Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: A165/2013

In the matter between*:*

FIRSTRAND BANK LIMITED Appellant

v

NOMIC 153 (PTY) LIMITED Respondent

(Registration no: 2004/028195/07)

Court: Justice Yekiso, Justice Zondi *et* Justice Cloete

Heard: 29 January 2014

Delivered: 20 February 2014

JUDGMENT

CLOETE J:

Introduction

[1] This is an appeal with the leave of the court *a quo* against the dismissal of an application by the appellant (*'the bank'*) for the provisional winding-up of the respondent company.

[2] The grounds of appeal are as follows. First, the court *a quo* conflated the bank's *locus standi* with the grounds relied upon by the latter for the winding-up, namely s 344(f) as read with s 345(1)(a) and s 345(1)(c) of the Companies Act 61 of 1973 (*'the Act'*). Second, the court *a quo* erred in finding that the so-called Badenhorst rule applied and that the bank's claim was disputed on *bona fide* and reasonable grounds (*Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (TPD) at 348A-B). Third, it was wrong in finding that the application was an abuse of the court process.

[3] For purposes of this appeal the respondent concedes that the bank has *locus standi 'by virtue of its status as a contingent or prospective creditor'* in respect of monies loaned and advanced to the respondent by the bank under a written mortgage loan agreement (*'the agreement'*) concluded on 22 April 2005 and secured by the registration of a first mortgage bond over Erf 15671 Somerset West (*'the property'*).

[4] The respondent however contends that the debt to the bank is not due and payable, and further that the quantum of the claim is disputed, although it is

common cause that if the respondent's defences fail, its indebtedness is more than R100 as envisaged in s 345(1)(a) of the Act. It is also common cause that the respondent has not made any payments to the bank since January 2009.

Background

[5] On 17 March 2009 the bank issued summons against the respondent, as first defendant, and Mark William Atkinson (*'Atkinson'* – the sole director of the respondent, in his capacity as surety) as second defendant (*'the defendants'*), for payment of some R2 million, being the full balance allegedly due and payable under the agreement (*'the action'*). It was defended and the bank's subsequent application for summary judgment was refused on 10 June 2009, with the defendants being granted leave to defend. There is no indication before us of the basis of the respondent's opposition to the summary judgment application since the opposing affidavit is not part of the appeal record, nor is there any indication why that application was refused by the presiding judge.

[6] The defences raised were contained in a plea and amended plea filed on 17 November 2009 and 23 July 2012 respectively.

[7] The main defences raised in the plea were as follows. First, the bank had failed to furnish proper notice of interest rate variations as required, with the domino effect that the instalments had been incorrectly calculated, were thus not due and payable, and breach triggering the acceleration clause as a result of non-payment could not be relied upon by the bank. Second, in December 2008 the bank chose not to demand payment of the full balance owing under the bond on

the respondent's default in payment, but instead gave the respondent the opportunity to bring the arrears up to date within a four month period, that is by the end of April 2009. The bank however in breach thereof issued summons prematurely in March 2009 for the full amount outstanding on the bond. Because the bank had already made its election, its subsequent institution of action for recovery of the full amount within the four month period (translating into an election to rather call up the full amount of the bond) was not competent. It is this latter defence which was focussed upon during the appeal.

[8] During the course of 2011 the respondent found a purchaser for the property and made an offer of settlement, but the bank accepted it a day later than the deadline stipulated. Because timeous acceptance by the bank was a suspensive condition of the sale of the property, the settlement offer fell away.

[9] On 12 January 2012 the bank, through its attorneys, caused a letter of demand to be delivered to the respondent in terms of s 345(1)(a) of the Act, claiming payment of some R2.6 million, being the full balance allegedly due and payable under the agreement by that stage. The respondent contended that the letter was neither *'competent* [nor] *appropriate in the circumstances'* given that *'the matter is not only* lis pendens *but the claim itself is in dispute'*. The bank disagreed and launched the winding-up proceedings on 4 April 2012. The action instituted in March 2009 was not withdrawn and is still pending in this court.

[10] Notwithstanding the general requirement relating to the procedure in motion proceedings as set out *inter alia* in *Bader and Another v Weston and Another*

1967 (1) SA 134 (C) at 136E-137C, the respondent initially opposed the application only on certain grounds set out in a notice in terms of rule 6(5)(d)(iii) of the uniform rules of court. The respondent failed to file an affidavit dealing with the merits of the application at that stage.

[11] Instead, the respondent delivered a short affidavit deposed to by Atkinson, which was not an answering affidavit, the gist of which was to complain that the bank was abusing the process of court in persisting with the application, given that the respondent was engaged in negotiations to settle the dispute with a different attorney who acted for the bank in the action. Atkinson disclosed that:

> *'The respondent has received a written cash offer to purchase the property… the respondent has accepted the offer… subject to a condition precedent that the* [bank] *agrees to cancel the bond against payment of the sum of R2.1 million… I am advised that if agreement is reached… in regard to the sale of the property but the* [bank] *is successful in liquidating the respondent, the result will be that the sale agreement will not be able to be given effect to in the light of the provisions of Section 345(2) as read with Section 348 of the Companies Act, 61 of 1973… the respondent is thus placed in an invidious position by the two contradictory stances adopted by the* [bank] *in instructing one firm of attorneys to negotiate a sale of the property while simultaneously giving instructions to a second firm of attorneys to apply to liquidate the respondent.'*

[12] The bank's replying affidavit dealt with the aforementioned allegations and in particular that it had rejected the offer disclosed to the court by the respondent.

[13] Without having obtained the leave of the court, the respondent then delivered another affidavit, purporting to respond to the bank's replying affidavit, which in turn resulted in a flurry of further affidavits being filed by the parties. During the

course of argument we were informed that those affidavits had been accepted by the parties as forming part of the record which the court *a quo* was then expected to deal with. This is a most unsatisfactory approach for the parties to have adopted. There is ample authority to the effect that a party cannot simply elect to file further affidavits without having first obtained the court's leave to do so, and it has also been held that, if this is done, the court is entitled to regard such affidavits as *pro non scripto*: see *inter alia Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at paras [9] and [11]. This undesirable state of affairs is exacerbated by the respondent's failure to comply with the well-established requirements that a deponent to an answering affidavit must admit or deny, or confess and avoid, allegations in the applicant's affidavit, failing which the court will, for purposes of the application, accept the applicant's allegations as correct: *Moosa v Knox* 1949 (3) SA 327 (N) at 331. The result is that as a court of appeal we are bound by a record consisting of a number of affidavits which the court *a quo* did not, in the absence of properly motivated applications for their admission, even have to consider.

[14] The grounds set out in the respondent's notice in terms of rule 6(5)(d)(iii) were that:

14.1 the deeming provision in s 345(1)(a) of the Act cannot apply in circumstances where the creditor's claim referred to in the demand is already the subject of disputed litigation;

14.2 the defence of *lis pendens* applies by virtue of the pending action; and

14.3 the application was an abuse of process.

[15] The amended plea (filed later on 23 July 2012) repeated the earlier defences (albeit in an amplified manner) and raised a further defence to the bank's claims in the action. The further defence was that the respondent's failure to pay was excused because of the bank's *'wrongful and unreasonable frustration'* of its attempts to make payment in a lesser amount than what was owed, in full and final settlement, as well as the bank's breach of an *'implied term'* in the mortgage bond obliging it to act reasonably, in good faith, and with due care and diligence in relation to the property. In the alternative it was alleged that the bank breached a legal duty owed to the respondent to act reasonably and with due care in regard to the latter's interest in dealing with the property, causing the respondent to sustain liquidated damages in the form of further interest accrued on the loan.

[16] It was only on 22 August 2012 that Atkinson, in one of his further affidavits, confirmed the allegations contained in the amended plea on oath, and averred that the defences raised therein had been advanced in good faith. He submitted that *'… the contents of the pleadings in the action show that there is a dispute on* bona fide *and reasonable grounds regarding firstly, whether or not the applicant's claim against the respondent is due and payable and, secondly, whether it is enforceable at all by virtue of the doctrine of impossibility of performance, and that a liquidation application should not be entertained in the circumstances.'*

The findings of the court a quo

[17] The court *a quo* found that the defences raised were *bona fide* on two grounds. First, the respondent had spent considerable costs in defending the action. Second, the judge who was seized with the summary judgment application had already pronounced on the *bona fides* of the defences raised by refusing the application and granting leave to defend (although, as previously mentioned, there is nothing on the papers disclosing the grounds of opposition in that application, nor why the order was made).

[18] The court *a quo* also found that the respondent had placed sufficient facts before it which, if proved at the trial of the action, would successfully defeat the bank's claims, but did not provide reasons for this finding.

[19] Having reached these conclusions the court *a quo* found that the fact of the pre-existing dispute precluded the bank from placing reliance on a neglect to pay within the meaning of s 345(1)(a) of the Act; and that, even accepting that the bank is a contingent creditor, the application would in any event have to fail because the bank had relied exclusively on its own (disputed) debt. It had failed to provide details or facts of any unpaid debts to other creditors to demonstrate that the respondent is commercially insolvent.

[20] The court further found that no reliance could be placed on *'without prejudice'* communications relating to settlement offers made by the respondent. During argument we were informed that this appears to have been a *bona fide* error by

the court *a quo*, given the respondent's concession during those proceedings that it had itself waived privilege.

[21] Finally, the court concluded that the winding-up application was an abuse of the court process because the bank was aware, in light of the pending action, that its claims were reasonably and *bona fide* disputed. In view of its findings the court *a quo* did not consider it necessary to deal with the issue of *lis pendens.*

The issues which crystallised during the appeal

[22] During the appeal it was accepted by the appellant that for the delivery of a s 345(1)(a) demand to trigger the deeming provision of an inability to pay, the debt which is demanded must be due. Put differently, the only effect of a failure to comply with the demand, if the debt is already due, is that the deeming provision of an inability to pay debts becomes the ground for the winding-up: see *inter alia*, *Absa Bank Ltd v Tamsui Empire Park 1 CC* (11151/2013) [2013] ZAWCHC 187 (3 December 2013) at para [30].

[23] The arguments presented thus centred on whether the debt is disputed by the respondent on *bona fide* and reasonable grounds, and indeed whether the Badenhorst rule even applies. The unusual feature of this case is that these fall to be determined against the pleadings filed in the pending action, and which have been incorporated by reference into the respondent's affidavit of 22 August 2012, which affidavit was in turn accepted by the court *a quo* as being properly before it. One of the defences raised by the respondent in the action relates

directly to the bank's case as pleaded, namely whether it competently exercised an election when it instituted proceedings for recovery of the full amount.

[24] The papers (which incorporate the amended particulars of claim as well as the plea and amended plea) disclose the following. On 28 November 2008 the bank addressed a letter to the respondent, care of Atkinson, in terms of s 129 of the National Credit Act 34 of 2005. The s 129 letter (although poorly drafted and thus confusing in certain respects) called for payment of the arrears on the bond. The final paragraph of the s 129 letter reads as follows:

> *'Should you fail to reply to this notice within 10 business days of date of delivery hereof, by either not contacting us in order to make an alternative repayment arrangement or by not approaching a debt counsellor for assistance in this matter, the bank will institute legal proceedings for recovery of the full outstanding balance in terms of the mortgage agreement.'*

[25] On 10 December 2008 the chief financial officer of the respondent wrote to the bank, informing it that the respondent was experiencing financial difficulties in maintaining the bond repayments. The bank was requested to provide *'some leeway until the first quarter of next year while we put repayment measurement* [sic] *in place. We will still pay on a monthly basis as we do at this stage. It might not be the full amount, but we will still deposit steadily'.* This was clearly an attempt to reach an alternative repayment arrangement as required by the s 129 letter. (For purposes of this appeal the only relevance of the s 129 letter is within the context of whether the bank had made an election.)

[26] On 22 December 2008 the bank responded that it would only accept payment of the full monthly instalment plus a monthly amount equivalent to 25% of the arrears for a four month period, that is until the end of April 2009. During January 2009 the respondent made two payments totalling R8 000. No further payments were made.

[27] The cause of action pleaded by the bank in its amended particulars of claim (the original particulars of claim do not form part of the papers) was that the defendants failed to pay *'on demand one or more of the payments they were obliged to make… more specifically on the following dates and in the following amounts…'*. The period of default relied upon by the bank commenced on 31 January 2008, that is, more than a year before summons was issued, and eleven months before the bank gave the respondent time to pay. It was alleged that the failure to pay *'constitutes a default by* [the respondent] *and a breach of its obligations in terms of the bond'.* Judgment was sought for the full amount outstanding, together with orders declaring the property specially executable and cancellation of the bond. Although it is common cause that the bond stipulates that a failure to make payment of any instalment triggers the acceleration clause, the main issue in the action is whether, against this background, the bank was entitled to proceed with summons for the full amount when it did.

[28] The bank contends that the Badenhorst rule does not apply because the respondent acknowledges liability for at least an amount of R100, and that the defence raised that the debt is not due and payable is extraneous to the

"indebtedness" within the meaning of the so-called rule. In support of this argument the bank relies on the decision in *Nedbank Ltd v Zonnekus Mansion (Pty) Ltd* (A378/2012) [2013] ZAWCHC 6 (7 February 2013). That case is however distinguishable because there the respondent had not seriously disputed that the debt was due and payable. It sought essentially to place the *locus standi* of the appellant bank in issue by disputing the validity of a cession under which the bank had sued. "Indebtedness" for purposes of the Badenhorst rule comprises two elements namely: (a) an admitted liability; and (b) that the debt is due and payable. In the present matter the respondent disputes that the debt (although its existence is admitted) is due and payable, which brings the dispute within the application of the rule.

[29] In the winding-up proceedings the bank's case is based squarely on two grounds, namely the deeming provisions in s 345(1)(a) and s345(1)(c) of the Act. As to s 345(1)(a), the respondent's defence is that the debt is not due. This defence cuts across the appellant's argument that, even where *quantum* is disputed, an admitted indebtedness of R100 or more is sufficient for purposes of the winding-up (as was held in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (WLD) at para [16]). The manner in which the bank has pleaded its case in the action, taken together with the common cause events that preceded the institution of the action, have persuaded me that this leg of the respondent's defence constitutes a triable issue. As previously stated, the bank has chosen to pursue its action. As a result, the aforementioned issue will be decided by a trial court on a balance of probabilities after hearing all of the evidence.

[30] The position might well have been different if the bank had withdrawn its action prior to launching the application for winding-up. While it is tempting to evaluate the respondent's defence in the action within the context of the winding-up proceedings, I believe that this would be the wrong approach. We would effectively be making findings on the self-same merits of a defence in circumstances where the bank has chosen to persist in the merits being determined by a court at a trial. In addition Atkinson's defences in the action are identical to those of the respondent, and we would thus be prejudging his defence in circumstances where he is not a party to the winding-up proceedings.

[31] I appreciate that the respective purposes of the action and the winding-up proceedings are different. The goal in the action is to compel payment by the respondent and/or Atkinson, while the goal in the winding-up proceedings is, strictly speaking, to achieve a *concursus creditorum* in which payment will hopefully be recovered in due course. However, just because the goals are different, this does not mean that the result will necessarily differ, particularly where it is common cause that the bank is a secured creditor of the respondent.

[32] As to s 345(1)(c) of the Act, the bank contends that it has been proven to the satisfaction of the court that the respondent is unable to pay its debts because of its "inability" to pay, coupled with its offers of settlement. I have already dealt with the triable issue concerning the inability to pay; and I am not persuaded that the offer of settlement was unconditional. It was made in an attempt to settle *'the dispute'* between the parties. The bank alleged that a separate property owned by the respondent is fully bonded in favour of Standard Bank and that *'it is clear*

that if the Respondent cannot pay the monthly instalments to the Applicant, then it also did not and cannot pay the instalments due to [Standard Bank]*'.* However this takes the matter no further, given that it is not only speculative, but is also premised on an inability to pay, rather than an unwillingness to do so.

Findings

[33] Having regard to the aforegoing, I am not persuaded that the court *a quo* conflated the bank's *locus standi* with the grounds relied upon by it for the winding-up. I am also not persuaded that the court *a quo* erred in finding that the Badenhorst rule applied and that the bank's claim was disputed on *bona fide* and reasonable grounds for purposes of the winding-up. Of course, the defences raised may be dismissed at the trial, but that is the forum that the bank has chosen to test the veracity of those defences.

[34] That leaves the court *a quo*'s finding that the application was an abuse of the court process. In *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F-G the court held that:

> *'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of* "abuse of process"*. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective.'*

[35] In the particular circumstances of this matter I do not agree that the bank's launching of the winding-up proceedings constituted an abuse of the court process. First, as I have already indicated, the relief respectively sought in the pending action and in the winding-up proceedings is different, and is not based upon the same cause of action; and the evidence advanced in the affidavits also covered events subsequent to the bank's institution of the action in March 2009. Second, the bank's case in the winding-up proceedings was certainly arguable in the court *a quo*, particularly having regard to the manner in which the respondent advanced its defence.

Conclusion

[36] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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J I CLOETE

YEKISO J

I agree.

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N J YEKISO

ZONDI J

I agree.

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D H ZONDI