respondent's version the application must succeed because the conclusion is that the

respondent is unable to settle the debt.

- [9] The defence that the total amount owing is not due and payable should not succeed. The respondent conveniently relied on clause 4 provisions under the general terms and conditions applicable to the facility. There are other conditions that must be complied with specifically to ensure ongoing availability of the approved facility. This argument is a non-starter because according to the agreement the clauses must be read together. Clearly when

the respondent did not comply with any of the monitoring conditions, the applicant called up the facilities. It took the applicant more than a year after the breach to institute the liquidation proceedings against the respondent.

- [10] The respondent took issue with the certificate of balance that the agreement contains a clause that certificate of balance constitutes conclusive proof of the indebtedness of the debtor. Both counsel relied on the decision in *Ex parte Minister of Justice: In RE Nedbank Ltd v Abstein Distributor*. The court stated the principle as follows:

“The interpretation of the Court in Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others 1989

- (3) SA 750 (T) of the decision of the Appellate Division of the Supreme Court of South Africa in the matter of *Sasfin (Pty) Ltd v Beukes 1989*
- (1) SA 1 (A) relating to the validity of a so-called 'conclusive proof clause' in favour of a creditor in an agreement in terms whereof the creditor is to be the author of the certificate of balance issued under such a clause, correctly reflects the D law, namely, that such a clause is in itself *contra bonos mores* and therefore void regardless of the context of the agreement in which it finds itself.”[1]
- [11] This decision does not come to the aid of the respondent. Clause 6.1 provides that the certificate of balance shall be *prima facie* proof of the amount owed under the facility. There is no mention whatsoever of the conclusive proof. Therefore, there

can be no talk of the clause being void *ab initio* because of the fact that it is *contra bonus mores*. On this point also, the opposition to the application cannot be sustained.

Order

- [12] In the circumstances, I make the following order:-

12.1. The estate of the respondent is hereby placed under provisional

liquidation order and handed over to the Master of the High Court, Bloemfontein.

12.2. A provisional order is hereby issued calling upon all interested

parties to show cause, if any on 6 May 2021 why a final order of liquidation should not be granted against the respondent.

12.3. This order, together with a copy of the Notice of Motion and annexures thereto, must be served upon:

12.3.1 The Respondent;

12.3.2. Any registered trade union that, as far as the applicants can reasonably ascertain, representing any of the employees of the respondent;

12.3.3. The respondent's employees, if any, by affixing a copy of the application and provisional order to any notice board, to which the applicants and employees of the respondent have access inside the respondents' business premises, or if there is no access to the premises by the applicant and the employees of the respondent, by affixing copy of the application to the front gate of the premises, where applicable, failing which, to the front door of the premises from which the respondent reside and/or conduct its business;

12.3.4. The South African Revenue Service;

12.4. That this order of liquidation be published in one (1) edition of THE CITIZEN and the GOVERNMENT GAZETTE.

12.5. The costs of this application to be costs in the liquidation.

M. A. MATHEBULA, J

On behalf of applicant: Adv. P Zietsman SC

Instructed by:

Symington & De Kok Attorneys.

BLOEMFONTEIN

On behalf of respondent: Adv. N.M.A. Muller

Instructed by:

Blignaut Attorneys

[1] 1995

(3) SA 1 (A) at 22 C-D

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