

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 31795//2014

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

7 FEBRUARY 2017


FHD VAN OOSTEN

In the matter between

THE STANDARD BANK OF SOUTH AFRICA LTD

APPLICANT

and

MIDNIGHT FEAST PROPERTIES 4 (PTY) LTD

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] This is the return day of a provisional liquidation order, issued on 21 October 2015, in this court by Adams AJ (as he then was). This application has been enrolled together with a related application, likewise for a final winding-up order, brought by the applicant under case number 34716/2016, against Castle Crest Properties 16 (Pty) Ltd (Castle Crest). Both applications are before me and by agreement between

the parties only the Midnight Feast Properties 4 (Pty) Ltd application was argued and the judgment and order granted herein will accordingly apply to both matters.

[2] The applicant's *locus standi* arises from two claims against the respondent founded on its suretyship liability for the indebtedness of the principal debtor Gas2Liquids (Pty) Ltd (Gas2Liquids), to the applicant, which is secured by a covering mortgage bond over the immovable property of the respondent. Gas2Liquids is indebted to Standard Bank in two amounts, the first an overdraft debt in a sum exceeding R6 million, in respect of which there is no dispute and the second, pertaining to a letter of credit exceeding the amount of R26m, which is in dispute, but that does not affect the applicant's *locus standi*.

Background

[3] The applicant has instituted liquidation proceedings against all three entities: Gas2Liquids, the respondent and Castle Crest, in the latter case based on a home loan debt as well as a suretyship debt on behalf of the principal debtor. Gas2Liquids was placed in final winding-up by order of Lamont J, on 17 November 2016. Gas2Liquids has filed an application for leave to appeal in that matter.

[4] The provisional liquidation order in both the present matters was extended on numerous occasions. Voluminous papers, consisting of numerous affidavits and annexures thereto, that were randomly filed as the parties saw fit without leave of the court having been obtained, are before me. In the present application the papers extend into a bulky record of 1082 pages to which the Castle Crest application has contributed a further 824 pages.

[5] The papers filed reveal a persistent, systematic attempt by both respondents to delay and frustrate the inevitable, which is their final liquidation. I do not consider it necessary to traverse the many procedural steps that were taken and resultant paper trail to achieve this result. Suffice to mention that, firstly and most importantly, no answering affidavit to the applicant's founding affidavit was filed. Secondly, business rescue proceedings have been instituted and are pending in the Gauteng High Court. The contention once again advanced by the respondents, which was the sole issue addressed in argument before me, is that the liquidation proceedings are suspended by the business rescue proceedings. The business rescue proceedings

are contentious as three applications, relating thereto are pending, one of which I will revert to.

[6] Before dealing with the issue it is necessary to briefly refer to the hearing before Satchwell J, on 29 February 2016, of the extended return day of the provisional liquidation orders, in respect of all three applications. The learned judge further extended the provisional orders in the two present applications but proceeded to hear the Gas2Liquids application. At the hearing of these matters, counsel for the respondents handed up to the court the applications for the business rescue of all three entities, issued by Leverage Asset Managers (Pty) Ltd (Leverage), in support of the contention that the matters could not proceed as they were suspended in terms of s 131(6) of the Act. In her judgment in the Gas2Liquids application (*The Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd*, case number 45543/2012, unreported), Satchwell J dismissed the contention advanced for want of compliance, as to the requirement in respect of service by the sheriff on the respondent, or the Companies and Intellectual Property Commission or notice to all affected persons, in particular the shareholder, as is provided for in s 131.

[7] The business rescue applications launched by Leverage are opposed by the applicant. The applicant's answering affidavit and intervention application in those matters have not been responded to by Leverage and the matters I am informed, have been enrolled for hearing in the Gauteng High Court in Pretoria, on 18 April 2017.

The issue for determination

[8] Against this backdrop I now turn to the issue whether the present proceedings are suspended by the business rescue proceedings. It is common cause between the parties and I am satisfied that all formalities and statutory requirements for the granting of a final liquidation in both matters, have been complied with.

Discussion

[9] The requirements for a business rescue application were dealt with by Boruchowitz J, in *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) para [15]-[24], in respect of which the learned judge held that an applicant must satisfy the court that all reasonable steps have been taken to notify all

affected persons known to the applicant, by delivering a copy of the court application to them in accordance with regulation 7. I do not consider it necessary to say anything more concerning this aspect as counsel for the respondents conceded that the requirements of s 131 have indeed not been complied with. In the light thereof the conclusion I have arrived at is the same than that of Satchwell J, with which I agree.

[10] Counsel for the respondents confined his argument to pleading with this court in the exercise of its discretion, not to grant the final winding-up of the respondents, on the ground that the final liquidation can reasonably be avoided by disposing of their assets, and, further, considering the significant collateral damage, both economically and socially, that inevitably result from liquidation. Counsel further submitted that the court hearing the business rescue application on 18 April 2017, would be in a better position to determine whether final winding-up would be appropriate. For the reasons that follow the request cannot be acceded to.

[11] In the almost 15 months since the granting of the provisional liquidation orders, nothing of significance has occurred or been achieved which would indicate that any prospects of rescuing the respondents from financial distress and failure exist. As for the business rescue applications, nothing would be achieved in postponing the final determination of these applications to be heard in that court, in regard to which it must be remembered that the route of business rescue remains alive despite a final winding-up order having been granted (*Richter v Absa Bank Ltd* 2015 (5) SA 57 (SCA)).

Costs

[12] Counsel for the applicant submitted that, having regard to the delaying tactics resorted to by the respondents and in the absence of a defence to the applicant's claim, the respondent's costs of opposition to the liquidation application and the costs of the respondent's counter-application in each case, should be excluded from the costs of the liquidation. I agree. No good reason exists to burden the creditors of the respondents with the unnecessary expenditure incurred by the respondents.

[13] For all these reasons and at the conclusion of the hearing before me, and in each application, I issued an order in terms of draft order handed in by counsel for the applicant, the terms of which are reflected in the order that now follows.

Order

[14] In the result I make the following order in each of the two applications:

1. The rule *nisi* is confirmed and the respondent is placed under final winding-up.
2. The applicant's costs, including all reserved costs and the costs of the counter application shall be costs in the winding-up.
3. The respondent's costs of opposition and of its counter application shall be excluded from the costs of the winding-up.



FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ATTORNEYS FOR APPLICANT

COUNSEL FOR RESPONDENTS

RESPONDENTS' ATTORNEYS

DATE OF HEARING

DATE OF ORDER

DATE OF JUDGMENT

ADV JE SMIT

**EDWARD NATHAN
SONNENBERGS**

ADV DJ COETZEE

**CARL VAN ZYL
ATTORNEYS**

2 FEBRUARY 2017

2 FEBRUARY 2017

7 FEBRUARY 2017