REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: **18406/2016**

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

7/3/17

Date: **WHG VAN DER LINDE**

In the ex parte application of:

THE STANDARD BANK OF SOUTH AFRICA LTD Intervening Applicant

In re:

INTERGRATED PIPELINE SOLUTIONS (PTY) LTD Applicant

and

BANKUNA ENGINEERING & CONSTRUCTION (PTY) LTD Respondent

JUDGMENT

Van der Linde, J:

[1] This is the extended return day of a provisional winding-up order granted on 16 August 2016 at the instance of the applicant against the respondent. The initial return date was 3 October 2016, but it was then extended to 30 November 2016 because on 3 October 2016 the respondent handed up an answering affidavit and an application for condonation for the late filing of the answering affidavit. The answering affidavit raised many factual disputes to the applicant's claim, which was for payment under a construction sub-contract.

[2] In the meantime, on 23 November 2016, by agreement between all three parties, the intervening creditor was granted leave to intervene "as the second applicant" and times for filing affidavits by the parties were set. The intervening creditor's claim was for moneys lent and advanced under various agreements. These include four instalment sale agreements and a business revolving credit plan. The respondent fell into arrears on all the instalment sales, and seven of eight debit orders presented to pay the instalments due under the credit plan were returned unpaid. The intervening creditor contends that the respondent is commercially insolvent.

[3] The order, issued by agreement between the parties, provided that the respondent was to file its notice of intention to defend, *"if any"*, within a certain period. It also provided, as regards answering affidavits by the respondent, that these were to be filed *"in the event of opposition."*

[4] The respondent did not file an answering affidavit to the case launched by the intervening creditor, but elected instead to act under rule 6(5)(d)(iii), which provides: *"if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question."*

[5] The respondent's notice, which was dated 20 February 2017, asserts crisply: *"The respondent contends that, as a matter of law, the Standard Bank liquidation application cannot be determined whilst the applicant is proceeding with its liquidation application against the respondent."*

[6] The return date having been extended ultimately to 27 February 2016, the intervening creditor applied for leave to argue the matter on the basis that in truth the matter was not opposed because the respondent's law point was bad; and so the Practice Manual would not be offended if I heard the matter on my unopposed roll. I stood the matter down till later in the week, and having received heads of argument, heard it on Wednesday afternoon 1 March 2016. I reserved judgment till Tuesday 7 March 2017, extending the rule nisi concomitantly.

[7] The central argument for the respondent was straight-forward: that for so long as the applicant remained intent on seeking confirmation of the rule, it remained dominus litis, and the intervening creditor had no place in the hearing; in fact, it had no right to be heard at all. For this proposition it relied on the judgment of Coetzee, J (as he then was) in Fullard v Fullard, 1979 (1) SA 369 (T) at 371 H – 372 B. The learned judge there held that an intervening creditor may obtain a fresh order in its own name if the applicant creditor does not proceed with the case, or drags its feet. He held too that the court takes a practical view of the matter and bears in mind the general body of creditors.

[8] Fullard has been followed often, and may be accepted as laying down the general practice in this division.[1] Other cases too have stressed that the intervening creditor who seeks its own order cannot do so on the back of the cause of the applicant; it must make out its own cause. Also, it seems accepted if it is not self-evident, that two provisional orders cannot run in tandem.

[9] In short, the practice is that for so long as an applicant creditor persists in seeking relief on its own, prior, application, a court cannot ignore that application and instead grant a fresh order at the instance of a subsequent, intervening creditor, even if the latter makes out a

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[1] Compare Nel and Others NNO v The Master and Others, 2000(2) SA 728 (W); see too FirstRand v Wallace Pienaar 2002 (2) SA 758 (W); Ex parte Standard Trading Co (Pty) Ltd: In re Perl v Simco Clothing Manufacturers (Pty) Ltd, 1955 (3) SA 508 (W).

good case for it. The applicant as master of the litigation is entitled to have its case decided first.[2]

[10]What is the attitude of this dominus litis here? In the penultimate paragraph of its heads of argument, the applicant says, under the rubric *"Applicant's Conditional Tender"*, the following: *"In the final instance, to the extent that this court upholds the point of law of the respondent and finds that the sole impediment to Standard Bank obtaining its final order is that the applicant must first pursue its liquidation application, then, under that circumstance, the applicant assents to the discharge of its provisional order in favour of the grant of a final order to Standard Bank."*

[11] The respondent submitted that the applicant has no right to make such a conditional tender; it has no right to bargain with the court. I have no doubt that the applicant has no right to bargain with the court; but what is really happening here? The following observations are in my view pertinent.

[12]First, pleadings have not closed in the applicant's cause; the replying affidavit is still owing, and its appearance is likely to be delayed by the need for sufficient responses to discovery notices. So it will be some time before that cause will be determined, likely much later this year.

[13]Second, the respondent has no answer to the merits of the case presented by the intervening creditor. It chose not to file an answering affidavit but instead to take the law point only.

[14]Third, the intervening creditor asks for a final winding-up order, arguing that a provisional order has been out there, and served on everyone. In this the intervening creditor is supported by the respondent, who submits that there would be no point in discharging the applicant's rule, just to substitute for it a fresh rule at the instance of the intervening creditor.

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[2] Perhaps this is a manifestation of the maxim *prior in tempore potior in iure*, or of not jumping the queue; see the publication by Havard Professor Michael Sandel, What Money Can't Buy.

[15]Fourth, there seems little point in sitting back to observe the disputes between the applicant and the respondent wind their way through the courts when the prize for the applicant is a final winding-up order, precisely the same relief which the intervening creditor wants and to which there is no answer on the merits.

[16]Fifth, add to this the fact that creditors are being kept out of satisfaction of their claims whilst the interim order pertains, and it seems pointless to turn a blind eye to the applicant's attitude even if inelegantly expressed in its *"conditional tender."*

[17]These observations lead me to the conclusion that, as it happens, the sole impediment to a winding-up order being granted at the instance of the intervening creditor, is the fact that before it in the queue stands the applicant; but the applicant has in these circumstances deferred to the intervening creditor.

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

(a) The provisional winding-up order issued on 16 August 2016 is discharged.

(b) The application by the intervening creditor for the winding-up of the respondent is granted, and a final winding-up order hereby issues.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 1 March 2017
Date judgment: 7 March 2017