IN THE GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
25/09/2014 .....
DATE **SIGNATURE**

26/9/2014.

CASE NO: 26085/2014

In the matter between

STATUSFIN FINANCIAL SERVICES (PTY) LTD Applicant

and

CARSTENS, DAVID RICHARD MARTIN Respondent

CORAM: WEPENER J
HEARD: 11 September 2014
DELIVERED: 25 September 2014

JUDGMENT

WEPENER J:

[1] This is a return day of provisional order of sequestration of the respondent.

[2] The applicant is a financier who assists farmers in their business by granting, in appropriate circumstances, credit to such farmers. It is a registered credit provider in terms of the National Credit Act 34 of 2005 (the NCA).

[3] The respondent is a farmer who obtained credit from the applicant.

[4] The applicant launched an urgent application for the provisional sequestration of respondent and on 16 April 2014, Bam J granted such a provisional order and gave his reasons for doing so shortly thereafter. I incorporate those reasons herein and I am in full agreement therewith. I adopt each finding of the learned judge which, in my view, is factually correct.

[5] The applicant furnished a detailed explanation in its founding affidavit regarding the advances made, or the credit granted to the respondent and set out the basis on which it alleges that the respondent is indebted to it in the sum of R30 825 257,37 plus interest. It also showed the respondent's breaches in repaying some of the instalments which became due in terms of his indebtedness to the applicant.

[6] I need not further dwell upon all the facts leading up to the credit being granted to the respondent or his particular breaches of the agreement as the respondent's counsel advised that the respondent relies only on the 'technical' defence, namely that the applicant acted recklessly when it granted the respondent the credit with result that the agreement is enforceable pursuant to the provisions of the NCA. This, in turn, would result in the applicant not having locus standi as a creditor as it has no enforceable debt against the respondent.

[7] It was common cause and the respondent so accepted that, save for the defence that the applicant had granted credit to the respondent recklessly, the applicant complied with all other requirements for an order for the respondent's sequestration. The indebtedness and the fact that the respondent is insolvent if the applicant has an enforceable claim are common cause. The former denials of those issues have been abandoned.

[8] The reliance on the defence of reckless credit occurred in circumstances where the applicant convincingly showed that the respondent acted most deviously with the assets which formed part of the security which the applicant held. After the applicant set out how the respondent had given false versions and hid assets, the applicant had to obtain court orders to secure possession of the assets (at farms of neighbours and others in the vicinity); how the applicant had to trace these hidden assets and the respondent's actions during the period – respondent in his answering affidavit boldly denied the allegations (although he was well aware that the applicant had obtained notarial bonds over the movable assets). Although he "admitted" that he sold some of farming equipment (and some at wholly inadequate prices) he blandly denied that these assets were the subject of the notarial bonds. The respondent elected to divert attention to the alleged reckless credit granted to him and avoided explaining his conduct.

[9] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[1], Heher JA said:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred as such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rest his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.'

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[1] 2008 (3) SA 371 (SA) para 13.

[10] The respondent's bare denials and assertions are in stark contrast to his removal of assets and attempts to obscure their whereabouts. The applicant, admittedly, obtained several court orders against the respondent for the protection of these very assets which the respondent allegedly sold to third parties. The applicant having secured the major portion of the assets never faced a claim by any 'purchaser' as owner who allegedly purchased these assets from the respondent. The respondent's conduct has been exposed convincingly.

[11] Having regard thereto, it is not surprising that the respondent, in the end, solely offered an argument that the applicant was guilty of reckless credit granting as any other option has been shown to be false.

[12] The applicant and the respondent did file further affidavits prior to the hearing. The matter is now fully canvassed in affidavits and I am called upon to apply the relevant principles. Again, the respondent failed to deal with a large number matters and based on the principles set out in *Wightman*, I deal with the facts before me.

[13] The respondent relied on the principle espoused in *Badenhorst v Northern Construction Enterprises (Pty) Ltd.*[2] That principle, known as the *Badenhorst*-principle, lays down that sequestration proceeding should not be resorted to when there is a genuine dispute as to the debt. However, in the matter under consideration the debt itself (or the numbers thereof) is no longer an issue. It is only whether the respondent has raised a genuine and a bona fide dispute as to his indebtedness to the applicant by virtue of the alleged reckless credit granted to him which would have expunged such debt, according to the respondent's submissions.

[14] On the basis that the debt would be avoidable or unenforceable (and I make no finding in this regard) by the applicant in the event of it having granted credit to the respondent recklessly, I am called upon to determine whether such

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[2] 1956 (2) SA 346 (T).

was indeed the case. The respondent submitted that the judgment in *Kalil v Decotex (Pty) Ltd and Another*[3] is in point. It held that:

'As in the present case, the disputes that arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether the proper grounds for winding-up have been established. In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where a respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide on reasonable grounds, the Court will refuse the winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds.'

[15] Relying on the passage in *Kalil,* it was submitted that all the respondent has to do is to submit facts that, if proven, will constitute a good defence against the applicant's claim. The argument disregards the facts placed before the court by the applicant, which facts are largely undisputed. The approach in *Kalil* is available to a respondent where the applicant's case has not been fully set out to refute the respondent's allegations or, as it was said in *Kalil,* where the factual disputes allow for a court to find that the affidavits do not show a balance of probabilities in favour of the applicant.[4]

[16] The applicant fully answered respondent's often unsubstantiated allegations that he was afforded reckless credit, it is in these proceedings that it has to be determined whether such reckless credit was granted. There are no other proceedings where that the issue is to be determined.[5] Having regard to the facts set out by the applicant in order to refute the allegations regarding reckless credit, one is driven to the conclusion that the respondent is clutching at straws in his attempt to rely on the fact that the applicant is guilty of granting credit recklessly.

[17] However, in order to determine when a credit agreement is reckless the relevant provisions of the NCA[6] has to be considered.[7]

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[3] 1988(1) SA 943 (A) at 980B -D

[4] See *Kalil* p 978F

[5] See *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* 2011(2) SA 266 (SCA) para 17

[6] Sections 80 and 81.

[18] Most, if not all, of the allegations contained in respondent's affidavits do no more than parrot the wording of s (81)(2) of the NCA. On the other hand, the applicant procured from the respondent the necessary information to compile a comprehensive balance sheet and cash flow statement prior to the granting of credit . A manager of the applicant visited the respondent in order to perform an assessment covering a two year period. A relationship between the applicant and the respondent commenced in September 2007 when he made application for financial assistance to establish crops over a period of three years from 2007 until 2011.

[19] The respondent performed very well and fully repaid the facilities before all due dates. After three previously successful years the respondent, in 2012, was unable to fully repay a facility. He contended that he had droughts. Ordinarily crops are covered by insurance against droughts. Respondent, however, alleged that he had a problem with the harvesting operations and that his insurance claims failed. The Applicant later found out that some of the funds generated by insurance claims were paid to another creditor. The applicant produced cogent evidence that the portion of the money which should have been paid to it was diverted and paid to the other creditor. There are a number of other reasons why the applicant's contention that the non-payment of the facility in 2012 was not as a result of insufficient crop or an inability to pay but rather a manipulation of the proceeds and the siphoning of the crop to a new venture namely, a feedlot. The respondent orchestrated the disappearance of a substantial portion of his crop, by manipulating the member number under which he was supposed to deliver the crop to the silo.

[20] The respondent harvested and delivered his crop at the silos but a significant portion thereof to a value of approximately R1, 8 m was delivered under the number over which the applicant's cession was not registered. The cession which was granted to the applicant was thus undermined by devious conduct.

[21] All of this conduct of the respondent remains unexplained. The true reason for the respondent's predicament was therefore not because he received reckless

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[7] See *Desert Star Trading* para 14 .

credit but that he manipulated the proceeds which he received and so failed to pay his debts. He decided to start a feedlot. He gave no explanation on how he intended to provide supplements for the cattle at the feedlot. In the application for credit the respondent make no disclosure of his income and expenditure in relation to the feedlot. He did not include expenditure to acquire feed for the cattle in the feedlot. The applicant maintained that this corroborated its contention that the maize, the proceeds over which the applicant enjoyed the cession and which was the earmarked source for the repayment to the applicant, found its way to the feedlot. A significant portion of the crop was intentionally delivered under a member number over which the applicant had not registered a cession and it occurred in circumstances where the respondent clearly knew that the applicant had a cession over the proceeds of the crop. His fraudulent actions have not been disputed and can obviously not be rationally explained.

[22] At the time when the applicant attempted to exercise its security over the movables the respondent attempted to remove the unique serial numbers which the applicant applied to some of the equipment so as to render such equipment susceptible to a special notarial bond. The respondent cannot (and dare not) explain his actions.

[23] The alleged sale of movables has convincingly been shown to be false. The provisional trustees appointed for the respondent successfully launched an application to sell the respondents movables at public auctions. The persons who were alleged to have purchased these assets knew about the sale but took no steps to prevent the assets from being sold. Nor were any steps taken to institute the damages claim against either the applicant or the provisional trustees, showing the respondent's version to be concocted.

[24] The applicant also had to lodge urgent applications to prevent the respondent from dissipating the crop which order the applicant successfully obtained in order to secure the right to harvest the crop to protect it against dissipation by the respondent.

[25] At some time during 2014 the trustees received information to the effect respondent and his father were assisting in attempts to catch game at a game

camp alleged to be part of the assets of the respondent. The trustees then successfully brought an urgent application and an order was granted by the court interdicting the respondent and his father from attempting to catch the game at the game camp.

[26] In order to refute the allegations of reckless credit given by the respondent described herein, the applicant relied upon the credit information and facts furnished to it by the respondent. The applicant annexes the documents containing all the financial information regarding the respondent which had been made available to it. It is a substantial bundle of documents.

[27] The fact that the information upon which the applicant based its determination of the respondent's ability to meet his obligations originated from the respondent has not been contradicted. The respondent, true to form, failed to fully and truthfully furnish information regarding his financial position as I have indicated herein before. This failure, by its very nature, materially affected the ability of the applicant to make a proper assessment of the respondents existing financial means, prospects and obligations. In the circumstances I am of the view that the applicant's reliance on the provisions of section 81(4) of the NCA a complete defence to the allegations of alleged granting of reckless credit.

[28] The respondent's conduct is all but bona fide and reasonable. His defence is interspersed with untrue and unsubstantiated allegations. In fact, his case is really unarguable. I also adopt the conclusions of Bam J as set out in his reasons of judgment when granting the provisional order. Those conclusions remain valid in these proceedings.

[29] In all the circumstances, the provisional order of sequestration of the respondent is made final.

WEPENER J

Counsel for Applicant: J E Kruger

Attorneys for Applicant: EAL Muller Attorneys

Counsel for Respondent: M P van der Merwe

Attorneys for Respondent: Tim du Toit & Co