

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2011/37486

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

UKUBONA HOLDING (PROPRIETARY) LIMITED

Respondent

J U D G M E N T

LAMONT J:

[1] The applicant instituted winding up proceedings against the respondent. The applicant claimed that it was a creditor of the respondent and that the respondent was unable to pay its debts. In due course and on 27 October 2011 the parties reached an agreement which was incorporated in a draft order. Under and in terms of the draft order the application was postponed until 6th December 2011 and the parties agreed that:-

"the respondent's indebtedness to the applicant in the sum of R3,497,190.94 in respect of the respondents overdrawn Current Account... and its Fleet Management System Customer Agreement... to be paid in the following manner:

3.1. the applicant is authorised to forthwith appropriate the sum of Euros 66,640.99 from the respondent's Customer Foreign Currency Account with the applicant and to transfer such sum to the aforesaid Current Account in part satisfaction of the indebtedness;

3.2. the applicant is authorised to forthwith appropriate the sum of USD 24,077.18 from the respondent's Customer Foreign Currency Account and to transfer such sum to the aforesaid

Current Account in part satisfaction of the indebtedness;

3.3. the respondent is to pay to the applicant the sum of R1,400,000 on or before close of business on 30 November 2011 or such later date if expressly agreed to in writing between the parties:

3.4. the respondent is to settle the balance of the indebtedness on or before the close of business on 31st of January 2012 or such later date if expressly agreed to in writing between the parties.

4. in the event of any monetary funds of any nature from whatever source entering the two aforesaid Foreign Currency Accounts at any stage between 30 November 2011 and 31st of January 2012 the applicant is authorised without notice to the respondent to

appropriate the said funds in satisfaction of and limited to the balance of the payment...

6. should the indebtedness not be paid strictly in accordance with the provisions of

paragraph 3 above the respondent's notice of intention to oppose the applicant's liquidation application and the respondent irrevocably and unconditional consented to a final order of winding up.

[2] The respondent failed to make the payment which fell due during November 2011. On 8 December 2011 the applicant closed the account into which the foreign currency would have been paid and further payments into that account became prevented. The respondent alleges that an amount due to it and which was paid into the account on 31 January 2012 could not be paid into the account as it was closed.

[3] It is common cause between the parties that the respondent is indebted to the applicant in the amount set out in the draft order, it is also common cause that the applicant allowed the respondent an opportunity to pay the amount due, at a time when it was already overdue. The respondent authorised the applicant to use funds in its account in part payment of the amounts due.

[4] It was submitted on behalf of the respondent that the applicant had compromised the claim which it had against the respondent and that it was not entitled to proceed to

seek a liquidation of the respondent. It was further submitted that:-

1. a *modus* by which the payment was to be made was set out in the draft order.

2. as the applicant had disabled itself from being able to receive payment from the account into which the money would have been paid so it was submitted the applicant was not entitled to enforce a right of payment by way of liquidation.

[5] Where parties have arrived at a settlement of a disputed claim and the defendant has failed to carry out such a settlement it has been held that the plaintiff may at his option sue either on the original claim or on the subsequent terms of settlement. An indulgence given at a time when payment is overdue does not constitute a novation.

See: *Bacon v SA Railways and Harbours* 1925 CPD 261 at p 264;

Kraamer v Ferreira 1917 E.D.L. 29;

Antonie en Andere v Koekoe 1966 (2) SA 610 (T);

Voet 46.2.6;

Chapman v Fynney's Executors 9 N.L.R. 243;

Estate Liebenberg v Standard Bank of South

Africa Ltd 1927 AD 502 at p 523;

Jackson v Hirschberg 1933 CPD 76 at pp 83-4;

SA 29 *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4)
(D) at p 34.

[6] Assuming that there was a novation the settlement agreement would have the same effect as *res judicata*. It follows that an action on the original cause of action is excluded unless the settlement agreement expressly or by necessary implication permits a party in the event of the other party having breached the terms of the agreement to return to the original cause of action.

See: *Van Zyl v Niemann* 1964 (4) SA 661 (A) at 669

[7] In the matter of *Standard Bank of South Africa Ltd v Essop* 1997 (4) SA 569 (D and CLD) it was held that a consent to a sequestration order constituted an illegal agreement and that consequently the applicant having settled a sequestration application it was not entitled to prosecute the sequestration. The applicant in that matter was relying upon the rights conferred upon it under and in terms of the illegal agreement to enforce its rights to obtain a sequestration order. It was this exercise of rights that met with the disapproval of the Court. In the present matter it is apparent from the terms of the order that the applicant

retained the right to proceed with the liquidation application on the basis it claimed and independently of the settlement agreement. The only effect that the settlement agreement had upon the rights of the applicant to proceed with the winding up was that if the indulgence in which the applicant had allowed the respondent of making payment was met then the applicant would not proceed with the winding up. The applicant did not compromise the amount due to it; it allowed the respondent an opportunity to make payment; the application was postponed to a future date to enable the applicant to proceed with the application on the original causa if payment was not made.

[8] It is common cause that the payment was not made, hence the applicant proceeded with the application. The agreement incorporated in the draft order in my view reserves the right of the applicant if it wished to proceed with the liquidation to continue to do so. The question decided in *Essop's case supra* concerning whether or not the consent to the liquidation order was legal or illegal is irrelevant to the present proceedings. I accordingly find that the application was not compromised and that the applicant is entitled to proceed to enforce its rights.

[9] The respondent submitted that the applicant holds

substantial security for its claim and that it should be compelled to rely upon such security rather than to wind up the respondent. There is no evidence that the security is readily realisable or that the cost of realisation of the security is disproportionate to the cost of the winding up proceedings. It appears to me that the applicant is entitled as a creditor to enforce its rights to obtain execution by way of winding up proceedings.

[10] The respondent submitted that the applicant was acting in bad faith in that it had disabled itself from receiving monies which were due to it by closing the foreign exchange account. I need not decide this issue as independently of the amounts which were due to the applicant in terms of the right of appropriation from the foreign exchange account, the balance due on 31st of January 2012 was not paid.

[11] I also for the same reason need not decide whether or not Eskom in fact paid any amount to the account, or the applicant had put in place arrangements for any amounts which were paid to the account to be forwarded to a fresh account

[12] The respondent is unable to pay its debts. It accepted that it was unable to pay the debt at the time it conditionally consented to the winding up order. Its inability to pay is

further evidenced by the fact that it has failed to do so.

[13] In my view the applicant is entitled to a final winding up order.

[14] I make the following order:

The respondent is finally wound up.

**LAMONT J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT
JOHANNESBURG**

Counsel for Applicant	:	I Miltz SC
Attorneys for Applicant	:	JMS INC Attorneys
Counsel for Respondent	:	A. Pullinger
Attorneys for Respondent Phillips	:	Matthew Kerr-
Date of hearing	:	7 March 2012
Date of judgment	:	20 March 2012