

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 42861/21

CASE NO: 42862/21

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[15 AUGUST 2022]

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SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

K2016522263 (SOUTH AFRICA) PROPRIETARY LIMITED

RESPONDENT

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

And

TUMELO PATRICK MATLALA

RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] There are two opposed applications under case numbers 2021/42861 and 2021/42862, respectively. The parties agreed that these two matters are related and must be heard together. The deponents to the affidavits are the same in both matters. The applicant in case no 2021/42861, First National Bank (“FNB”) seeks the final winding up of the respondent, K2016522263 (South Africa) Proprietary Limited based on inability to pay debts owing to the applicant, as contemplated in terms of the provisions of section 345 read with Section 344(f) of the Companies Act 61 of 1973.
- [2] The applicant alleges that, the respondent is currently indebted to it in the sum of R496 919.25 as at 1 July 2021 pursuant to a written loan agreement and a written re-advance and a future use restatement agreement concluded between the applicant and respondent, both duly represented, on 10 July 2019 and 11 October 2019 at Germiston, respectively.
- [3] The written loan agreement was conditional upon the respondent providing inter alia the following security; a limited suretyship by Tumelo Patrick Matlala (“Matlala”), the sole director of the respondent under case number 2021/42861, in favour of the applicant for all obligations of the respondent to the applicant. Also, the registration of a covering mortgage bond in favour of the applicant by the respondent over the respondent’s immovable property, being: remaining Extent of Erf 3 Union Township, Registration Division I.R., The Province of Gauteng, Title Deed No.: T2615/2019, Local Authority, Ekurhuleni Metropolitan Municipality, measuring 410 (Four Hundred and Ten) Square Metres in extent (“the property”).
- [4] The applicant in case no 2021/42862, First National Bank (“FNB”) seeks to obtain a money judgment against the Matlala in his capacity as surety and co-principal debtor in the amount of R496 919.25 together with interest and costs (“the money judgment application”).

- [5] On 27 June 2019, Matlala bound himself in favour of the applicant as surety and co-principal debtor, jointly and severally with the respondent, for all the latter's obligations to the applicant. On the same date and at Germiston, a mortgage bond number B16614/2019 was executed in favour of the applicant over the property. The respondent provided a written cession and pledge of property income in favour of the applicant over the property. Pursuant to the written loan agreement, the applicant lent and advanced the sum of R410 000.00 to the respondent and otherwise complied with all its obligations in terms of the written loan agreement. The applicant alleges that, it lent and advanced the further sum of R190 000.00 to the respondent and otherwise complied with all its obligations in terms of the written re-advance and future use restatement agreement.
- [6] Clauses 14.1, 14.2 and 14.2.2 read with clause 14.3 and 14.3.1 of the standard terms and conditions of the written loan agreement stipulates that, in the event of the respondent failing to pay any amount due in terms of the loan agreement, the applicant will have the right, without prejudice to any other rights which it may have, and without further notice, to accelerate or place on demand payment of the outstanding balance, which shall immediately become due and payable.
- [7] The applicant alleges that the respondent, in breach of both loan agreements, failed to maintain the repayment arrangements of R7 438.50 per month and as a consequence, the applicant demands payment of the entire indebtedness, being the accelerated amount. The failure to maintain the monthly agreed upon repayment instalments constituted a default event as referred to in the loan agreements. Notice as anticipated by clause 14.3 according to the applicant was provided to the respondent on 9 June 2021. This is admitted. Demand was made on 13 July 2021 in terms of section 345 of Act 61 of 1973 ("the 1973 Companies Act") and a copy was delivered to the respondent at its registered address which delivery was effected through registered post; and the Sheriff fixed a copy of the demand to the main entrance at its principal place of business. The return of service issued by the Sheriff in question records:

“On this day of July 2021 at 11:20 I properly served the LETTER OF DEMAND I.T.O SECTION 345 OF THE COMPANIES ACT 61 OF 1973 in this matter by leaving /delivering a copy thereof by affixing it to the MAIN ENTRANCE of the REGISTERED ADDRESS of K2016522263 (SOUTH AFRICA) (PTY) LTD at MANAGING DIRECTOR OF K2016522263 (SOUTH AFRICA) (PTY) LTD 74 BLACK REEF ROAD, GERMISTON 1401, which is kept locked and thus prevents alternative service.”

- [8] It is common cause that, 74 BLACK REEF ROAD, GERMISTON serves as both the business and residential address albeit with separate gates. The Sheriff in a supplementary affidavit confirms that: the property situated at 74 Black Reef Road, Dinwiddie, Germiston has two entrances, one gate, referred to by Matlala as the main gate which gate leads to a portion of the premises dedicated to medical suites and a secondary gate, not mentioned by Matlala, which gate leads to the premises of the respondent.
- [9] The sheriff further explained that he had to serve several legal processes in recent times on the respondent and/or Matlala and because of the consistent closure of the secondary gate, but was compelled to serve the relevant processes at the medical suites. The Sheriff was in possession of Matlala’s mobile number. Matlala failed to answer the call made to him and knowing that the persons at the medical suites would refuse to accept service, he had no alternative but to effect service by affixing.
- [10] In opposing these applications, the respondent (Matlala) advances the exact same grounds. Mr Matlala says the respondents came to know about the letter of demand after the Sheriff of the Court delivered the papers on the 12 October 2021 at his residential address. The liquidation and money judgment applications were served on his daughter, a minor child born on 8 July 2005. It is common cause that the daughter was above the age of 16 when she accepted the papers. The requirements of rule 4(1) (a) of the Uniform Rules in relation to service were thus satisfied. The respondent does not dispute that the address at which the demand was served at no 74 Black Reef Road, Germiston, constitutes the respondent’s registered address which also serves

as his residential address, but it is the content of the return of service that is challenged.

[11] It is trite that a demand left at the registered office is a demand for such purposes even if it does not in fact come to the attention of the company¹. In our law, the return of service issued by the Sheriff having attended to service of the demand constitutes prima facie evidence that there has been due compliance with section 345(1)(a)(i) as far as delivery of the said demand is concerned. Section 43(2) of the Superior Courts Act of 2013 provides that: “(2) The return of the Sheriff or Deputy Sheriff of what has been done upon any process of the Court, shall be prima facie evidence of all matters therein stated.”

[12] The court in *Van Vuuren v Jansen*² held that a sheriff's return of service is regarded as prima facie evidence of the truth of its contents and a Court will require clear and satisfactory proof that it is incorrect. The attack on the integrity of the return of service in circumstances where no alternative method of service was achievable, constitutes substantial compliance with the requirements of Act 63 of 1971. I am satisfied in this instance that the return of service issued by the Sheriff having attended to service of the demand constitutes prima facie evidence that there has been due compliance with section 345(1)(a)(i) as far as delivery of the said demand is concerned. Effective service of the application to liquidate has been achieved especially under circumstances where an affidavit opposing the relief claimed has been delivered on behalf of the respondent.

[13] It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds³. This is known as the so-called 'Badenhorst rule'. Where, however, the respondent's

¹ *Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd* 1983 (3) SA 815 (O) at 824; *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) at 418B–C

² 1977 (3) SA 1062 (T) at 1062

³ See *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347 – 348 and *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) ([1987] ZASCA 156) at 980D.)

indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds⁴.

[14] Section 344(f) of the 1973 Companies Act provides that a company may be wound up by the Court if *“the company is unable to pay its debts as prescribed in section 345”*. Section 345 (1) (b), for its part, provides that a company *“shall be deemed to be unable to pay its debts if ... any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process”*.

[15] The respondent alleges as to the merits of the application that, the respondent managed to reduce the arrears amount of R 11 629.79 to R 3 129.79 between the 14 June 2021 and 02 September 2021 as per the remedial plan in place with the applicant. The failure of the respondent to pay the instalment for May and June 2021 occurred as a result of the Covid-19 lockdown restrictions and since then the business has returned to normality. The respondent is adamant that it is solvent as its assets exceed its liabilities. The allegation by respondent that the bond account is paid up is not supported by evidence in support of such allegation. According to the applicant as at 10 November 2021 was and remains in arrears in the amount of R6 822.46, which the respondent in their answering affidavit, indicated that it the arrears amount was reduced to R 3 129.79 when the applications were launched. The applicant, is only required to establish an indebtedness of no less than R100.00.

[16] The respondent alleges that as a direct result of its failure to have maintained the monthly agreed upon instalments and at the request of Matlala that the parties had entered into a remedial plan. The allegations in this regard were denied by the applicant. The respondent failed to provide any proof of the conclusion or the existence of a repayment plan or arrangement.

⁴ *Kalil v Decotex supra n3 at 980C.*

[17] The loan agreements provide that the applicant would be entitled to prove the respondent's indebtedness by way of a certificate of balance which the applicant complied with in both instances. The law regarding certificates of balances remains, it stands as prima facie proof of the substance of its contents in any litigation to exact payment⁵. The certificate of balance in these applications remains unchallenged.

The liquidation application

[18] After a proper reading and consideration of the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law, I am satisfied that the applicant has made a prima facie case that the granting of a provisional order of winding-up of the respondent on the ground that the respondent is unable to pay its debt is justified as described in section 345. The respondent is clearly indebted to the applicant. The respondent's version is found to be far-fetched and untenable. This court is entitled to take a robust approach. There is no bona fide dispute whether the debt is due and payable even on the respondent's own version from the papers. The issues raised by the respondent in opposing the claim of the applicant, is not regarded sufficient to constitute a bona fide dispute on reasonable grounds in relation to the liquidation application.

The money judgment application

[19] The respondent, by extension on the basis of the suretyship agreement is indebted to the applicant in the amount of R496 919.25 together with interest at the applicable prime rate.

[20] The following order is made in respect of case no: 2021/42861

1. The respondent is placed under provisional winding-up in the hands of the Master of the High Court.
2. A rule nisi is issued with return date on Wednesday, 12 October 2022 at 10 am, calling on the respondent and interested parties to show cause why the respondent should not be placed under final winding-up.

⁵ *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 38H-383A.

3. This order is to be served as follows:
 - 3.1 by the sheriff on:
 - 3.1.1 the respondent at its principal place of business;
 - 3.1.2 the employees of the respondent at its principal place of business;
 - 3.1.3 the South African Revenue Service;
 - 3.2 on creditors of the respondent by one publication on the Citizen newspaper.
4. The costs of this application will be costs in the liquidation.

The following order is made in respect of case no: 2021/42862 (the money judgment application)

- [19] Judgment is granted against the respondent in the following terms:
- 19.1. payment of the amount of R496,919.25;
 - 19.2. payment of interest on the aforesaid amount at the rate of 1% per annum above the prime interest rate (currently 7%) calculated daily and compounded monthly in arrears from 1 July 2021 to date of final payment; and
 - 19.3. costs of suit such costs to be taxed on the attorney and client scale.

MUDAU J
[Judge of the High Court]

APPEARANCES

For the Applicant:	Adv. S Aucamp
Instructed by:	Smit, Jones & Pratt Incorporated
For the Respondents:	Mr Matlala in person

Date of Hearing: 27 July 2022

Date of Judgment: 15 August 2022