

SOUTH AFRICA / JUDGMENT

Standard Chartered Bank, Johannesburg Branch v Blue Financial Services Limited and Another (20442/2014) [2018] ZAGPJHC 583 (31 August 2018)

[2018] ZAGPJHC 583

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

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

In the matter between:

STANDARD CHARTERED BANK,

JOHANNESBURG BRANCH Applicant

and

BLUE FINANCIAL SERVICES LIMITED First Respondent

BLUE FINANCIAL SERVICES (SOUTH AFRICA)

(PTY) LIMITED Second Respondent

J U D G M E N T

MAKUME, J:

- [1] The dispute between the parties in this matter has its genesis in two agreements the first being the term loan and banking facility agreement concluded between the Applicant and the First Respondent during or about the 26th February 2009. The second agreement is the Debt Rescheduling Agreement (DRA) entered into between the Applicant and the Respondents as well as other companies which formed part of the Blue Group of

Companies. This second agreement was concluded during or about August/September 2010 at the time when it was common cause that the Blue Group of Companies was having financial difficulties in meeting its obligations as set out in the term loan and banking facility agreement.

- [2] At the commencement of this hearing I was addressed by both counsel on the number of affidavits before me the issue being whether I should or should not admit those filed out of turn and without leave of the court. I deal hereunder with the sequence and contents of each affidavit as they emerge from the record.

THE FOUNDING AFFIDAVIT

- [3] The founding affidavit which sets out the cause of action in this matter was deposed to on the 5th June 2014. Attached to the founding affidavit are the following documents:
- (a) The term loan agreement between the Applicant and the First Respondent (Annexure SCB1).
 - (b) The cession of debts document (Annexure SCB2) concluded by the Second Respondent in favour of the Applicant.
 - (c) The guarantee document (Annexure SCB3) by the First Respondent in favour of the Applicant.
 - (d) The Debt Rescheduling Agreement (DRA) concluded between the First Respondent, the Applicant and Mayibuye Group (Annexure SCB5).

THE RESPONDENTS' ANSWERING AFFIDAVIT

- [4] The Respondents' answering affidavit is dated the 9th July 2014 and was duly served on the Applicant on the same day. In the answering affidavit Mr Schalk van der Merwe on behalf of the First and Second Respondents ("the Blue Group") raises the following issues:
- (a) That this application should be dismissed on the basis that the Applicant failed to join other interested parties as they appear in the Debt Rescheduling Agreement ("the DRA") in particular Mayibuye and the Lender Committee referred to in the DRA.
 - (b) That in terms of the principles of the rescue package and the DRA the Applicant is bound by the dispute resolution process contemplated in the DRA.
 - (c) That the Applicant knew or ought to have known before it elected to proceed on motion that there would be a dispute concerning the proper interpretation of the DRA which would necessitate the calling of oral evidence. In brief the Respondents argue that this matter cannot be resolved on the papers and that the application should be dismissed.

THE APPLICANT'S REPLYING AFFIDAVIT

- [5] The Applicant filed and served its replying affidavit dated the 6th August 2014 on the 7th August 2014. In that affidavit the Applicant denies that there is a need to join the other parties stated in the DRA. Secondly the Applicant disputes that its claims are subject to dispute resolution a process contemplated by the DRA. Lastly the Applicant maintains that it is not necessary to refer the dispute to oral evidence.

APPLICANT'S FIRST SUPPLEMENTARY AFFIDAVIT

- [6] On the 4th December 2014 the Applicant filed this supplementary affidavit without leave and no notice. All that the Applicant says in paragraph 4 of that affidavit is that it should be admitted as evidence in these proceedings as it is in the best interest of justice. This first supplementary affidavit deals with the issue that the suspensive conditions contemplated in the subscription agreement were never complied with and therefore the DRA lapsed. The Applicant further posed the issue that if it is so that the Respondents did not comply with the suspensive conditions then in that event the Applicant's claim is based solely on the term loan and facility agreement as well as the cession of debt. The Applicant requested that Respondents provide information or confirmation that the suspensive condition was timeously fulfilled.

RESPONDENTS' NOTICE OF MOTION DATED MAY 2017

[7]

7.1 On the 26th May 2017 some three years after the last affidavit the Respondents filed this application requesting that they be granted leave to deliver a supplementary affidavit Annexure SVDM1.

7.2 As motivation for the filing of that supplementary affidavit the Respondents say that subsequent to the filing of its answering affidavit a number of relevant events had occurred which the Respondents deem appropriate that they be brought to the attention of the court.

7.3 In that affidavit the Respondents through Schalk van der Merwe their Group Chief Legal Adviser and Group Company Secretary say that –

- (a) The Applicant in paragraph 24 of its founding affidavit did not dispute the validity of the DRA and that it was surprising that in the heads of argument the Applicant now disputes the fulfilment of the conditions precedent to the subscription agreement namely the DRA. The Respondents attached a document titled “Fourth Amendment and Restated Subscription Agreement” which was concluded on the 9th December 2010 between Mayibuye Group and Blue Financial Services Limited. That document confirmed that the conditions precedent had been fulfilled and that both the subscription and the DRA had taken effect.
- (b) Secondly the distribution and conversion plan contemplated in the DRA was submitted and that Applicant failed to disclose the nature of its dispute to the distribution and conversion plan. The Respondents concluded that the only remedy open to the Applicant is in terms of clause 7.24 of the DRA.

- (c) Thirdly the Respondents in this affidavit made reference to the findings of a Zambian court in an action based on the DRA between one of the lenders African Banking Corporation against Blue Financial Services in which court it was found that the DRA did not supplant the loan facility agreement. All it did was to amend the terms of the loan agreement as to the repayment schedule.
- [8] It is common cause that on the 15th June 2017 this Court granted the Respondents leave to file this affidavit marked SVDM1.

APPLICANT'S FURTHER AFFIDAVIT DATED 25 MAY 2017

[9]

9.1 This was an affidavit filed in response to the Respondents' affidavit marked SVDM1. It is deposed to by one Sirgitkhan Nadine Bham. In it the Applicant denies that Annexure SP1 being the fourth amendment to the subscription agreement resolved the issue of the conditions precedent. The Applicant reiterated that the Respondents have as at that date failed to provide proof of the timeous fulfilment of the suspensive condition.

9.2 Secondly in that affidavit the Applicant disputes that the distribution and conversion plan is of relevance to the proceedings as in any case such distribution and conversion plan was not submitted to the Lender Committee timeously as required by the DRA.

FURTHER SUPPLEMENTARY AFFIDAVIT BY THE RESPONDENTS DATED 7TH SEPTEMBER 2017

[10]

10.1 This affidavit was filed without leave of the court and sent by email to the Applicant's attorneys on the 7th September 2017. In it the Respondent says this further supplementary affidavit is in response to the further affidavit by Sirgitkhan Nadine Bham. 10.2 Attached to this affidavit is a copy of a bank statement in the name of Blue Financial Services Limited dated the 31st December 2010 from which it appears that on the 10th December 2010 an amount of R150 million was credited to that account. Also attached to that affidavit is a Purchase of Rights Agreement between Mayibuye and Pine Bridge Global evidencing how the balance of R13 million was catered for to enable the fulfilment of the condition precedent.

NOTICE OF MOTION TO DELIVER FURTHER SUPPLEMENTARY AFFIDAVIT BY SECOND RESPONDENT DATED 29 SEPTEMBER 2017

[11]

11.1 This notice of motion was set down to be moved on the 7th February 2018 that is on the day of the commencement of the hearing of this matter. In the notice of motion the First and Second Respondents seek leave to deliver the further supplementary affidavit.

11.2 In this affidavit the Respondents say that having briefed a new legal team they received advice to deal with the issue of the acceleration of the end date provided for in the DRA and provide reasons why the Respondents were unable to meet their commitments to pay the DRA lenders their agreed interest.

11.3 The Respondents seek leave to introduce new evidence of fraud that was perpetrated by the founders of the Blue Group prior to the conclusion of the DRA.

11.4 Significantly in this affidavit the Respondents mention that during the three year term of the DRA only interest accruing to the existing claims was required to be serviced by the borrowers and that failure to make any interest payments qualified as an acceleration event allowing the DRA lenders to accelerate the end date.

11.5 The affidavit then goes at length to describe the fraudulent acts by one of the founders of Blue Group as well as by one Deon Bekker which ultimately resulted in the Respondents not being able to comply with its obligations to pay the agreed debt. To back up the fraud issue the Respondents attached a forensic report by one Hatzikilson a Chartered Accountant.

APPLICANT'S AFFIDAVIT IN RESPONSE TO RESPONDENTS' NOTICE OF MOTION DATED 29 NOVEMBER 2017

[12]

12.1 This is an affidavit in reply to the last affidavit in which the Respondents seek leave to amongst others introduce new evidence of fraud by the founders of the Blue Group. That new evidence is tendered by way of an expert report.

12.2 The Applicant points out that leave to file that affidavit should be refused as it seeks to introduce new evidence which was known to the Respondents at the time of filing the answering affidavit.

12.3 The Applicant states that in any case the Respondents do not tell the court the date on which this new seminal information came to their attention.

12.4 The Applicant says that they will be prejudiced by the admission of this new evidence also that the information by Van der Merwe as at this stage was pure hearsay, irrelevant 12.5 In addition the Applicant demonstrated that in a separate rescission application involving Mapula the Respondents blamed the Applicant for the loss and said nothing about the purported fraud.

THE RULE AND PRACTICE RELATING TO FILING OF FURTHER AFFIDAVITS

[13] It is common and accepted practice that three sets of affidavits are allowed. It is the founding and supplementary affidavit, the answering affidavits and lastly the replying affidavits. (See *Bank of Africa v Wood Bros* (1886) 4 SC 334; *Transvaal Government v The Standerton Farm Association* 1906 TS 21; *Rieseberg v Rieseberg* 1926 WLD 59; *Haywood v Gradwell* 1932 EDL 305; *Victor v Victor* 1938 WLD 16.)

- [14] I commence first with the notice of motion dated September 2017 wherein the Respondents seek leave to introduce the fraud evidence perpetrated against the Blue Group by amongst others Mr Van Niekerk. The Applicant is opposing that application on the basis that the Respondents have failed to demonstrate when they came to know of the fraud in order to condone their late introduction of such evidence.
- [15] The filing of supplementary affidavits outside the regulated set of three can only be allowed in exceptional circumstances. The Applicant says that the application to admit such evidence was brought late with no explanation.
- [16] I have after careful consideration come to the conclusion that this affidavit in which the Respondents seeks leave to introduce new evidence of fraud should not be allowed. Accordingly the application to admit such affidavit is dismissed with costs.
- [17] The Respondents object to the Applicant's first supplementary affidavit filed during December
2017. A period of three years passed and it was only in December 2017 that they responded to that affidavit and even then did not raise any objection to its admissibility. I have come to the conclusion that leave be granted to file that affidavit and that it be considered in the determination of the issues before me.
- [18] Having disposed of the issues around the affidavits what now remains are two issues. The first is whether the other signatories to the DRA should or should not have been joined in this application. The second is whether the Applicant is entitled to its claim or not irrespective of whether the DRA became unconditional or not.
- [19] I will deal first with the Applicant's claim which in my view depends on the interpretation to be placed on clauses 3.5.6, 7.4, 7.28.1 and lastly 7.28.2 of the DRA. It is these clauses in the DRA which are determinative of the issues in this matter.
- [20] The Applicant's claims 1, 2 and 5 are for payment of interest and not the capital amount referred to in the term loan as well as the overdraft facility agreement and such payments are regulated by clauses 3.5.6, 7.4 as well as 7.2.8.
- [21] To kick start I quote verbatim the contents of clause 3.5.6 of the DRA. It reads as follows:
- "No principal payment will be made under the existing facilities for a period of 3 (three) years (the standstill period) but interest which accrues on the existing facilities will be paid during that period."*
- [22] Clause 3.5.6 must be read in conjunction with clause 7.5.1 and clause 12.14.1 of the DRA which make it very clear that the Respondents shall during the payment period pay interest to the lenders in this case the Applicant.

- [23] It is common cause that the reasons and basis on which the parties concluded the DRA was to achieve a structural debt rescheduling instead of liquidating the Blue Group for its failure to meet its obligations as set out in the two loan agreements. To this end the parties agreed on a moratorium for payment of the capital which is a period of three years (the standstill period) during which period only the interest that accrued to the loan amount was payable.
- [24] Clause 3.5.2 of the DRA explains the fundamental premises of the rescue package which was ultimately to restore the Blue Group to solvency and to prevent its winding up and to provide its creditors with prospects of recovering money owing to them.
- [25] Payment of the interest became due because the Respondents had defaulted with payments during the standstill period and thus triggering the end date in accordance with clause 7.8 of the DRA which reads as follows:

“If an acceleration event occurs the Lender Committee shall be entitled to accelerate the end date to such an earlier date as the Lender Committee may determine provided that:

7.8.1 the Lender Committee shall deliver written notice (Acceleration Notice) to Blue in which the Lender Committee advises Blue both of the fact that the Lender Committee has elected to accelerate the end date and on which the end date will occur.”

- [26] It is common knowledge that the parties had appointed GMG Trust Company SA as the Lender Committee in terms of clause 5.2 of the DRA. On the 29th July 2013 and the 7th August 2013 GMG addressed letters to Blue Financial Services in the following words:

“Pursuant to clause 16.2 of the DRA, acceleration events have occurred under the DRA. This entitles the lenders under the DRA to take action specified in clause 7.8 of the DRA. The Lender Committee has elected to accelerate the end date. The Lender Committee designates 6 September 2013 to be the end date.”

- [27] The terminology used in this agreement is not only repetitive but is also confusing for instance measuring date and the effective date are the same. The effective dates outstanding were measured on the 1st January 2011. It is common knowledge that the effective dates outstanding were agreed in the sum of R85 million in respect of the term loan and R51 million in respect of the banking facility or overdraft agreement as on the 1st January 2011. This allegation which appears in paragraph 38 of the Applicant's founding affidavit was not disputed and was in fact admitted. It relates to claim 3 of the application.
- [28] Similarly in claim 4 the Applicant claims for the difference between the sum of R234 million and the value of the South African book as on the last measuring date or effective date being the 31st December 2013.
- [29] Clause 16 which deals generally with acceleration and the effect of non-payment more than emphasises the fact that interest on the amount advanced is treated separately and as a distinct component from the capital amount.

- [30] The defences raised by the Blue Group as they emerge from their papers is briefly that interest has not and does not become payable as it became part of the conversion plan contemplated in the DRA in other words the Respondents say that whatever may be due and owing is not payable but is bound to be converted to shares in favour of the Applicant. This contention is in my view belied by the provisions of clause 16 of the DRA which specifically describes non-payment of interest as an event that triggers action for immediate payment even before the expiry of the moratorium period. Clause 16.2 is clear and unambiguous. It says that any borrower who fails to pay interest which has become payable under the DRA on account of any existing facility on the due date that constitutes a ground for acceleration. Clause 16.2 also provides for the existing facilities to remain intact and for interest to be payable in terms of or on due date as arising from the existing facilities.
- [31] This document which is the subject matter of the present dispute is descriptive in name. It was meant to reschedule payments due by the Blue Group to the Applicant arising out of the term loan and the banking facility agreement. The rescheduling period is defined in clause 2.1.110 as the period which commences on the effective date and ends on the end date. The end date marks not only the end of the rescheduling period. It also marks the beginning of the payment period that date was accelerated to the 6th September 2013 as a result of certain trigger events. Therefore the rescheduling period ran from the 1st January 2011 up to the 6th September 2013.
- [32] The distribution plan and distribution principles which is what the Respondents rely on were not accepted by the Applicant and are not relevant for present purposes. It is common cause that the dispute about the conversion plan is ongoing between the parties.

BREACH OF THE DRA

- [33] It is common knowledge that during July 2013 already the Applicant informed Blue Group that a breach of the DRA terms had taken place as contemplated in clause 16.2. That was followed by another letter dated the 7th August 2013 which reiterated that the acceleration event as contemplated in clause 16.2 had occurred and that the Applicant was

now entitled to take action as specified in clause 7.8 of the DRA. It is common knowledge that the Respondents' Blue Group admitted that event and also that failure to pay interest constitute an acceleration event. What then remained was for the Respondents to file a distribution plan within ten days from the date of acceleration. The Respondents failed to do so. Instead it provided a conversion plan.

THE AMOUNT OWING

- [34] On the 5th June 2014 a certificate of indebtedness was issued by the Applicant indicating outstanding indebtedness in respect of interest due under the term loan and facility up to the 6th September 2013 in the amount of R9 762 765,47. This amount is not disputed. It is the amount in claim 1 of the notice of motion.

[35] On the 29th November 2013 the Applicant addressed a letter to the Respondents and said the following:

“In the acceleration notice the Lender Committee advised that it had elected to accelerate the end date. The Lender Committee advised BFS that it had elected 6 September 2013 to be the end date. BFS was required in terms of clause 7.13 of the DRA to deliver a distribution plan to the Lender Committee by no later than 10 business days after the end date. To date no distribution plan has been delivered. Under the circumstances BFS is in default of its obligations under the DRA.

Clause 7.28 of the DRA entitles the lenders to realise security which they enjoy under the existing security if the borrowers fail to comply with their obligations under clause 7 of the DRA. In view of the default by BFS, SCB intends exercising its rights under the existing security on the basis set out below.”

[36] Blue Group the Respondent replied to this letter on the 4th December 2013 and basically denied liability adding that the Applicant was aware and had been kept abreast with reasons why the distribution plan referred to in clause 7.13 had not as yet been circulated. The Respondents added that any claim that may exist in favour of the Applicant in terms of the provisions of clause 7.28 would be limited to an amount calculated in terms of the remainder of the provisions of clause 7 of the DRA. Blue Group made further reference to clause 12.14.1 of the DRA as being in support of their contention.

[37] I respectfully disagree with the Respondents’ conclusion. Once the Respondents failed to circulate a distribution plan the interest became payable both in terms of the term loan as well as in terms of the DRA. This the Applicant made clear in a letter addressed to the Respondents dated the 10th December 2013 which letter was in response to the Respondents’ letter of the 4th December 2013. In paragraph 4 of its letter the Applicant says the following:

“Clause 7.28 of the DRA entitles the lenders to realise security which they enjoy under the existing security if the borrowers fail to comply with their obligations under clause 7 of the DRA.”

[38] This default by the Respondents entitled the Applicant to realise the security which it enjoys which is the cession and the guarantee in relation to the amounts owed to it under the DRA and the term loan and banking facility.

[39] In an attempt to belatedly comply with the provisions of clause 7.21 of the DRA on the 11th December 2013 the Respondents wrote to the Applicant and said this:

“We are happy to report that Blue Financial Services has delivered a conversion plan as envisaged in clause 7.21 of the Debt Rescheduling Agreement (DRA) to Mr Brendon Harms of GMG Trust as chairman of the Lender Committee.”

[40] The Respondents firstly failed to forward the conversion plan within the prescribed period stipulated in clause 7.2.1. Secondly the purpose of the DRA would have been defeated had the Applicant agreed to convert what is due in terms of clause 7 into equity. That was never

the intention of the parties and it is accordingly not a proposal worth giving consideration to. The meaning that Blue Group wants to give to this concession plan is contrary to what clause 16, 7 and 12.4.1 provide for. It is that the existing facilities remain intact. In any event the DRA does not oblige the Applicant under any circumstances to accept the concession plan. It is within their discretion. The Applicant made this clear to the Respondent in their letter dated

the 24th February 2014 addressed to Blue Group.

- [41] It is common cause and not in dispute that one of the factors controlling the existence of this special loan facility was the so-called Country Cover ratio. This was determined at the commencement of the transaction to be the sum of R234 million. It was agreed that once the Country Cover ratio dropped from R234 million in December 2010 to R113 million in July 2013 this called for the submission of the conversion plan.
- [42] In the correspondence and in its affidavit Blue does not dispute that payment is due in respect of the Country Cover ratio but says that such payment should be dealt with in terms of the conversion plan. I have already indicated that the said conversion plan was not only late but it was never meant to be compulsory and was in my view correctly rejected by the Applicant.

THE RESPONDENTS' CASE

- [43] The Respondents confirm that as at the 31st December 2010 its claims as constituted by its microloans to its clients amounted to R234 million. This was available to the Respondents as its total claims against borrowers.
- [44] When concluding the DRA the purpose was to collect that amount from the borrowers and to pay it to the lenders i.e. the Applicant and others. All other claims or assets generated after the 1st January 2011 were excluded from the DRA. So the existing book as at 31 December 2010 was to be collected.
- [45] As on the 31st October 2010 the capital amount owing to the Applicants was the sum of R143 million. The R234 million was in fact the entire value of the Johannesburg book on the South African book.
- [46] In terms of the DRA the Applicant had to be paid interest that was owing to them over a period of three years and thereafter other arrangements would be made. It is common cause that as at 2010 Blue Group was in a state of commercial and technical insolvency hence DRA as it was regarded a safer option than liquidation.
- [47] Mayibuye came in and made the following proposals to Applicant and other lenders:
- (i) Don't liquidate we will collect the existing R234 million for all of you.
 - (ii) They will achieve this by reducing the overhead expenses.

- (iii) They will bring expertise to the process of collecting the R234 million.
 - (iv) They will do it vigorously that is in collecting the existing loan.
 - (v) They will invest R163 million to enable Blue to generate new loans going forward.
 - (vi) The R163 million that they will introduce or invest in Blue is to be ring-fenced and will not be part of the DRA.
 - (vii) DRA excludes future claims from its ambit i.e. Blue with Mayibuye assisting will collect the book as it existed on the 1st November 2011.
 - (viii) Once collected those amounts would be paid over to the Applicant and other lenders. It was a continuous winding-up of that book instead of liquidation. This entire process would depend on the successful collection of the book.
 - (ix) DRA provided that during the three years still period the lenders or the Applicant must be paid interest then the process will stop. This was the bait to prevent liquidation.
- [48] On the happening of the end date whether on the agreed anniversary of a day before the third anniversary or if accelerated in terms of clause 7.8 by the Lender Committee all assets of the existing book that existed on 1st January 2011 would all be liquidated and the money distributed to the various lenders.
- [49] It would appear that Mayibuye gave itself a period of three years within which it would vigorously using their expertise collect the total debt of R234 million plus interest from the borrowers and then pay all to lenders and close that book i.e. till end of December 2013.
- [50] In the event of a shortfall after what shall have been distributed pro rata then the shortfall lenders like the Applicant will then have an option to convert its debts to shares in the Blue Group i.e. debts to equity exchange. If not it will then rely on Blue effecting future payments on the bad claims, non-performing claims.
- [51] There was no time limit to the collecting of the non-performing accounts as at a given date when the debt would be written off. This is like the structure of the old African Bank which created the good book and the bad book.
- [52] Applicant agreed to participate in the bad book. The good book acquired by Mayibuye in the creation of new loans or business was not available to the Applicant.
- [53] Only income generated from the R234 million was the only amount contemplated to be used to pay the Applicant (clause 2.1.49 excluded claims that is the Mayibuye issue).
- [54] The purpose of the DRA was to enable Blue to continue to collect on the existing claims and to pay for the first three years interest to the lenders and thereafter to distribute all available cash so that the entire existing claims are extinguished.
- [55] The Applicant did receive interest for close 24 months at the rate of R1,5 million per month.

- [56] It is common cause that in the event of Blue failing to collect on the existing book then the Applicant has the right of remedy as prescribed in clause 12.2.5 that is acceleration of the end date. Such acceleration will have the effect that the distributed cash will be collected and paid to the lender.
- [57] Respondents submit that the purpose of the acceleration of the end date is to stop the entire process.
- [58] In the view that the Respondents hold the issue is whether this claim for interest which Applicant says should have been paid to them prior to the end date is an independent claim or whether that claim falls within the payment and distributable process concluded in clause 7 of the agreement.
- [59] The Respondents say that this claim falls within the distributable process whilst Applicant says it is a separate and independent claim.
- [60] Respondents say it is why it allowed for acceleration because there is no money being collected and it would have been futile to continue to attempt to recover funds which are simply non-existent.
- [61] In my view the interpretation and understanding of the Respondents is flawed on the following grounds:
- (i) Clause 3.5 reads as follows: “but interest which accrues on the existing facilities will be paid during that period”.
 - (ii) It does not say that interest will be paid as part of the end date distributable cash.
- [62] The Respondents concede that during the three years interest is payable but if there are no payments resulting in the non-payment of interest then the end date is accelerated and then a different distribution principle kicks in and is regulated as set out in clause 3.5.9 of the DRA. The Respondents argue that clause 3.5.9 requires that collection on account of existing claims will be utilised first to pay operating costs and then to interest on account of existing claims. This clause that the Respondents rely on is contradicted by clause 3.5.6 which clearly sets out that no principal payments will be made under the existing facilities for a period of three years (the standstill period) but that interest which accrues on the existing facilities will be paid during that period.
- [63] There is evidence to which the Respondents conceded that in fact since the inception of the moratorium period being the 1st January 2011 to the 6th September 2013 (the accelerated date) the Respondents had been paying interest as required. In fact clause 3.5.8 read together with clause 3.5.10 puts paid the Respondents’ argument. Clause 3.5.8 reads as follows:

“During the standstill period the borrower will use all commercially reasonable endeavours to collect the existing claims.”

Clause 3.5.10 reads as follows:

“To the extent to which those collections are not needed to pay interest and operating costs they will be used to create further claims or to purchase liquid instruments.”

[64] The Applicant is not only a secured lender but falls within the category of shortfall lenders at the end of the standstill period. Clauses 7.4 read with 7.5 and 7.6 envisages payment of interest over two different periods. First it is interest payable during the rescheduling period which is the still period and then interest payable during the payment period. Payment period as defined in clause 2.1.97 as the period which commences on the end date and which ends on the date on which all the capital account instruments and all the performing included claims (as at the end date) have either been collected by the applicable group companies or finally written off as irrecoverable in terms of the provisional policy and with the consent of the Lender Committee as envisaged in clause 7.20.

[65] It is accordingly not correct therefor as argued by the Respondents that the whole purpose of the DRA was to achieve a situation that after the end date all of the lenders' claims shall either have been discharged over the three years period or by the conversion of shares or lastly by writing off the amount as not being collectable. In any event the Respondents do not have carte blanche authority to write off that debt. It has to seek the permission of the Lender Committee as stated in clause 7.20 of the DRA. Clause 7.20.2 reads as follows:

“The Lender Committee shall in its discretion determine whether or not that liquid instrument or claim must be written off and Blue shall give effect to the Lender Committee's decision.”

[66] The Respondents maintain further that post the end date no interest is payable and rely on the provisions of clause 7.11. I do not agree with that. The heading preceding clause 7.11 reads “Principal Payments”. It has nothing to do with interest. In any case in paragraph 29 of the answering affidavit the Respondents agree and say the following:

“During the period between the effective date and the end date interest will be paid to the lenders based on the available cash as contemplated in the DRA.”

[67] Then there is an interpretation placed on clause 7.2.12 of the DRA by the Respondents who maintain that on the happening of the end date the lenders will be paid cash amounts whether in respect of interest, principle or cash held by the borrowers. In this instance the Respondents in their capital account and once that is done it is the end of the matter because the existing claims will no longer exist. In my respectful view this interpretation is not correct. The DRA was meant to create a moratorium on existing claims for a period of three years so that the Respondents re-organises itself and improve on its collection and recovery methods. It was never meant to extinguish claims. That interpretation does not make business nor economic sense. It will be

tantamount to reckless trading by whoever is in control of the Applicant.

[68] It is equally not correct that excluded claims include existing claims. Quite to the contrary clause 2.1.49 says that excluded claims means any claim other than existing claims and the capital account claims. Excluded claims would be those claims generated after Mayibuye injected funds into the Blue Group. Clause 2.1.51 supports this view. Existing claims are also included claims (see clause 2.1.66).

[69] A proper reading of the several clauses of the DRA never intended to extinguish the existing claims. The intention was that after three years the status quo ante would be reverted to otherwise I see no reason why there are guarantees including cession of debts in favour of the Applicant if

what the Respondents say is correct. Again I hold the view that the Respondents' contention makes no economic sense.

THE RATIO CERTIFICATE

[70] This is the claim in prayer 3 of the notice of motion. It is governed by clauses 12.8 and 12.9 of the DRA. It is as correctly stated by the Respondents complicated clauses that require certain events to take place prior to establishing a claim under those clauses. The Respondents maintain that the Applicant has not established any of the requirements which must be met before clause 12.9 can be invoked.

[71] In prayer 3 the Applicant seeks an order directing the First Respondent to produce a ratio certificate as contemplated by the DRA with reference to the last measuring date being the 31st December 2013 showing the value and calculation of the South African book as contemplated by clause 12.5.2 of the DRA.

[72] It is common cause that the last Country Cover ratio or certificate is that which appears on page 402 of the papers which determines the cover ratio of South Africa to be R234 million.

[73] In order for the Applicant to succeed with claims 4 and 5 there is need to determine if the Country Cover ratio is lower than the initial level of R234 million and that the Respondents have failed to restore same to its initial level within a period of twelve months. Therefor to enable the Appellant to be able to claim prayers 4 and 5 it is incumbent on the Respondents to produce a ratio certificate.

[74] Clause 12.6 is clear and reads as follows:

"12.6 Blue shall within 10 days after each measuring date deliver to the Lender Committee a Certificate (Ratio Certificate) which sets out:

12.6.1 The total costs ratio and each Country Cover ratio as at the applicable Measuring Date, and the manner in which Blue has calculated those dates."

- [75] The Respondents have failed to do so within 10 days after the measuring date that fell after the initial measuring date to deliver a ratio certificate when in fact that is familiar and is within the knowledge of the Respondents. The Applicant is entitled to be furnished with the ratio certificate to enable it to proceed with its claim as prayed for in prayers 4 and 5.
- [76] It is common cause that what the Country Cover ratio seeks to prevent is that assets or cash of the Blue Group from one country being utilised to pay liabilities of Blue in South Africa. Clause 12.9 contemplates that if assets in South Africa fell below the initial ratio then Blue had to top up the assets or pay the liabilities. It is accordingly correct that in order to enable the Appellant to claim in terms of clause 12.9 the requirement of clause 12.8 should first be exhausted. That could not happen because the Respondents have not furnished the ratio certificate as required by clause 12.6. Accordingly it is only fair that the relief sought in prayers 4 and 5 be suspended pending the furnishing of a ratio certificate by the Respondents. I say this because payment of the amount claimed in prayers 4 and 5 depends on what is in the ratio certificate. The Respondents must furnish the ratio certificate. It is nonsensical that same can only be claimed by the Lender Committee.
- [77] The reason why the Applicant could not comply with the circumstances envisaged in clauses 12.8 and 12.9 is because there was never a reduction of the debt the country cover ratio remained same. There was no need to re-measure or to level ratio as there was no payment.
- [78] The relief in prayers 4 and 5 will largely depend on what is in the ratio certificate. Therefore an opportunity should be afforded the Applicant to approach this Court once it has been determined what the difference is between the value of the South African book in terms of the certificates and the sum of R234 million. That amount once determined will entitle the Applicant to payment of a specific amount plus interest.
- [79] Prayer 7 of the notice of motion the Applicant seeks an order that it be granted unimpeded access to the Second Respondent's debtor books so as to enable the Applicant to call up and collect the debts due from the Second Respondent's debtors.
- [80] At the conclusion of the loan and banking facility agreement the Second Respondent signed a cession of its debtors as security in favour of the Applicant. It is the document marked Annexure SCB4 and is dated the 26th February 2009.
- [81] On the 29th November 2013 the Applicant addressed a letter to the Second Respondent in accordance with clause 6.2.5 of the cession of debtors'

agreement and requested the Second Respondent to provide it with a schedule of debts. Instead of complying with the request the Second Respondent clearly avoided this issue and referred to the provision of clause 7 of the DRA and made no reference at all to the cession of debt agreement which was still in force. On the 10th December 2013 the Applicant addressed a letter to the Second Respondent paragraph 4 of that letter reads as follows:

“Clause 7.2 of the DRA entitles the lenders to realise security which they enjoy under the existing security if the borrowers fail to comply with the obligation under clause 7 of the DRA ... BFS SA has failed to make payment under the guarantee as required by a letter of 29 November 2013. SCB is accordingly now exercising its rights as set out in clause 10 of the cession in relation to the Receivables including its rights in terms of clause 10.2.2 of the cession.”

[82] In answer to prayer 7 and in argument the Respondents failed to give any reason why it should not be compelled to give the Applicant access to the debtor books. The Respondents only say that the list of debtors were no longer necessary as this related to the cover ratios which are only relevant up to the end date counsel for the Second Respondent added that the Second Respondent's debtor book is only relevant in the event that this Court finds in favour or grants relief in respect of prayer

1.

[83] I have already found in favour of the Applicant in respect of prayer 1 and there being no plausible reason advanced by the Second Respondent this prayer is also granted in favour of the Applicant.

[84] I am of the view and satisfied that on the papers the Applicant has made out a case in regards claims 1, 2, 3, 4, 5 and 7. It is so that prayer 6 was abandoned so was the alternative claim and in view of the abandonment of the alternative claim the issue of the non-joinder raised by the Respondents falls off and I make no ruling.

[85] There is nowhere in the heads of argument as well as in the oral submissions before me where the Respondents advances any argument why this matter should have been referred to oral evidence instead of it being decided on motion. I will likewise not deal with that and I presume that the Respondents have abandoned same.

[86] In the result I hereby grant judgment in favour of the Applicant and I make the following order:

- (a) The First Respondent alternatively the Second Respondent is ordered to pay to the Applicant the sum of R9 762 765,47 the one paying the other to be absolved.
- (b) Payment of interest on the said amount in (a) above at the rate of 15,5% per annum from the date of mora to date of payment.
- (c) The First Respondent is directed and ordered 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 as contemplated by clause 12.5.2 of the DRA (the South African Book).

- (d) To enable the Applicant to prove its claim as prayed for in prayers 4 and 5 of the notice of motion the Applicant is hereby granted a right to approach this Court on the same papers duly amended once it has been determined what the difference is between the value of the South African Bank in terms of the ratio certificate and the sum of R234 million.
- (e) The Applicant is granted immediate unimpeded access to the Second Respondent's debtors book so as to enable the Applicant to call up and collect debts due from the Second Respondent's debtors and to have the proceeds realized paid into an account designated by the Applicant.
- (f) The Respondents are ordered to pay costs of this application on an attorney and client scale.

DATED at JOHANNESBURG on this the day of AUGUST 2018.

M A MAKUME

JUDGE OF THE HIGH COURT

Dates of hearing: 7th and 8th February 2018

Date of judgment

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