Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

Case Number: 952/2011

In the matter between:

FIRSTRAND BANK LIMITED **APPLICANT**

Versus

SERISO 321 CC **RESPONDENT**
(Registration no.:CK2000/053253/23)
Domicilium Address at 9 Watsonia Street, Paradise,
Knysna, Western-Cape Province

CORAM	:	**D H ZONDI J**
JUDGMENT BY	:	**D H ZONDI J**
FOR THE APPLICANT	:	**ADV. J T BENADÉ**
INSTRUCTED BY	:	**MARAIS MüLLER YEKISO INC.**
FOR THE RESPONDENT	:	**ADV. R RANDALL**
INSTRUCTED BY	:	**PASTER. P . INC.**
DATE OF HEARING	:	**25 OCTOBER 2011**
DATE OF JUDGMENT	:	**31 OCTOBER 2011**

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Domicilium Address at 9 Watsonia Street, Paradise,
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JUDGMENT DATED THIS 31st DAY OF OCTOBER 2011

ZONDI, J:

[1] On 8 February 2011 the applicant brought an application for the provisional winding-up of the respondent on the grounds, firstly that the respondent is unable to pay its debts as envisaged by section 68 (c) read with section 69(1) (a) of the Close Corporations Act No. 69 of 1984 ("the Act"); secondly that the respondent is commercially insolvent and thirdly that it is just and equitable that the respondent should be liquidated.

[2] The applicant and the respondent on 23 March 2011 concluded the agreement of settlement in terms of which the respondent and Emithini Harwood CC (in liquidation) ("Emithini CC") undertook to liquidate their indebtness to the applicant

in certain monthly instalments with effect from 7 March 2011. The deed of settlement was by agreement between the parties made an order of Court on 25 March 2011.

[3] The applicant's claim against the respondent is based on two deeds of suretyship signed by the respondent's members on the respondent's behalf on 2 March 2006 and 30 April 2009 respectively in terms of which the respondent bound itself to the applicant as surety and co-principal debtor with Emithini CC, the principal debtor for the due payment by the Emithini CC *"of all or any monies which the debtor may from time to time hereafter owe to"* the applicant. The amount recoverable by the applicant was in terms of the second deed of suretyship limited to R720 000.00.

[4] In terms of clause 4 of the deed of settlement Emithini CC agreed that the applicant could proceed with the application for its liquidation on an unopposed basis should Emithini CC fail to comply with the obligations in terms of the agreement and fail to remedy the breach within 3 (three) days from the date of written notice by the applicant to remedy such breach.

[5] In relation to the respondent clause 5 of the agreement provided as follows:

> *"Seriso 321 CC agrees that the Plaintiff will be entitled to proceed with the application for liquidation against it should the Emithini Hardwood CC fail to perform in terms of this settlement as mentioned below and on the terms specified, and fail to remedy any breach thereof within 3 (three) days from date of written notice to be given by the Plaintiff to the Emithini Hardwood CC to so remedy such breach, and the Seriso 321 CC be given 3 (three) days written notice by the Plaintiff in which Plaintiff confirms to Seriso 321 CC that the Emithini Hardwood CC has breached the agreement and failed to remedy the breach within the 3 (three) days notice period given to it."*

[6] Clause 13 of the settlement agreement made it clear that the deed of settlement was not to be regarded as novation, variation and/or waiver of any existing debt or liability.

[7] The respondent and Emithini CC defaulted on their payments and pursuant to the terms of the deed of settlement the applicant proceeded with its liquidation application against Emithini CC and the respondent. Emithini CC did not oppose the winding-up application and it was finally liquidated on 5 July 2011.

[8] The respondent opposed the application contending inter *alia* that it did not owe the applicant the amount claimed; that the applicant failed to comply with its obligations in terms of the settlement agreement and denied that it is commercially insolvent.

[9] The issues raised in this application have to be determined in the context of the following factual matrix.

[10] The applicant initially granted a facility of R150 000.00 to Emithini CC on 20 November 2006. In terms of the letter of facility dated 20 November 2006 the applicant sought and obtained two deeds of suretyship from the members of Emithini CC; deed of suretyship in the amount of R200 000.00 signed by the respondent and a second covering bond of R120 000.00 over erf 4669 Knysna ("the property") belonging to the respondent.

[11] Emithini CC and the respondents are two associated close corporations of which Mr and Mrs Van Niekerk are members. During 2009 Emithini CC requested an extension of the aforesaid facility in order to raise further capital.

[12] The applicant agreed to extend the facility to R600 000.00 on condition that a further covering bond be registered over the respondent's property in an amount of R600 000.00 in favour of the applicant as well as second suretyship be executed by the respondent on behalf of Emithini CC in favour of the applicant limited to R720 000.00 as collateral security for the due fulfilment of Emithini CC's obligations to the applicant.

[13] On 13 May 2009 and at Knysna the respondent signed a close corporation resolution authorising the conclusion of the transaction. A further covering bond for R600 000.00 was duly registered over the respondent's property in favour of the applicant on 1 June 2009 to secure the loan.

[14] On 30 April 2009 the respondent duly executed the second deed of suretyship limited to R720 000.00 and in terms of which the respondent bound itself in favour of the applicant as surety and co-principal debtor with Emithini CC for the due payment by Emithini CC of all monies which Emithini CC might from time to time owe to the applicant.

[15] The applicant denies the suggestion by the respondent that there was an agreement that any payments from further covering bonds would be utilised to reduce Emithini CC's credit facility. It alleges that the covering bonds were registered as collateral security for Emithini CC's obligations under the facility. In my view the applicant's contention is correct and is consistent with the explanation given by Mr Van Niekerk when he applied for the extension of credit facility on 26 June 2009. In motivating the request for an increase of credit facility he said *"over the past two months we have had to start employing labour and training operations in Cape Town for the Port Elizabeth operation. Offices and related equipment has had to be*

purchased pending the first shipment". He went on to say *"Emithini CC will need an (sic) temporary extension of the current overdraft by R100 000.00 for a period of two months reducing by R20 000.00 per month thereafter until the current overdraft limit is reached".*

[16] The applicant alleges that in terms of the two deeds of suretyship the respondent agreed *inter alia* that a certificate signed by a manager of the applicant would be sufficient proof of any applicable rate of interest and the amount owing under the deeds of suretyship. It further alleges that as at 15 December 2010 an amount of R677 140.06 plus interest was due to it being the outstanding balance of monies lent and advanced by it to Emithini CC on the overdraft facility.

[17] On 20 December 2010 the applicant's attorneys of record on its instructions caused a written demand to be served on the respondent in terms of section 69 (1) (a) of the Act by registered mail and also by Sheriff on 23 December 2010. The respondent neglected and/or refused to pay the amount claimed by the applicant or to secure or compound the amount to the reasonable satisfaction of the applicant. As a consequence of the respondent's neglect the applicant launched the present application.

[18] The proceedings were settled between the parties on 23 March 2011 in terms of the deed of settlement which by agreement between the parties was made an order of Court on 25 March 2011. The applicant alleges that the respondent defaulted on the Court order and as required by the deed of settlement it sent a notice of default to the respondent by registered mail on 21 April 2011 requesting it to remedy the default. The notice was also served on the respondent by Sheriff on 21 April 2011. A similar notice was sent by email to the respondent's attorneys of

record on 14 April 2011 who in response thereto informed the applicant's attorneys of record that Mr M Van Niekerk was out of town on business and that he would make payment when he returned to the office. As the facts show, Mr Van Niekerk returned to his office but did not make payment as promised.

[19] Although the respondent in its answering affidavit had opposed the application on various grounds during argument Mr **Randall** who appeared for the respondent confined his argument to three main grounds.

[20] The respondent admitted having concluded the first deed of suretyship limited to the amount of R200 000.00. It challenged the validity of the second deed of suretyship on the ground that it was not properly completed. It is significant to note that the respondent does not deny to have signed the deed of suretyship and neither does it contend that it was fraudulently concluded.

[21] The respondent alleges that it disputes its liability to the applicant alternatively the extent of such liability on the grounds, first, that it is released as a surety because the applicant in his dealings with Emithini CC behaved in a manner which had the effect of prejudicing it. The allegations underpinning this contention are that the applicant had an obligation to ensure that the "*increased or additional bonds were registered*" and thereafter "*to pay from the proceeds thereof to the principal debtor amounts in reduction of the facility on its account*". The legal basis for this obligation is, however, not explained. Secondly, the respondent denies that the applicant has complied with its obligations in terms of the deed of settlement. Thirdly, the respondent denies that it is commercially insolvent.

[22] The application for the provisional winding-up of the respondent is based on

three grounds. The first one is that the respondent is unable to pay its debts within the meaning thereof in section 68 (c) read with section 69 (1) (a) and (c) of the Act. The second is that it is just and equitable that the respondent be wound-up. The third is the breach by the respondent of the settlement agreement.

[23] In terms of section 68 of the Act, a close corporation may be wound up by a Court if it is unable to pay its debts or if it appears to the Court that it is just and equitable that it should be done.

[24] With regard to the circumstances under which a close corporation shall be deemed to be unable to pay its debts, section 69 of the Act provides:

> "69 *Circumstances under which corporation deemed unable to pay debts:*
>
> *(1) For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if-*
>
> *(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or*
>
> *(b) ...*
>
> *(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.*
>
> *(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation.*

[25] As far as the respondent's inability to pay its debts is concerned the applicant relies on an actual inability to pay debts as well as the respondent's failure to comply with the statutory demand it sent to the respondent on 23 December 2010. It is not in dispute that the statutory demand which the applicant addressed to the respondent on 23 December 2010, in which payment of the amount owing was demanded, was ignored by the respondent.

[26] The defence that is raised by the respondent is that it is not liable to the applicant for the payment of the amount claimed by the applicant and it raises various grounds on which it bases its denial.

[27] It has been held, on a number of occasions, that winding-up proceedings ought not to be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt (*Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 218 E-J; Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T); *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 956 I-J; *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening)* 1978 (1) SA 70 (D) at 72 A).

[28] An applicant for a provisional order of liquidation need only make out a *prima facie* case. Where the application is opposed and the factual disputes have been raised in the affidavits in deciding whether or not the applicant has made out a *prima facie* case regard should be had not only to the applicant's papers but also to the respondent's rebutting evidence (*Kalil v Decotex (Pty) Ltd* supra at 976 H).

[29] I am not satisfied that the evidence upon which the respondent relies for its defence is sufficient to rebut the *prima facie* case made out by the applicant. Notably the respondent admits that it concluded a first deed of suretyship for the sum of R200 000.00 and on a proper construction of the structure of its defence regarding the second deed of suretyship it is clear that it is not denying that it signed the deed of suretyship for the sum of R720 000.00. What it alleges is that the second deed of suretyship is invalid because it was not properly completed. In my view the facts which the respondent has alleged are not facts which, if proved at trial, would constitute a good defence to the applicant's claim (*Hülse-Reutter and Another* supra at 219 G). In the circumstances the respondent's contention that it is not liable to the applicant for the payment of the amount claimed, should fail.

[30] There is a suggestion in the respondent's heads of argument that it cannot be said that the respondent is commercially insolvent because it is possessed of immovable property valued at approximately R6.6million and if it were to be sold the proceeds of sale would far exceed the amount of R677 140.06 claimed by the applicant. Mr **Benade** who appeared for the applicant argued that this was not the only amount in which the respondent is indebted to the applicant. There is also a mortgage loan.

[31] The question which the Court should answer in deciding whether the company should be wound-up on the ground of commercial insolvency is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on trading. As was held by Berman J in *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993(4) SA (C) 436 at 440G: *"It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that*

it cannot do this, it follows that it is unable to pay its debts within the meaning of s345 (1) (c) as read with s344 (f) of the Companies Act 61 of 1973 and is accordingly liable to be wound-up".

[32] The respondent's contention must fail because this property is also bonded to the applicant and the applicant may not be the only creditor of the respondent. In my view the respondent's property is not an asset which is readily realisable because if it was, the respondent would have sold it to meet the applicant's claim.

[33] The second contention raised by the respondent is that it has been released from suretyship because the applicant in his dealing with the principal debtor (Emithini CC) has done something which has the effect of prejudicing it as a surety. The facts upon which this contention is based are very sketchy and vague. The respects in which the applicant is alleged to have behaved in relation to the principal debtor and the prejudice which results from that behaviour are not set out. The defence which the respondent seems to raise is that the applicant *"breached its obligation in that it either failed to ensure that the increased or additional bonds were registered, or if registered, failed to pay from the proceeds thereof to the principal debtor amounts in reduction of the facility on its account".* The legal basis of this obligation, however, remains unexplained.

[34] In our law there is no general principle to the effect that if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released. (*ABSA Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) at 1123 J – 1124 A) see also *Bock and Other v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) at 252 D – 253 B). As a general proposition, prejudice to the surety can only release the surety (whether totally or partially) if the prejudice is

the result of a breach or other legal duty or obligation; and the prime source of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If the alleged prejudice is caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the resultant prejudice is one which the surety undertook to suffer and the creditor's conduct cannot constitute breach. In the present case there is no evidence to support the contention that the applicant had to utilise any amount raised by way of credit extension to reduce Emithini CC's overdraft account. In the circumstances the respondent's contention must fail.

[35] The other defence raised by the respondent is that in bringing the liquidation application the applicant failed to comply with its obligations under the settlement agreement. The facts underpinning the respondent's contention are that the amount claimed under the settlement agreement had not become due and payable when the applicant brought this application. It is alleged by the respondent that in terms of the settlement agreement the applicant was required in the event of default, to give Emithini CC three days notice in which to remedy breach. It is pointed out by the respondent that in terms of the settlement agreement the notice would be deemed to have been delivered three days after having been sent by registered post and the applicant would be required to deliver a separate notice three days thereafter to the respondent. It was argued by the respondent that the notice of default sent to the respondent, and upon which the applicant relies in this application was too short and therefore defective.

[36] Clause 5 of the deed of settlement makes the following provisions regarding giving of default notices:

"Seriso 321 CC agrees that the Plaintiff will be entiled to proceed with the

application for liquidation against it should the Emithini Hardwood CC fail to perform in terms of this settlement as mentioned below and on the terms specified, and fail to remedy any breach thereof within 3 (three) days from date of written notice to be given by the Plaintiff to the Emithini Hardwood CC to so remedy such breach, and the Seriso 321 CC be given 3 (three) days written notice by the Plaintiff in which Plaintiff confirms to Seriso 321 CC that the Emithini Hardwood CC has breached the agreement and failed to remedy the breach within the 3 (three) days notice period given to it."

[37] I reject the suggestion by the respondent that a proper default notice was not given in this matter and that the applicant's failure to properly give such notice renders the applicant's claim defective. In my view the respondent was given an adequate period to remedy breach. A notice of default was first, sent to Emithini CC by registered mail on 15 April 2011. The applicant also forwarded a copy of the notice of default to the Sheriff for service on Emithini CC. The Sheriff went to Emithini CC's principal address to effect service of the notice. The Sheriff was unable to serve the notice at Emithini CC's address on 15 April 2011 as there was no one available. Mr M Van Niekerk, one of Emithini CC and the respondent's members informed the Sheriff that he was not available to accept service of the notice as he was in Port Elizabeth and would be back on 20 April 2011. According to the Sheriff's return of service a default notice was subsequently served on Emithini CC on 20 April 2011.

[38] The applicant's attorneys had also forwarded a notice to Emithini CC and the respondent's attorney on 14 April 2011, who upon receipt thereof, informed the applicant's attorneys that Mr Van Niekerk was away on business but had conveyed the notice of default to him and had undertaken to make payment on his return. In

the circumstances, the respondent's contention must fail.

[39] I am satisfied that the respondent has failed to pay on demand the amount owed to the applicant, which is cogent *prima facie* proof of the inability of the close corporation to pay its debts. As stated in *Rosenbach Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1982 (4) SA 593 (A) at 597, "*a concern which is not in financial difficulties ought to be able to pay its way from current or readily available resources*". Despite the commitment made by the respondent through its attorney on 14 April 2011 that it would pay the next instalment in terms of the agreement of settlement when Mr Van Niekerk returned from a business trip, no payment was made.

[40] In the result the order in the following form is made:

1. That the respondent is placed under a provisional order of winding-up in the hands of the Master of this Honourable Court.
2. That a *Rule Nisi* is issued calling upon all interested parties to show cause on Friday 25 November 2011 at 10h00, if any, to the above Honourable Court, as to why:
    2.1 The respondent should not be placed under a final order of winding-up; and
    2.2 Why the costs of this application should not be costs in the winding-up of the respondent;
3. The service of this order be effected by:
    3.1 The Sheriff of this Honourable Court or his lawful deputy at the registered office and/or the principal place of business of the respondent.
    3.2 Prepaid certified mail on all known creditors of the respondent with claims exceeding R5000.00;

3.3 One publication in each of the following newspapers:

3.3.1 The Cape Times;

3.3.2 Die Burger

3.4 On the employees of the respondent, if any, by affixing a copy of this order to the entrance to the respondent's main place of business;

3.5 The applicant's attorneys of record on the South African Revenue Services.

D H ZONDI
HIGH COURT JUDGE