THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 20858/2011

In the matter between:

FIRSTRAND BANK LTD Applicant

versus

C T H DIFALANA GRAIN (PTY) LTD Respondent

JUDGEMENT: 27 FEBRUARY 2012

BOZALEK J:

[1] This matter came before me on 13 February 2012 being the return date of a provisional order of liquidation made by Blignault, J on 8 December 2011.

[2] Mr Luderitz SC appeared on behalf of the applicant to seek a final order which was opposed by respondent. There was no legal representative on behalf of the respondent but one of its two directors, Mr JA Wasserman, sought and was granted leave to present legal argument on behalf of the respondent. Reasons for that ruling were given contemporaneously and I shall not repeat them.

[3] Full argument was delivered by the parties' representatives whereupon I extended the rule until 27 February 2012 and reserved judgment until that date.

[4] The papers in this matter are voluminous and revealed a lengthy history of litigation between the parties in the form of an arbitration which resulted in an award in favour of the applicant against the respondent in the amount of R31 012 906.29. It is common cause that the basis upon which the award was made was confirmed by an arbitration appeal panel whereupon the quantification of the award took place resulting in a final award. That final award has yet to be made an order of court.

[5] It is also common cause that the respondent is not possessed of any assets (save perhaps for a claim for damages), does not carry on business in any manner or form, has no employees and is unable to pay its debts.

[6] The respondent opposes the finalisation of the order on a number of grounds namely:

6.1 it disputes the authority of the deponent to the applicant's founding affidavit, Mr J Theron;
6.2 it contends that this application is premature or that the applicant lacks *locus standi* in that the award upon which it relies has yet to be made an order of court;
6.3 it contends that the final award of the arbitrator falls to be reviewed for lack of prior notice;
6.4 it contends that the application lacks urgency and;
6.5 perhaps most importantly, it contends that the granting of a final order would not be just and equitable until such time as the respondent is given an opportunity to pursue other avenues against the applicant *viz* seeking to overturn or set aside the award or pursue a claim for damages against the applicant.

[7] I shall deal with these points in sequence.

THE DEPONENT'S AUTHORITY

[8] In my view there is no substance to the respondent's objection since it has failed to exercise the remedy available to it in terms of the provisions of Rule 7(1) in challenging the authority of the deponent as has been pointed out in *Firstrand Bank Ltd v Fillis and Another* 2010 (6) SA 565 at 567 D – G and in *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 SCA. In any event the deponent has, it emerges from his replying affidavit, now been expressly authorised to depose to both the founding and replying affidavits.

THE ABSENCE OF A LIQUIDATED CLAIM

[9] Whilst the applicant may not have a liquidated claim against the respondent for want of the final award of the arbitrator not yet being made an order of court, this does not in my view affect its *locus standi* or remove its grounds for obtaining an order of liquidation against the respondent. Section 344(1)(f) of the 1973 Companies Act provides that a company may be wound up if it is unable to pay its debts. In terms of s346(1)(b), such an application may be brought by one or more of its *creditors "including contingent and prospective creditors"*. A contingent liability is: one which, by reason of an existing *vinculum juris* between the creditor and the company, may become an enforceable liability on the happening of some future event.

[10] The final award by the arbitrator against the respondent is *par excellence* such a contingent liability. The only qualification to be applied in these circumstances is that in taking a contingent or prospective liability into

account the court does not treat it as if it were due and payable but rather as one of the factors affecting its decision as to whether or not the company is unable to pay its debts. See *Barclays Bank D.,C. and O v Riverside Dried Fruit Company (Pty) Ltd* 1949 (1) SA 937 (C) at 949 – 950. It is common cause that the respondent is unable to pay its debts and there is thus in my view no bar to the applicant seeking an order for the winding up of the respondent on the ground relied upon by the respondent in this regard.

Urgency

[11] As regards urgency it is the practice of this Court to treat applications for liquidations as matters of some urgency. In any event the respondent has had adequate opportunity to deal with the application and has suffered no meaningful prejudice by reason of any time constraint.

[12] The balance of the respondent grounds for opposing the granting of a final order to be considered under the umbrella of the court's discretion and the respondent chose to argue them under the rubric of whether it would be *"just and equitable"* to place the company into final liquidation which in fact is misplaced since the grounds for liquidation relied on, insolvency, has been proven. Be that as it may it is trite that the court's power to grant a winding up order is a discretionary power, irrespective of the ground upon which the order is sought. See *F & C Building Construction Company (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (d) at 844. That discretion must of course be exercised on judicial grounds. *See Irvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) SA 231 (E) at 244. So far as the court's power to wind up a company on the grounds that it is just and equitable to do so it has been

held that this paragraph *"postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding up". See Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) at 136.

[13] The first ground for opposing the granting of a final order in this context is that the respondent should be allowed to exercise certain remedies which it has in terms of the Arbitration Act with a view to having the award amended or set aside. The first basis for such a challenge would be the alleged failure of the applicant to give notice to the respondent or its legal representative that they were approaching the arbitrator to seek a final award following the rejection by the appeal panel of the respondent's appeal against the arbitrator's award on the merits.

[14] The allegations in this regard turn around the fact that the respondent's attorney, Mr MH Barnaschone, who was previously with the respondent's attorneys of record, Messrs Honey and Partners, left their employ and commenced practice for his own account.

[15] However, as was pointed out by the applicant's counsel, Messrs Honey and Partners have never filed a notice of withdrawal as the respondent's attorneys of record and the respondents were first advised of Mr Barnaschone's new status on 11 October 2010. By this time, in fact on 17 September 2010, the arbitrator had already entertained evidence and submissions from the applicant in relation to the quantification of respondent's liability and made his final award on that same day. That determination as well as the applicant's notification that it intended to make this final arbitration

award an order of court was served on Messrs Honey and Partners on 1 October 2010.

[16] More importantly, the applicant's application for a final award, comprising of four lever arch files, was hand delivered to Messrs Honey and Partners on 13 August 2010. In these circumstances, and in the absence of any direct evidence from either Mr Barnaschone or any representative of the firm Honey and Partners on the question of whether they were aware at all material times of the fact that the respondent was seeking a final award, I consider that this alleged irregularity is no ground for refusing the final relief sought by the applicant.

Section 31 and 33 of Arbitration Act

[17] The second major ground relied upon by the respondent is the contention that the making of any final order should be postponed pending an application by the respondent to the Competition Tribunal for a certificate in terms of s65 (6)(b) of the Competition Act which would found a claim for damages by the respondent in the High Court against the applicant.

[18] It was common cause that on 14 July 2011 the Competition Tribunal confirmed a consent agreement between the Competition Commission and the applicant in terms of s49 (d) of the Competition Act, 89 of 1990 in terms of which the applicant paid an administrative penalty in the amount of R2.1m for a breach of the Act relating to the dealings between the applicant and the respondent which gave rise to the arbitration proceedings and the award against the respondent.

[19] The consent agreement was concluded pursuant to an investigation by the Commission and its subsequent finding that an agreement between the applicant and *Noord Wes Korporasie Ltd ("NWK")*, and in particular clause 4.4 thereof, which comprised an undertaking in the part of applicant that it would not sell 140 000 tons of grain relocated to NWK silos within South Africa or Botswana over a certain period, constituted a contravention by applicant of s4(1)(b)(ii) of the Act.

[20] Section 65(6) of the Act provides as follows under the heading "Civil Actions and Jurisdiction":

> *"a person who has suffered loss or damages as a result of a prohibited practice -*
>
> *a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of s49D(1); or*
>
> *b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court in the prescribed form:*
>
> *i) certifying that the conduct constituting the basis for the action as been found to be a prohibited practice in terms of this act.*
> *ii) stating the date of the Tribunal or Competition Appeal Court finding; and*
> *iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.*

[21] In turn s4 provides for the prohibition of restrictive horizontal practices and s4(1)(b)(ii) reads:

> *"an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if: ...*
>
> *b) it involves any of the following restrictive horizontal practices*
>
> *i) ...*

ii) dividing markets by allocating customers, suppliers, territories or specific types of goods or services.

[22] In the consent agreement it is specifically recorded that clause 4.4 of the agreement constituted a contravention of s4(1)(b)(ii) of the Act. It seems clear that should the respondent succeed and obtain a certificate in terms of s65 of the Act then it is open to it to sue for any loss or damage suffered as a result of the prohibited practice and the finding of the prohibited practice is a finding which cannot be disturbed by the civil court in question. Where the parties differed, however, was whether, on the above facts, largely undisputed, the procuring of a certificate gave rise to any cause of action which could either nullify the award or, as Mr Wasserman contended, form the basis for a counterclaim by the respondent against the applicant for damages suffered equalling or even exceeding the award obtained by the applicant against the respondent in the arbitration proceedings.

[23] Although Mr Wasserman contended that the finding of a prohibited practice as embodied in the consent agreement gave rise to an entirely new cause of action on the part of the respondent he could not substantiate this general allegation. On behalf of the applicant it was contended that the offending agreement (clause 4.4) (concluded between applicant and NWK) was considered in the arbitration proceedings against the background of the agreement concluded between the parties in terms of which the respondent stored grain on behalf of the applicant and was granted a mandate to sell some or all of the grain on agreed terms. However, the applicant's argument proceeded, it was established in the arbitration proceedings, and confirmed

on appeal, that the mandate had lawfully been revoked by the applicant following the repudiation of the storage and sale agreement by the respondent and, for good measure, that the respondent had in any event suffered no damages in consequence of the conclusion of the agreement between NWK and the applicant by reason of certain conditions prevailing in the grain market at the relevant time.

[24] The applicant's contentions in the above respects appear to be borne out by the arbitration award and the appeal panel's findings and certainly were not countered by Mr Wasserman on behalf of the respondent. In these circumstances it seems to me to be inevitable that even if the respondent should obtain the s65(6) certificate and launch an action for damages against the applicant it will be met with a plea of *res judicata* to which it will have no reply. There are also compelling indications that the respondent's claim for damages, which was quantified in the arbitration proceedings in an amount of R3 311 000 odd, has been considerably inflated by an additional amount of R28m without any clear rationale or basis therefor.

[25] There are in addition various factors which suggest that any action by the respondent is unlikely to eventuate. In the first place, notwithstanding that the Competition Tribunal's finding has been known to the respondent since 17 May 2011, it has taken no steps to obtain the required certificate, let alone institute an action for damages. Secondly, being possessed of no assets and being *de facto* insolvent, it is difficult to see how the respondent will be able to prosecute any claim against the applicant or to meet the inevitable demand for security for the applicant's costs which will be forthcoming.

[26] It was further suggested in argument on behalf of the respondent that it could gain relief from the arbitration award by revisiting it and presenting the evidence of the finding of the Competition Tribunal.

[27] The only means by which this could be accomplished are in terms of either s32 or s33 of the Arbitration Act. Section 32 deals with the remittal of an award back to the arbitrator. Sub-section 32(1) provides that the parties may jointly within six weeks after the publication of an award remit the matter back to the arbitration tribunal *"for reconsideration and for the making of a further award or a fresh award".* There is clearly no prospect of the applicant consenting to any such remittal.

[28] Section 32(3) provides that a party to the arbitration may on notice to the other party on good cause shown, remit any matter which was referred to arbitration back to the tribunal for reconsideration for the making of a further award or fresh award. Any such action however, must be launched within six weeks after the publication of the award in question. In the present case the final award was made nearly 18 months ago and the respondent has been aware of the Competition Tribunal's findings for some nine months. In these circumstances it is difficult to envisage any application for a remittal of the matter back to the arbitrator in terms of s32(2) succeeding.

[29] Section 33 of the Arbitration Act deals with the setting aside of an award on specified grounds and also provides that any such application must be made within six weeks after the publication of the award to the parties. As indicated above this time limit has long since expired and, in any event, the respondent has made no attempt to make out a case that any conduct which

it complains of falls within that which must be established to successfully invoke the provisions of s33.

[30] In effect what the respondent's case boils down to is the contention that, although it is *de facto* insolvent and without any meaningful assets, it has a claim for damages in an amount equal to or greater than the sum of the award which the applicant has obtained against it. A similar situation was addressed in the matter of *Storti v Nugent and Others* 2001 (3) SA 783 (W) where the Court considered a claim for damages a factor *"too nebulous to place any value thereon"* when considering when to bring a company out of winding up. In my view the circumstance of the present matter are on all fours; the respondent has not even launched the action and the prospects of success in any such action must be regarded as remote, at best.

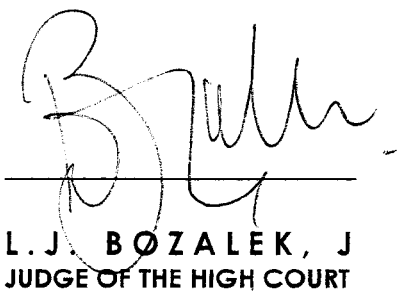
[31] It is not suggested that the applicant's motive in seeking a final liquidation order is to harass or oppress the respondent or to stifle any action for damages on its part. In the circumstances given the unchallenged evidence of the respondent's *de facto* insolvency and the applicant's undisputed claim for R31m, it appears to me that the discretion which this Court had to refuse an order for final liquidation is very limited.

[32] Finally the respondent also sought the setting aside of the rule nisi granted on 9 December 2011 in terms of Rule 42(1) on the basis that it was erroneously granted *"in the absence of the respondent"*. This is a reference to the fact that Mr Wasserman was not granted an audience on that day or preceding days when his counsel was not able to argue the matter. I do not consider that there is any merit in this argument and, in any event, the

respondent has enjoyed a full hearing before me represented by Mr Wasserman.

[33] Taking all the circumstances into account I am unpersuaded that there is any justification for exercising that discretion in favour of the respondent by postponing the application for liquidation or refusing to grant a final order. There has been full compliance with the service requirements set up in the provisional order and in the circumstances I consider that the applicant has made out a case for a final order.

[34] In the result the respondent is placed in final liquidation in the hands of the Master of the Court.



L. J. BOZALEK, J
JUDGE OF THE HIGH COURT