

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES

DATE: 26TH FEBRUARY 2024

(1) CASE NO: 2023-022639

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

NYONI, PETEZAKE

Respondent

(2) CASE NO: 2023-24656

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

ALORA PALLETS (PTY) LIMITED

Respondent

Neutral Citation: *FirstRand Bank v Nyoni* (2023-022639); *FirstRand Bank v Alora Pallets* (2023-024656) [2024] ZAGPJHC ---- (26 February 2024)

Coram: Adams J

Heard: 13 and 14 February 2024

Delivered: 26 February 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 26 February 2024.

Summary: Suretyship – application for judgment – principal debtor breached loan agreements – acceleration clause – whole amounts owing, due and payable after loans 'called up' – not open to principal debtor and Surety to only pay up the arrears – judgment granted against Surety –
Winding-up application – commercial insolvency ground for winding-up order – debt owing, due and payable in full after loan 'called up' – no longer open to company to pay off loan in instalments – whole amount of loan should be paid – if not, company deemed unable to pay its debts and is therefore commercially insolvent – winding-up order granted.

ORDER

- (1) In the matter under case number: **2023-022639**, judgment is granted in favour of the applicant against the respondent for: -
 - (a) Payment of the sum of R8 495 755.87, together with interest thereon at 11.75% (the current prime interest rate) subject to change, calculated daily and compounded monthly in arrears, from 8 February 2024 to date of final payment, both days inclusive.
 - (b) Payment of the sum of R863 984.35, together with interest thereon at 18.75% (the current prime interest rate plus 7%), subject to change, calculated daily and compounded monthly in arrears, from 8 February 2024 to date of final payment, both days inclusive.

- (c) Payment of the costs of this application on the scale as between attorney and own client scale.
 - (2) In the matter under case number: **2023-024656**, the following order is granted: -
 - (a) The respondent is placed under final winding-up in the hands of the Master of the High Court of South Africa.
 - (b) The costs of this application shall be costs in the winding-up of the respondent.
-

JUDGMENT

Adams J:

[1]. On 13 and 14 February 2024 respectively the above two opposed applications came before me in the opposed motion court of that week. The applicant in both matters is FirstRand Bank Limited (FirstRand Bank), which lent and advanced monies to the respondent in the second application (Alora Pallets) pursuant to and in terms of a loan agreement dated 15 October 2019 / 18 November 2019, a subsequent 'Re-Advance and Future-Use Restatement Agreement' dated 19 March 2020 and a facility agreement dated 29 September 2022. On 15 October 2019 the respondent in the first application (Mr Nyoni) bound himself in favour of FirstRand Bank as surety *in solidum* and as co-principal debtor for the whole of Alora Pallets' indebtedness to the bank. In the second application FirstRand Bank applies for the final winding-up of Alora Pallets and in the first application the bank applies for a monetary judgment against the Mr Nyoni on the basis of the suretyship.

[2]. Both these applications are grounded by Alora Pallets' indebtedness to FirstRand Bank. It is accordingly convenient to deal with these two matters in one judgment, even though there has been no formal consolidation of the applications.

[3]. By September 2022, Alora Pallets had fallen into arrears with its account with the bank to the tune of about R127 000, and it was placed on terms by the bank to bring its arrears up to date within seven days. By 2 November 2022, the amount of the arrears had increased to R260 000 and the bank, as per a letter of demand of that day, 'called up' both the loan agreement and the credit facility, as it was entitled to do, and demanded payment of the total amounts outstanding on both accounts, which, at that stage, amounted to a sum in excess of R9.6 million.

[4]. On 6 December 2022 FirstRand Bank's attorneys addressed to Alora Palettes a notice in terms of s 345(1)(a)(i)¹ of the Companies Act², demanding payment of the amounts payable in terms of the loan agreement and the credit facility, totalling over R9.7 million. On the same day a letter of demand was addressed to Mr Nyoni, demanding from him the said sum on the basis of the suretyship given by him in favour of FirstRand Bank. Subsequent attempts by the parties and, in particular, Mr Nyoni, to resolve the impasse, came to naught. And during March and April 2023, FirstRand Bank proceeded with the issue of the above applications against Mr Nyoni and Alora Pallets. At that point, Alora Pallets was indebted to FirstRand Bank in the total sum of R9 458 986.81 – R8 573 783.61 in respect of the loan account and R885 203.20 relating to the credit facility.

[5]. During the period from 6 December 2022, when the final demands were made by FirstRand Bank's attorneys, to 14 June 2023, when the respondents' answering affidavits in the two applications were deposed to by Mr Nyoni, Alora paid in total R1 245 384.94 on account of its indebtedness to FirstRand Bank. Those payments would have brought the accounts up to date at that stage, but for the fact both accounts had been 'called up'.

¹ Section 345(1)(a)(i) provides that '[a] company ... shall be deemed to be unable to pay its debts if –
(a) a creditor ..., to whom the company is indebted in a sum not less than one hundred rand then due –

(i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or

... ..

and the company ... has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or ...'.

² Companies Act, Act 61 of 1973.

[6]. The issue to be decided in the first application is simply whether a case is made out on behalf of FirstRand Bank for judgment against Mr Nyoni on the basis of the suretyship signed by him in favour of the bank. In the second application, the main question to be considered by the Court is whether Alora Pallets is commercially insolvent.

The First Application against Mr Nyoni

[7]. Mr Nyoni opposes the application for judgment against him on a number of bases, the most notable of which is his contention that Alora Pallets has, before and since the launching of this application, made payments on account of its indebtedness to FirstRand Bank, thereby extinguishing the arrears.

[8]. As correctly submitted by Mr Horn, who appeared on behalf of FirstRand Bank in both applications, whilst these further payments should be taken into account in the amount of the monetary judgment to be granted against Mr Nyoni, it does not detract from the fact that, after the debts were 'called up' by the bank, the whole amounts outstanding on both accounts, became owing due and payable. In the absence of payment by Alora Pallets of the full amounts owing, due and payable, the bank was entitled to insist on payment of the full outstanding balances. This means that it is no longer open to Alora Pallets to pay the debt in instalments. It is also no longer possible to extinguish the arrears. The entire debt is now payable, not only the arrears.

[9]. This, in turn, means that the Mr Nyoni, as surety, is liable to the bank for payment of the total of the amounts outstanding on the two accounts.

[10]. The other grounds raised by Mr Nyoni in opposition to the application are, in sum, as follows: (a) First, he contends that the application should be stayed pending the outcome of FirstRand's application for Alora's winding-up premised on its inability to pay its debts; (b) Second, Mr Nyoni contends that, should the liquidation application and the present application succeed, FirstRand will end up with two judgments for payment of the same debt – essentially a double recovery; (c) Third, Mr Nyoni alleges that his liability as surety will only arise if Alora is liquidated and its assets are insufficient to pay its

debts; and (d) Fourth, Mr Nyoni claims that the National Credit Act³ ('the NCA') applies to the facility agreement concluded between FirstRand and Alora Pallets and, therefore, to the suretyship too. If the Court finds that this is not so, then Mr Nyoni challenges the constitutionality of the applicable provisions of the NCA.

[11]. I shall make short thrift of these defences of Mr Nyoni and simply say that they are misguided and bad in law.

[12]. The benefit of *excussion* is the right of a surety (other than a co-principal debtor) against the creditor to demand that the creditor first proceed against the principal debtor with a view to obtaining payment, if necessary, by execution of assets, before turning to the surety for payment of the debt (or as much of it as remains unpaid). By virtue of the fact that the benefit of excussion does not avail Mr Nyoni, he is immediately liable, jointly and severally, for the indebtedness of Alora Pallets to FirstRand Bank. This is so if regard is had to the express provisions of the suretyship agreement, which provides in the relevant part of clause 11 as follows: -

'... [FirstRand] may demand that I/we immediately pay any amounts that are due and payable along with interest, costs and fees. If I/we do not either pay [FirstRand] or make arrangements with [FirstRand] to its satisfaction, [FirstRand] may take legal steps ...'.

[13]. As for the constitutionality challenge to certain provisions of the NCA, it was contended on behalf of FirstRand Bank that the purported constitutional challenge is defective. I agree with these contentions. Firstly, Uniform Rule of Court 16A was not complied with in that Mr Nyoni failed to give notice to the registrar of the challenge at the time of filing his answering affidavit. This is to afford interested parties the opportunity to respond to the challenge. Secondly, the challenge is impermissibly vague. Mr Nyoni says that the constitutional challenge is aimed at section 129 of the NCA, but section 129 provides for notice to consumers prior to enforcement proceedings.

[14]. The challenge seems rather to be directed at the provisions which exclude the application of the NCA to certain agreements. Even if this can be discerned from a benevolent reading of the answering affidavit, the grounds of

³ National Credit Act, Act 34 of 2005.

the challenge are not provided. Critically, Mr Nyoni fails to indicate which section of the Constitution he relies upon or how the relevant provisions of the NCA are in violation thereof. A fundamental principle of constitutional litigation is that such a challenge must be explicit and requires accuracy in the identification of the provision of legislation that is challenged on the basis that it is inconsistent with the Constitution. If these requirements are not complied with, the challenge must fail.

[15]. Accordingly, the constitutional validity challenge is still born.

[16]. For all these reasons, the application for judgment against Mr Nyoni should succeed.

The Second Application against Alora Pallets

[17]. In the second application, as I have already indicated, FirstRand Bank applies for the winding-up of Alora Pallets on the basis that it is, and is deemed to be, unable to pay its debts as contemplated in s 345 read with s 344(f) of the Companies Act.

[18]. Alora Pallets opposes the winding-up application on the basis of a number of defences. These defences are bad in law and without merit.

[19]. So, for example, it is contended by Alora Pallets that the application for its winding-up should be stayed pending the outcome of an application for a money judgment against its surety, Mr Nyoni. At a fundamental level, this stance is misguided. There is no basis in law for staying the winding-up application pending the outcome of the application for a money judgment against Mr Nyoni.

[20]. Moreover, Alora Palettes contends that it is factually and commercially solvent. For purposes of this application, FirstRand Bank is required to demonstrate only commercial insolvency. In that regard, it was held by the SCA in *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd*⁴ as follows: -

‘That a company's commercial insolvency is a ground that will justify an order for its liquidation has been a reality of law which has served us well through the passage of

⁴ *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 (SCA) at para 17.

time. The reasons are not hard to find: the valuation of assets, other than cash, is a notoriously elastic and often highly subjective one; the liquidity of assets is often more viscous than recalcitrant debtors would have a court believe; more often than not, creditors do not have knowledge of the assets of a company that owes them money – and cannot be expected to have; and courts are more comfortable with readily determinable and objective tests such as whether a company is able to meet its current liabilities than with abstruse economic exercises as to the valuation of a company's assets.'

[21]. A company is conclusively deemed unable to pay its debts when it fails to positively respond to a demand in terms of section 345 of the Companies Act. The phrase 'unable to pay its debts' connotes insolvency in the commercial sense, namely an inability to meet its day-to-day liabilities, even though the company's assets may exceed its liabilities.

[22]. *In casu*, an amount in excess of R9.6 million is presently owing, due and payable by Alora Pallets to FirstRand Bank. It is not able to pay this amount, which makes it commercially insolvent in that it is 'unable to pay its debts'. What is more is that Alora Pallets, which failed to comply with the s 345 demand from the bank, is conclusively deemed to unable to pay its debts.

[23]. Alora Pallets also contend that there exist exceptional circumstances which would justify my exercising my discretion not to liquidate the company. In that regard, Mr Horn referred me to the SCA decision in *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd*⁵, in which it was held as follows: -

'... generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against the respondent company that has not discharged that debt. ... the discretion of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a "very narrow one" that is rarely exercised and then in special or unusual circumstances only.'

[24]. It is contended by Alora Pallets that the exceptional circumstances consist *inter alia* of it being a black owned business, the fact that its forty-seven or so employees would be rendered unemployable by a winding-up order and the fact that its business was adversely affected by the Covid-19 pandemic.

⁵ *Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* 2022 (1) SA 19 (SCA) at para 12.

[25]. In my view, these circumstances are not exceptional and definitely not so exceptional as to warrant the court exercising its discretion in favour of Alora Pallets.

Conclusion and Costs

[26]. Accordingly, the relief sought by FirstRand Bank in both applications should be granted.

[27]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁶.

[28]. I can think of no reason why I should deviate from this general rule in the first application. The costs order in the second application should be in accordance with the standard costs order in liquidation applications.

[29]. Furthermore, in the agreements in question provision was made for costs to be paid by Mr Nyoni on the scale as between attorney and own client in the event of the bank instituting legal proceedings to enforce its rights in terms of the said contracts.

[30]. I therefore intend awarding costs in the first application against Mr Nyoni in favour of the applicant on the scale as between attorney and own client. The costs of the second application should be paid by the liquidated company.

Order

[31]. Accordingly, I make the following orders: -

(1) In the matter under case number: **2023-022639**, judgment is granted in favour of the applicant against the respondent for: -

- (a) Payment of the sum of R8 495 755.87, together with interest thereon at 11.75% (the current prime interest rate) subject to change, calculated daily and compounded monthly in arrears, from 8 February 2024 to date of final payment, both days inclusive.

⁶ *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

- (b) Payment of the sum of R863 984.35, together with interest thereon at 18.75% (the current prime interest rate plus 7%), subject to change, calculated daily and compounded monthly in arrears, from 8 February 2024 to date of final payment, both days inclusive.
 - (c) Payment of the costs of this application on the scale as between attorney and own client scale.
- (2) In the matter under case number: **2023-024656**, the following order is granted: -
- (a) The respondent is placed under final winding-up in the hands of the Master of the High Court of South Africa.
 - (b) The costs of this application shall be costs in the winding-up of the respondent.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

HEARD ON:	13 th and 14 th February 2024
JUDGMENT DATE:	26 th February 2024 – judgment handed down electronically.
FOR FIRSTRAND BANK (APPLICANT IN BOTH MATTERS):	Advocate N J Horn
INSTRUCTED BY:	Werksmans Attorneys, Sandton
FOR THE RESPONDENTS IN BOTH APPLICATIONS:	Adv M Skhosana, together with Adv Sithole
INSTRUCTED BY:	M T Raselo Incorporated, Mondeor, Johannesburg