

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2020/28966

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

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B.C. WANLESS
2023

3 February

In the matter between:

**THE LAND AND AGRICULTURAL
DEVELOPMENT BANK OF SOUTH AFRICA**

Applicant

and

PHOSFERT TRADING (PTY) LIMITED

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 3 February 2023.

JUDGMENT

WANLESS AJ

Introduction

[1] On the 27th of July 2022 Mudau J heard an application by THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA (*“the Applicant”*) for the final, *alternatively*, provisional, winding-up of PHOSFERT TRADING (PTY) LIMITED (*“the Respondent”*). The application was opposed and argument was presented before the learned Judge. Pursuant thereto, on the 15th of September

2022, Mudau J delivered a written judgment¹ and granted an order whereby the Respondent was provisionally wound-up. Thereafter, the Applicant complied with the terms of the order in respect of service and the Respondent has opposed the granting of a final winding-up order. The application papers were not supplemented by either party. Arising therefrom, the issues essentially remain the same insofar as the grounds upon which the Applicant relies for the winding-up of the Respondent and the opposition thereto on behalf of the Respondent, are concerned. It follows therefrom that the decision this Court must make is whether the Respondent should be finally wound-up or whether the application for the winding-up of the Respondent should be dismissed and the order of Mudau J provisionally winding-up the Respondent set aside.

[2] The Applicant's application for the winding-up of the Respondent is in terms of subsection 346(1)(b) of the *Companies Act 61 of 1973* ("*the Act*") read with subsections 344(f) and (h) and 345(1)(c) of the Act.

Subsection 346(1)(b) of the Act states:

"Application for winding-up of company

- (1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made-
 - (a)
 - (b) by one or more of its creditors (including contingent or prospective creditors);²

Subsections 344(f) and (h) of the Act read as follows:

"Circumstances in which company may be wound up by Court

A company may be wound up by the Court if-

- (f) the company is unable to pay its debts as described in section 345;
- (h) it appears to the Court that it is just and equitable that the company should be wound up. ³

Finally, *subsection 345(1)(c) of the Act* reads:

¹ *Caselines 035-1 to 035-12,*

² *Emphasis added.*

³ *Emphasis added.*

“When company deemed unable to pay its debts

- (1) A company or body corporate shall be deemed to be unable to pay its debts if-
 - (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.”⁴

[3] This Court is aided greatly by the fact that Mudau J has delivered a clear and concise judgment in this matter when granting an order provisionally winding-up the Respondent. In the premises, particularly in light of the fact that the application papers are identical in respect of both stages of the application for the winding-up of the Respondent, it would be superfluous for this Court to simply repeat the facts and principles of law applicable to this matter and as already dealt with by Mudau J. Rather, the approach this Court shall adopt in this judgment will be to refer to the salient portions of Mudau J’s judgment, incorporating, *alternatively*, distinguishing, same by reference thereto in the judgment of this Court, thereby reaching a decision as to whether this Court should grant a final winding-up order.

The facts

[4] The facts of this matter giving rise to the Respondent’s indebtedness to the Applicant are as set out in paragraphs [2] to [6] inclusive of the judgment of Mudau J (“*the judgment*”). This Court is in agreement therewith. Moreover, the documentation and the facts relied upon by the Applicant as set out in the judgment are common cause in this application, subject to certain grounds of opposition to the application raised by the Respondent. In light thereof, the end result is that the Applicant avers that the Respondent is indebted to the Applicant in terms of a Deed of Suretyship in respect of two companies, namely AGRI TRADING SERVICES (PTY) LIMITED (“*ATS*”) and AGRI OIL MILLS (PTY) LIMITED (“*AOM*”) in the total sum of not less than R122 308 995.58 as at 11 February 2019, excluding further interest and costs for which the Respondent is indebted as surety *in solidum* for and co-principal debtor, jointly and severally, with each of *ATS* and *AOM*. The reason why the Respondent is ultimately indebted to the Applicant is in light of the fact that the said Deed of Suretyship was lawfully ceded by GROCAPITAL FINANCIAL SERVICES (“*GroCap*”) to the Applicant.

The grounds of opposition raised by the Respondent

[5] A number of grounds of opposition were raised on behalf of the Respondent to the application. The grounds of opposition raised at the stage when the matter first came before this Court are as dealt with in the judgment when granting the provisional winding-up order. When the matter was once again set down before this Court for

⁴ *Emphasis added.*

the granting of a final winding-up order the grounds of opposition argued at this stage⁵ had become somewhat refined. These can be broadly described as the following:

- 5.1 an application for the final winding-up of the Respondent cannot be granted on the grounds of being just and equitable;
- 5.2 the indebtedness of the Respondent towards the Applicant is genuinely disputed in that:
 - 5.2.1 the transactions fall outside the Applicant's powers;
 - 5.2.2 the Applicant did not allege nor prove the fulfilment or waiver of any of the suspensive conditions contained in the agreement between GroCap and ATS and the agreement between GroCap and AOM;
 - 5.2.3 the Applicant did not allege nor prove the fulfilment or waiver of any of the suspensive conditions contained in the agreement of cession between GroCap and the Applicant;
 - 5.2.4 the Applicant has not demonstrated that GroCap's purported claims against ATS, AOM and/or the Respondent were part of the subset supposedly ceded, nor does the Applicant allege when and how that was supposed to have taken place;
- 5.3 it is denied that the Respondent provided a suretyship undertaking to GroCap.

The test to be applied in the granting of a provisional and final winding-up order

- [6] It is important that the distinction between the test to be applied at the stage when a court considers the granting of a provisional winding-up order and that when a court considers the granting of a final winding-up order, be borne in mind. This distinction was clearly and succinctly set out in the matter of *ABSA Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd and Another*⁶ where it was held:

“At the provisional stage the applicant had to make out only a prima facie case – in the peculiar sense of that term explained in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 at 976D – 978F. In order to succeed in obtaining a final order the applicant has to prove its case on the evidence as it falls to be assessed in the usual manner in proceedings on motion for final relief. The practical distinction between the two requirements thus arises out

⁵ Respondent's Heads of Argument on Final Winding-up dated 12 October 2022.

⁶ (23255/2010) [2012] ZAWCHC 43 (15 May 2012) at paragraph 1.

*of the application of the Plascon-Evans evidentiary rule in opposed proceedings for a final order; cf. Export Harness Supplies (Pty) Limited v Pasdec Automotive Technologies (Pty) Limited 2005 JDR 0304 (SCA), at para. 4. The effect has been described in terms which suggest that a higher 'degree of proof...on a balance of probabilities' is required for a final order than for a provisional order (Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA), at para. 3). While the basis for that description is understandable, I would suggest respectfully that the position might more accurately be described as being that while the applicant must establish its case on the probabilities to obtain either a provisional or a final order, in an opposed application, a different, and more stringent approach to the evidence, consistent with the Plascon-Evans rule, must be adopted by a court in deciding whether the applicant has made a case for a final order. This is in contradistinction to the approach to an opposed application for a provisional order, when the case is decided on the probabilities as they appear from the papers."*⁷

- [7] It is now necessary for this Court to consider each of the grounds of opposition raised by the Respondent to the granting of a final winding-up order.

An application for the final winding-up of the Respondent cannot be granted on the grounds of being just and equitable.

- [8] This ground of opposition was raised at the first hearing by the Respondent but does not appear from the judgment to have been considered by Mudau J when granting the order provisionally winding-up the Respondent. Moreover, it does not appear from the judgment that the order of provisional winding-up was based on just and equitable grounds. In addition thereto, it would seem that the Applicant both at the first hearing and again before this Court, placed little emphasis on this ground as one upon which the Respondent should be wound-up, but rather, based its case primarily on the fact that the Respondent was unable to pay its debts.
- [9] The Respondent submitted that it had dispelled any case the Applicant may have had for a just and equitable winding-up. In summary, the Applicant had alleged that it would be just and equitable to wind the Respondent up because the Respondent had been used to mislead creditors in a sham company structure. In opposition thereto the Respondent had alleged that it was at all times independent, trading and generating funds as a holding company and engaged in business with both ATS and AOM at arms' length.

⁷ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph 26; *Nedbank Ltd v Zonnekus Mansions (Pty) Ltd* (A378/2012) [2013] ZAWCHC 6 (7 February 2013) paragraph 24; *ASA Metals (Pty) Ltd v Vardocap (Pty) Ltd* (5630/2017) [2018] ZALMPPHC 12 (17 April 2018) at paragraph 15

[10] In light of the foregoing and when this Court applies the correct test in respect of a final winding-up order to the facts as set out in the application papers, this Court cannot grant a final order winding up the Respondent in terms of subsection 344(h) on the grounds that it would be just and equitable to do so.

The transactions fall outside the Applicant's powers

[11] This ground was raised by the Respondent at the first hearing and was dealt with in the judgment. The Respondent is quite correct that in terms of section 3 of *The Land and Agricultural Development Bank Act 15 of 2002* the Applicant is empowered and obligated to pursue only the purposes set out therein and a transaction which falls outside such a purpose is invalid and unenforceable.⁸ It was submitted by the Respondent that neither the business of ATS nor AOM concerned agriculture. As such, any purported cession by GroCap to the Applicant of GroCap's alleged claims against ATS and AOM fell outside the Applicant's purpose and are invalid and unenforceable. In the premises, it was submitted by the Respondent that there is and can be, no principal debt owing by ATS and/or AOM to the Applicant.

[12] In the judgment, this proposition was rejected on the basis that, on the Respondent's own version, the business of both ATS and AOM involve the business of "*the procurement of soya beans, crushing them to produce soya oil and soya cake and selling the end products into the market*". On this basis the Court held that the business of ATS and AOM fell squarely within the objects of subsections 3(1) and (2) of *The Land and Agricultural Development Bank Act 15 of 2002*. These subsections are set out, in full, in the judgment. In order not to burden this judgment unnecessarily, the said subsections (which by their very nature are lengthy and wide) will not be repeated herein.

[13] It is necessary to point out that it was not the Respondent's version that the businesses of both ATS and AOM were as described above. Rather, it is common cause on the application papers that whilst AOM carried on business processing and manufacturing in the soya bean market as set out above, ATS was in the business of trading on the South African Futures Exchange, predominantly in agricultural derivatives.

[14] This Court has carefully considered the foregoing and is satisfied that the business carried out by both ATS and AOM fall within the meaning and purpose of *The Land and Agricultural Development Bank Act 15 of 2002* with particular reference to section 3 thereof. In respect of the business of ATS, this Court is satisfied that same

⁸ *Panamo Properties 103 (Pty) Ltd v Land and Agricultural Development Bank of South Africa 2016 (1) SA 202 (SCA) at paragraph [21]; Land and Agricultural Development Bank of South Africa v Impande Property Investments (Pty) Ltd 2014 JDR 2084 (GJ).*

would be covered by the provisions of subsection 3(1)(f) of *The Land and Agricultural Development Bank Act 15 of 2002* which states that:-

“The objects of the Bank are the promotion, facilitation and support of the enhancement of productivity, profitability, investment and innovation in the agricultural and rural financial systems.”⁹

The fact that ATS carried out business trading on the South African Futures Exchange, predominantly in agricultural derivatives, puts this mode of business within the objects envisaged by *The Land and Agricultural Development Bank Act 15 of 2002*.

- [15] But even if this Court is incorrect in this regard, it must be accepted that the business carried out by AOM and as described earlier in this judgment, falls squarely within the objects of section 3 of *The Land and Agricultural Development Bank Act 15 of 2002*. Hence, even if, for the purposes of argument, it was accepted that the cession by GroCap to the Applicant of GroCap’s claims against ATS fell outside the Applicant’s purpose and were therefore invalid and unenforceable, the Respondent’s indebtedness in respect of AOM would still remain. In the premises, this Court ultimately agrees with the finding of Mudau J in the judgment and holds that this ground of opposition does not assist the Respondent in avoiding the granting of a final winding-up order.

The Applicant did not allege nor prove the fulfilment or waiver of any of the suspensive conditions contained in the agreement between GroCap and ATS and the agreement between GroCap and AOM

The Applicant did not allege nor prove the fulfilment or waiver of any of the suspensive conditions contained in the agreement of cession between GroCap and the Applicant

The Applicant has not demonstrated that GroCap’s purported claims against ATS, AOM and/or the Respondent were part of the subset supposedly ceded, nor does the Applicant allege when and how that was supposed to have taken place

- [16] Whilst the above three headings were set out separately earlier in this judgment¹⁰ and were raised as separate grounds of opposition on behalf of the Respondent, it is, by virtue of the nature thereof, convenient to deal with them simultaneously, as if under one heading. Indeed, this appears to be the approach adopted by Mudau J in the judgment when granting the provisional winding-up order.

⁹ *Emphasis added.*

¹⁰ *Subparagraphs 2.2; 2.3 and 2.4 ibid.*

- [17] In respect of the cession and the underlying *causa* thereto, it was (correctly in this Court's opinion) submitted on behalf of the Applicant that it does not "lie in the mouth of the Respondent" to, without adducing any evidence, deny that the claim was properly and lawfully ceded to the Applicant. Moreover, as pointed out by the Applicant, representatives of both the cedent and cessionary have confirmed, under oath, that the claim was ceded and complete. As found by Mudau J in the judgment, as cessionary, the Applicant is entitled to enforce all rights that previously vested in the cedent, including the enforcement of rights related to securities provided to the cedent as per their SLA. The learned Judge further found that the Respondent had not provided any countervailing evidence to dispute that the claim was in fact ceded. In the premises, Mudau J held that such a bald or bare denial by the Respondent does not constitute a defence as the Applicant's version is, in this instance, not seriously or unambiguously addressed.
- [18] This Court not only accepts the submissions made on behalf of the Applicant but also concurs with the decision reached on this aspect by the Court granting the provisional winding-up order. In the premises, none of the grounds as set out above form the basis of valid opposition to prevent this Court from granting an order finally winding-up the Respondent.

It is denied that the Respondent provided a suretyship undertaking to GroCap

- [19] With regard to this ground of opposition raised by the Respondent, it is not clear whether the Respondent ultimately relies on *iustus error*, *alternatively*, fraud. In the Applicant's Heads of Argument (filed prior to the first appearance in this matter) the argument in response to this ground of opposition deals solely with *iustus error* and fraud is not mentioned. Moreover, in the judgment, when dismissing this ground of opposition to the application the Court noted that "*The high-watermark of the respondent's case is its reliance on iustus error*". Mudau J, despite acknowledging earlier in the judgment that the director of the respondent alleges she was induced by fraud to sign a page of the Deed of Suretyship, does not mention fraud again in the judgment and does not deal with fraud when dismissing this ground of opposition by the Respondent. However, in the Respondent's Heads of Argument on Final Winding-up dated the 12th of October 2022 (after the granting of the provisional winding-up order) reliance is placed squarely on fraud and the defence of *iustus error* has been specifically abandoned.
- [20] More specifically, the Respondent seeks to avoid any liability and therefore any indebtedness to the Applicant arising from the Deed of Suretyship as a result of fraud committed by a third party whose misrepresentation caused the Respondent's director to sign a single page of the document.
- [21] Despite the apparent confusion as to the nature of the Respondent's defence (in law), what is clear to this Court is that the facts of this matter remain the same. In the

premises, it is merely necessary for this Court to consider, on the same facts as before, whether the Applicant is entitled to a final winding-up order once the *Plascon-Evans* evidentiary rule is applied, taking into account that the Respondent now relies on fraud rather than *iustus error*.

- [22] Whilst admitting that she signed the Deed of Suretyship, Mrs Rohit (the Respondent's director) alleges that she signed only the one page "...as shareholder of ATS authorising and consenting to Hugo renewing ATS's financial facilities". Mrs Rohit also alleges that she was told that the page she was signing would be attached to and constitute, a shareholders' resolution and not a Deed of Suretyship.
- [23] The submissions made on behalf of the Applicant in response to these averments, even despite the fact that they were made in respect of the defence of *iustus error*, are no less noteworthy in respect of the defence of fraud. The first such submission is that Mrs Rohit concedes that the document was signed to renew ATS's financial facilities which included security demanded in the form of a suretyship. Thus, submits the Applicant, there can be no doubt that Mrs Rohit knew she was signing a Deed of Suretyship, particularly since she, on her own version, is a seasoned businesswoman.
- [24] In addition to the foregoing the Applicant also submits that there could have been no doubt that Mrs Rohit knew she was signing a Deed of Suretyship in light of the fact that not only did she sign this document but she also signed the resolution referred to in the said Deed of Suretyship. It was submitted on behalf of the Applicant that this resolution, which was put up as an annexure to the replying affidavit, clearly refers and agrees to the "Unlimited Cross Suretyship".
- [25] Based on the foregoing, it was submitted that the Respondent's version is accordingly so far-fetched and untenable that this Court is justified in rejecting it on the application papers before it and is entitled to grant a final winding-up order.
- [26] Having regard to, *inter alia*, the submissions made on behalf of the Applicant and applying the test as set out in *Plascon-Evans* to the facts of this matter, it is clear that the defence of fraud cannot assist the Respondent in its opposition to the application by the Applicant for the final winding-up of the Respondent.

Conclusion

- [27] That concludes an examination of the grounds of opposition raised by the Respondent in respect of the application for a final winding-up order. Where any other possible grounds of opposition may not have been dealt with in this judgment, this Court is in agreement with the judgment of Mudau J in respect of the granting of the provisional winding-up order and is satisfied that those grounds of opposition do not stand muster at the stage of granting a final winding-up order when the correct

test is applied thereto. Further, this Court aligns itself with the findings of Mudau J in relation to, *inter alia*, the Applicant having proven the Respondent's indebtedness to it; the fact that the Respondent is commercially insolvent and, most importantly, the inability of the Respondent to pay its debts. This judgment will not be burdened by, once again, dealing therewith.

[28] In the premises, it must follow that this Court finds that the Respondent is unable to pay its debts within the meaning of subsection 345(1)(c) of the Act and should be finally wound-up.

Order

[29] This Court makes the following order:

1. The Respondent is finally wound-up pursuant to the provisions of subsection 344(f) read with subsection 345(1)(c) of the Companies Act, 61 of 1973 (as amended) and read with the Companies Act, 71 of 2008 (as amended).
2. This order shall be served forthwith on the Respondent at its registered address and a copy of this order shall be published once in the Government Gazette and once in the Citizen newspaper.
3. The costs of this application are to be costs in the winding-up of the Respondent's estate.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 17 October 2022
Judgment: 3 February 2023

Appearances

For Applicant: L van Grass
Instructed by: Van Greunen and Associates

For Respondent: W Strobl
Instructed by: KVN Inc.