REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 32130/11

1. *REPORTABLE: NO*
2. *OF INTEREST TO OTHER JUDGES: YES*
3. *REVISED.*

4 May 2012 **FHD VAN OOSTEN**

In the matter between

FIRSTRAND BANK LTD **APPLICANT**

and

BUNKER HILLS INVESTMENTS 499 CC **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is the return day of a provisional winding up order which was granted on 15 February 2012. The respondent opposes the application for a final winding up order.

[2] The application is based on the respondent's alleged inability to pay its debts pursuant to its indebtedness arising from a suretyship agreement signed by the respondent in favour of the applicant. The suretyship was in respect of a written loan agreement concluded between the principal debtor, Ladysmith Wastetech and Scrap Metal Dealers CC, and the applicant, pursuant to which the total amount of R1 935 824.40 is alleged to have become due owing and payable.

[3] The respondent is a single residential property owning entity and does not trade. A covering mortgage bond is registered over the property in favour of the applicant securing payment of the amount of R3m, plus an additional amount of R600 000. The deponent to the respondent's answering affidavit is Yuvraj Jairaj Singh, who is the sole member of both the respondent and the principal debtor. The respondent raised two arguments *in limine*: firstly, the applicant's alleged lack of *locus standi* and secondly, that the application for liquidation is wrongly premised on s 68(c) of the Close Corporations Act 69 of 1984 (the Act) which has been repealed by s 224 (2) of the Companies Act 71 of 2008. I turn to deal with each thereof in turn.

[4] Firstly, the attack on the applicant's *locus standi*. Some background facts are necessary. On 11 May 2011 the applicant and the respondent concluded a written settlement agreement in respect of the respondent's indebtedness to the applicant. In terms of the settlement agreement the respondent admitted its indebtedness to the applicant in the amount of R1.8m and undertook to pay the amount by way of instalments in specified amounts. The respondent paid only the sum of R45 000.00 in respect of the instalment of R200 000.00, due on 30 May 2011, and further failed to pay the instalment due on 30 June 2011. In terms of the acceleration clause the full balance outstanding became due and payable. The application for the respondent's liquidation was launched 19 August 2011. On 16 September 2011 the parties agreed to a written consent order which the learned presiding Judge, Lamont J, refused to make an order

of court. It however remained an agreement between the parties (the consent order). In terms of the consent order the respondent "is directed" to make payment to the applicant of five monthly payments of R25 000 each from 16 September 2011, with a final payment, of the full balance outstanding, on 10 February 2012. Except for one payment of R25 000.00 the respondent failed to make any other payments provided for in the consent order, and in particular the full balance, and the application was re-instated for hearing on 14 February 2012. Mr Singh of the respondent was aware of the enrolment and according to him, he attended court on 14 February 2012, but he was "unable to find" the matter on the court roll. The provisional winding up order, as I have mentioned, was granted on 15 February 2012 in the absence of an appearance by, or on behalf of, the respondent. The respondent's attorneys of record withdrew and the respondent's present attorneys of record were appointed. On an extended return day of the provisional winding up order the respondent was granted leave and ordered to file an answering affidavit within a specified time which it failed to do. The respondent did however later file an answering affidavit together with an application for condonation for the late filing thereof. The applicant replied thereto and a full set of affidavits is before me.

[5] The respondent contends that the consent order in fact constituted a compromise or *transactio*, resulting in a new cause of action substituting the cause of action relied upon in the founding affidavit and the applicant accordingly having lost its *locus standi*. The argument is flawed in its premise. A proper consideration of the terms of the consent order shows that it merely provided for a new structure for the payment of the debt originally agreed upon in the acknowledgement of debt and that it therefore constituted an amendment to the terms of payment, as provided for in the acknowledgement of debt. There is nothing in the consent order that in any way refers to, or that can be reconciled with, a new cause of action. The intention of the parties was clearly to afford the respondent latitude in the payment of its indebtedness. The attack on the applicant's *locus standi* accordingly must fail.

[6] This brings me to a further contention raised by the respondent, concerning clause 23 of the consent order, which reads as follows:

'3. The applicant is authorised in the event of the respondent failing to make payment strictly as aforesaid, to set-down this application on the unopposed roll and seek relief prayed for it in its notice of motion on such supplemented papers as may be appropriate, which relief the respondent consents to the grant of.'

Relying on the judgment of Meskin J, in *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D&CLD), the respondent submitted that clause 3 is illegal and contrary to public policy and therefore void. In that matter the learned Judge dealt with a similar clause than we are dealing with now, and held (at p575E) it to be 'unconscionable', as it deprived the respondent of his status of a solvent person and 'inevitably to subject him to all the onerous obligations and extensive restrictions which bind an insolvent in terms of the Act' (*ie* the Insolvency Act 24 of 1936). The re-instatement of the application for provisional sequestration, the learned Judge concluded, was accordingly a nullity as it was based on a non-existent right under the contentious term.

[7] Clause 3 of the consent order, in my view, and as correctly submitted by counsel for the applicant, is clearly distinguishable from the facts in *Standard Bank*. But it goes further: the respondent was not deprived, at any stage, of the right to participate in these proceedings. A full set of affidavits has been filed and the respondent, duly represented, opposed the final order. In these circumstances I am unable to find any prejudice arising from clause 3 of the consent order and it follows that the contention must fail.

[8] The second point, as I have already indicated, concerns the applicant's reliance on a repealed section of the Close Corporations Act (the Act). The respondent with reference to the relevant statutory requirements, submitted that the applicant, relying on the respondent's inability to pay its debts as contemplated in s 344 of the Companies Act 1973, bears the onus of proving that the respondent is "actually (or factually) insolvent" or that it is just and equitable that the respondent be wound up. A similar contention was considered by Van der Byl AJ, in *FirstRand Bank Ltd v Lodhi Properties Investment CC and Others* (NGHC case no 38326/2011, dated 20 March 201, unreported). In the view I take of this case, I do not consider it necessary to go any further than to refer to the finding of the learned Judge that a liquidation, on the grounds of commercial insolvency,

has not been done away with in the new Companies Act. I respectfully agree. Having considered the facts of this matter I am satisfied that the respondent is clearly commercially insolvent. The history of the matter shows indulgences twice afforded to the respondent to pay its indebtedness to the applicant, which were not kept. The respondent does not trade and therefore has no source of income. Except for owning an immovable property the respondent does not have readily liquid or realizable assets available to settle its indebtedness (*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D&CLD) 597 C-H). The amount owing is substantial and nothing has been put forward indicating any hope of possible payment. The disputes raised by the respondent concerning its indebtedness are neither *bona fide* nor reasonable. Counsel for the respondent sought to criticize the applicant for seeking to "enforce a debt", under the guise of liquidation proceedings. The argument is fallacious. As was held in *Absa Bank v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) 441A, a creditor having a debt which the company cannot pay, is *ex debito justitia* entitled to a winding-up order. The applicant, in my view, did not act unreasonably in pursuing the liquidation of the respondent. In so far as it may be necessary, I find that it, in any event, is just and equitable, on the grounds that I have already dealt with, that a final winding up order be granted.

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

1. The provisional order for the winding-up of the respondent is made final.

2. The costs of this application, including the costs reserved on 12 April 2012, shall be costs in the liquidation.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ***ADV PD QUINLAN***

APPLICANT'S ATTORNEYS ***MAHARAJ ATTORNEYS***

COUNSEL FOR RESPONDENT	*ADV RJ DE BEER*
RESPONDENT'S ATTORNEYS	*TG BOSCH & BADENHORST*
DATE OF HEARING	*12 & 23 APRIL 2012*
DATE OF JUDGMENT	*4 MAY 2012*