



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 4426/2021P

In the matter between:

BUSINESS PARTNERS LIMITED

APPLICANT

and

FAIR DEAL SELECT CC

RESPONDENT

Coram: Koen J
Heard: 7 September 2022
Delivered: 4 October 2022

ORDER

1. A rule nisi is issued calling upon all persons interested to show cause before this Honourable Court on 25 November 2022 at 9h30 or as soon thereafter as the matter may be heard, why the respondent should not be finally wound-up, and why the costs of this application, and the applicant's costs in relation to the application to compel

compliance with a subpoena issued by the respondent, should not be costs in the liquidation;

2. This order operates with immediate effect as a provisional order for the winding-up of the respondent;

3. Service of this order is to be effected by:

(a) Publication forthwith in both the *Government Gazette* and the *Mercury* newspaper;

(b) Service on the South African Revenue Service;

(c) Service on the registered address of the respondent at 303 Crimby Avenue, Westcliff, Chatsworth;

(d) Service on the employees of the respondent, if any; and

(e) Service on any registered trade union that represents any of the employees of the respondent, if any.

JUDGMENT

Koen J

[1] The applicant, Business Partners Limited, in its capacity as a creditor of the respondent, Fair Deal Select CC, seeks an order for the provisional winding-up of the respondent.¹ It is not in dispute that a written demand for R2 645 498.75 was addressed on behalf of the applicant to the respondent on 11 March 2021, and that the amount demanded remained unsatisfied thereafter for a period of 21 days. In the ordinary course, that would mean that the respondent is deemed to be unable to pay its debts,² and as the other requirements for the provisional liquidation of the respondent have been satisfied, a provisional winding-up order may follow. The respondent however disputes the amount of its alleged indebtedness. The issue arising is whether the debt is

¹ The respondent's heads of argument were filed late. It brought a substantive application for condonation which was not opposed, and condonation was granted.

² Section 66(1) of the Close Corporations Act 69 of 1984, read with s 345(1) of the Companies Act 61 of 1973.

disputed by the respondent on reasonable and bona fide grounds.³ At the stage of an application for a provisional order of liquidation, the applicant must show that the debt *prima facie* exists, and it is for the respondent to show that it is bona fide disputed on reasonable grounds.⁴

[2] The respondent is a property developer. Its sole member is Mr Ramakrishnan Pillay, who is also referred to as Collin Pillay (Mr Pillay). The respondent and the applicant have a long business association going back, on what is alleged in the papers, to before 2009. During that association, the respondent has operated a number of accounts with the applicant. They include mainly account numbers 403575, 403576 and 407410, although there is also an account with number 703414 in respect of the payment of a royalty. It is common cause that account 403575 has long been settled and is irrelevant to the issues before this court. It will accordingly not feature further in this judgment.

[3] Account 403576 was opened in respect of a loan agreement concluded on 8 December 2009. Clause 3 of that loan agreement provided:

‘3. PURPOSE FOR WHICH THE LOAN IS GRANTED

The loan is granted for purposes of financing:

- | | | |
|-----|------------------------|------------------------------------------------------|
| 3.1 | The business known as: | Select Construction |
| 3.2 | Situate at: | 303 Crimpy Avenue
Westcliff
Chatsworth
4092 |
| 3.3 | Nature of business: | Property Development.’ |

[4] The loan was granted subject to various securities being put in place. Mr Pillay provided a suretyship in respect of the debts of the respondent. A covering bond was registered by Mr Pillay and his wife to secure all their indebtedness howsoever arising. That would include the suretyship obligations of Mr Pillay. In addition, on 18 January 2016, the respondent caused a covering mortgage bond no B526/2016 to be registered

³ *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A).

⁴ *Hülse-Reutter and another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C) at 218D–219C.

over the property described as Erf 1029 Queensburgh, in respect of 'any cause, including but not restricted to moneys lent and advanced and/or to be lent and advanced. . .'. The property mortgaged in terms of this bond is situated at 90 Coronation Road, Malvern. During the latter half of 2017, the respondent was developing a sectional title scheme comprising six units on the property. The scheme is known as Coronation, or also as Millereece.

[5] On 19 October 2017, the parties concluded a further loan agreement. It is very similar in its terms to the loan agreement referred to in paragraph 3 above. The purpose of the loan is stated in similar terms to that of the previous loan, the only difference being that the 'Nature of business' is stated as 'Residential Development', and not 'Property Development.' Nothing seems to turn on that difference. The composition of the loan, and the purposes for which it would be paid out, are specifically stated to be 'Other R232 109,00', 'Raising fee R51 300,00', 'Other R20 000,00' (later explained to be for 'The Quantity Surveyor or Representative'), another 'Other R2 728 915,00' and 'Land and Buildings R1 467 676,00'. Account number 407410 was opened in respect of this loan.

[6] The 'Other R2 728 915,00,' being the major part of the loan, is significant. It is reflected as payable to the applicant. The 'Conditions for Payment' applicable thereto state that it is:

'To be paid upon compliance with all conditions precedent towards contract number 403 576, except 8.4.13. Any shortfall shall be paid from the land and buildings allocation.'

Clause 8.4.13 of the loan agreement required that proof of payment by the respondent of a minimum amount of R1 500 000 towards the applicant's loan account number 403576 had to be submitted. Compliance with this condition precedent was however not insisted upon, as the amount of R2 728 915 was paid/credited to account 403576 without the sum of R1 500 000 having been paid to account 403576. What the condition of payment clearly contemplated was that the payment of R2 728 915 would be in addition to the payment of R1 500 000 in respect of the respondent's indebtedness to the applicant on account 403576. It was further envisaged that account 403576 might even after those amounts having been credited be in debit, as the condition of payment

expressly recorded, in respect of the balance on that account, that 'any shortfall shall be paid from the land and buildings allocation.' With the amount of R1 500 000, being the subject of the condition precedent not being paid, account 403576 would remain with a balance of at least R1 500 000, and probably more, as a shortfall was envisaged. Whatever the amount owing on account 403576 might have been, an aspect to which I shall return below, it is clear that there was no agreement between the parties that the payment of the R2 728 915 would extinguish the respondent's liability to the applicant under account number 403576.

[7] The following amounts were accordingly disbursed from and/or applied in respect of account 407410 pursuant to this loan agreement:

Payment to account 403576	R2 728 915
A raising fee payable to the applicant	R 51 300
Quantity surveyor fees	R 20 000
Amount retained out of which monthly interest payable on the loan amount advanced would be paid	R 232 109
Amount to be retained to pay over to the respondent or its creditors in respect of development (not R1 500 000)	<u>R1 467 676</u>
	R4 500 000

The debit of R2 728 915 on account 407410 found its corresponding entry as a credit in account 403576. The respondent contends that it believed that this payment discharged any outstanding liability on account 403576, but that could not be, as has been demonstrated in paragraph 6 above. If the payment of the R2 728 915 was to have extinguished the balance on account 403576, then there would have been no need to exclude the anticipated payment of R1 500 000, or to provide for 'any shortfall'. There is no scope, on the wording of the condition of payment, for the respondent to have been under such an impression.

[8] Indeed, the copy of the statement in respect of account 403576 annexed to the respondent's answering affidavit reflects the credit of R2 728 915 on 9 November 2017, which then left a balance of R2 625 752.15. Whether this statement can be relied upon

is an aspect to be returned to below when considering whether the debt is bona fide disputed on reasonable grounds.

[9] Various debits and transactions were effected on account 403576 after 9 November 2017 until 20 March 2019 (that is according to a copy of the statement relating to that account provided by the applicant with the consent of the respondent, as the copy thereof annexed to the respondent's answering affidavit was incomplete). On 20 March 2019 the balance on account 403576 was extinguished by credits to that account of R1 733 070.09 and R53 167.46.

[10] At some stage, various sectional title units were seemingly developed on the property at 90 Coronation Road. Units 1,3, 4 and 5 were sold and transferred prior to 20 March 2019, as on that date, according to a letter from Phipson-De Villiers Attorneys dated 23 July 2021, which is more than two years after the event, the following historical fact, under the heading '90 Coronation Road, Malvern: Business Partners' was recorded:

'With further reference to the above, we confirm the following amounts were paid to Business Partners in respect of their release figures when the transfers were registered in the Deeds Office. . . .'

The letter confirms that a total amount of R4 000 000 was paid.

[11] It is the apportionment of this R4 000 000 payment, which has assumed significance in this application.

[12] According to the account printout in respect of account 407410, amounts of R1 700 000 and R110 968.35 were credited to that account on 20 March 2019, and R102 794.10 was credited to that account on 25 April 2019. These credits total R1 913 762.45. That left R2 016 237.55 of the payment of R4 000 000.

[13] According to a statement in respect of account 703414, an amount of R300 000 was credited to that account on 20 March 2019, being in respect of a royalty payment. The corresponding debit was reflected in account 407410.

[14] What remained of the R4 000 000 was an amount of R1 786 237.55, which was credited to account 403576 on 20 March 2019 as two credits of R1 733 070.09 and R53 167.46 respectively. Altogether these payments amount to exactly R4 000 000:

Amounts paid to account 403576	R1 786 237.55
Royalty payment	R 300 000.00
Payments credited to account 407410	<u>R1 913 762.45</u>
	R4 000 000.00

[15] Although the correctness of some interest amounts which have been debited to account 403576 during November 2017 to June 2018 have been disputed by the respondent, the above allocation of payments/credits, although some of the details relating thereto emerged only in the replying affidavit, has not been contested in argument. But, importantly from the respondent's perspective, the R4 000 000 which it alleged had not been accounted for, has been properly accounted for.

[16] In its founding affidavit, the applicant relied on the loan agreement concluded on 9 November 2017, that is account 407410, as the underlying causa for the outstanding debt due to it and on which the liquidation application is based. In its answering affidavit, the respondent alleged that had the R4 000 000 transferred by Phipson–De Villiers Attorneys all been allocated to account 407410, it would have extinguished that liability as well; hence it owes nothing to the applicant in respect of account 407410. Insofar as the applicant explained that the R4 000 000 was used on 20 March 2019 to settle an outstanding indebtedness on account 403576, the respondent complained that a different indebtedness was now sought to be relied upon in reply. It is of course trite law that an applicant has to make out its case in its founding affidavit,⁵ and not in reply.

⁵ *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and another* 1980 (1) SA 313 (D).

[17] It is correct that the basis for the applicant's claim, as alleged in the founding affidavit, is confined to the balance owing in respect of account 407410. The applicant cannot rely on amounts owing in respect of other accounts, because these were not the causa alleged in the founding affidavit. However, the applicant's case was not that there were any outstanding debts owing in respect of any other accounts and causes of action, but that it had allocated the R4 000 000 received to the payment of those accounts, thus extinguishing whatever was owing on those accounts, and leaving only the balance owing on account 407410, on which it relies for the provisional order. If the applicant was entitled to allocate the payments/credits to the accounts in the manner it had done, then there was nothing wrong, in principle, in its approach to rely only on the indebtedness remaining on account 407410. Counsel were agreed that the allocation of the R4 000 000 had thus become the central issue for determination. This then turns to an enquiry into the issue whether such an allocation was permitted in the light of the relevant applicable legal principles. Neither party had really addressed this issue in their heads of argument, but it was dealt with fully in argument, after also allowing the matter to stand down over the short adjournment.

[18] The relevant legal principles regarding the allocation of payments made/received in a debtor/creditor relationship, have been summarized in *Ebrahim (Pty) Ltd v Mahomed*⁶ and are stated by *Christie's Law of Contract in South Africa*⁷ as follows:

'(1) The general principle is that the payment ought to be appropriated to the debt which the debtor had the most interest in discharging, that is to say, the debt bearing most heavily on the debtor, and the rules should be used as a guide towards that end, bearing in mind the circumstances of the particular case.

(2) The limitations upon the creditor's right to appropriate must also be recognised if the creditor has not appropriated. So an admitted debt must be paid before a disputed debt, a debt that is due must be paid before one not yet due, and an enforceable debt must be paid before an unenforceable one.

(3) *In favorem libertatis*, a judgment debt on which a writ of execution has been obtained will normally rank first

⁶ *Ebrahim (Pty) Ltd v Mahomed and others* 1962 (1) SA 90 (N) at 97F-100A.

⁷ G Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 497.

for payment, followed by a judgment debt, followed by a debt subject to *parate executie*, followed by a debt subject to any other penalty in the sense of some additional enforceable obligation which the debtor can avoid by paying the debt when it falls due. *Inter alia*, the accruing of interest and an acceleration clause rank as penalties for this purpose, but the fact that one debt is on a liquid document on which provisional sentence might be granted does not.

(4) A debt that is secured by a mortgage or pledge or a surety should be paid before an unsecured debt, a debt for which the debtor is solely liable before one for which it is jointly or jointly and severally liable, and one for which it is liable as principal before one for which it is liable as surety.

(5) If the debts are equal in all other respects, the payment should be appropriated to the oldest, that is to say, the first contracted.' (Footnotes omitted.)

[19] Common to both loan agreements under accounts 403576 and 407410, as a standard term and condition, is clause 7.2:

'7.2 Any payment received from the Borrower shall, in the first instance, be utilised against interest and sundry expenses, and thereafter against the principal debt.'

[20] This provision simply restates the common law position dealing with the appropriation of payments in respect of a single debt owing, comprising of capital and interest. The principle is also confirmed in *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)*.⁸ The provision does not deal with the situation of competing debts. In that regard, the legal principles summarized in *Christie's Law of Contract in South Africa* above apply.

[21] There is no evidence that the respondent had specified that the R4 000 000 payment should be appropriated to account 407410. That much was accepted on behalf of the respondent. Had it done so, as a condition of payment, such condition could have been refused by the applicant. There is also no evidence that the respondent had the most interest in discharging the debt on account 407410, or that it weighed more heavily on it, than the other debts paid from the R4 000 000. The respondent has not shown that the balance on each account was not due, owing and payable. It is not a case that

⁸ *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 829H – 832G.

the debt on account 407410 was due but that on account 403576 it was not, or that the latter debt was unenforceable. Indeed, the debt on account 403576 was the older debt.

[22] It was argued on behalf of the respondent that the debt under account 407410 was secured by the mortgage bond. But that is not entirely correct. The mortgage bond is a general covering bond, so it would cover any debt outstanding by the respondent to the applicant, including the royalty payment. It is so that the R4 000 000 was earned from the proceeds of land and buildings being constructed and sold, as contemplated for part of the finance to be provided pursuant to the loan agreement relating to account 407410 (R1 467 676, later apparently reduced even further to R542 000), but the major portion of that loan (R2 728 915) was used in respect of payment of the respondent's liability under account 403576. The loan was accordingly not restricted to the property development, such as to give rise to some form of implied condition that the proceeds from the sales of sectional title units were to be used solely to discharge the amount owing in respect of account 407410.

[23] It accordingly seems clear that the guiding principle was that the payment of R4 000 000 should be credited to interest and the oldest debt, which is what the applicant seemingly did. It appropriated the payment first to cover the interest on each of the two debts, being not only the more onerous obligation, but also what the common law and clause 7.2 of the standard terms and conditions of the loan agreements dictate. Thereafter the balance was applied in respect of the capital outstanding on the oldest debt, being that outstanding on account 403576 to result in a nil balance on that account. What remained was applied in respect of account 407410 and the royalty payment.

[24] Insofar as the payment of the royalty is concerned, although the terms relating to that indebtedness are terse, it was a debt that was due. Whether the royalty debt attracted interest is not clear. The R300 000 payment did not repay any interest, only capital. But even assuming that, contrary to the indebtedness on accounts 403576 and 407410, it might not have attracted interest and would thus be less onerous to the indebtedness in account 407410, if the R300 000 had been appropriated to account

407410, it would still have left a substantial balance due and owing on account 407410, in excess of that required by law for the liquidation of a company.

[25] The respondent would have received statements reflecting the balance owing to it from time to time – that is a simple commercial reality. If it had not, it could and undoubtedly as a matter of probability would have requested such statements. Although Mr Pillay referred to a time when he was indisposed, his illness did not cover the whole period since 2019. The doctor's certificate which he annexed in respect of a charge of R918.20 raised by a neurosurgeon, was dated 22 October 2019. That was several months after the payment of the R4 000 000 had been received and apportioned on 20 March 2019.

[26] Further, the respondent had brought an application for condonation in which one of the grounds advanced was that some of the delay which occurred in filing its heads of argument was due to the fact that, after receiving the heads of argument from the respondent's counsel, the respondent's attorney 'forwarded them to the Respondent's member as he has a legal advisor who is assisting him and advising him in this matter'. The attorney continues that

'Client detected an error in one of the figures which were referred to in the Heads of Argument and unfortunately neither I nor client were able to contact our Counsel regarding the correction as Counsel was detained in Pietermaritzburg High Court in an urgent application.'

What is clear from these allegations is that the sole member of the respondent, Mr Pillay, is not an ignorant person who might not have taken an interest in the outstanding obligations owed by the respondent to the applicant. On the contrary, he takes an active interest in the actual figures appearing in the heads of argument; *a fortiori* where statements would have been sent by the applicant reflecting the indebtedness remaining due to the applicant by the respondent. If there was a misallocation of the R4 000 000 as alleged by the respondent, then one would have expected an immediate objection from the respondent.

[27] The printout on account 403576 annexed to the respondent's answering affidavit as an annexure to correspondence received from its accountant, could only have

emanated from the respondent, meaning that it would have had possession thereof, at some stage after March 2019. That statement reflects the credits to that account which resulted in a nil balance, which means that the respondent would have been aware that these amounts were credited to that account on 20 March 2019, at a time, when on the respondent's version, it maintains it thought the debt owing on that account had been extinguished in 2017. If that was Mr Pillay's belief, then it is also difficult to understand why he, on 27 September 2019 concluded the 'Addendum to the loan agreement' of 19 October 2017, restructuring the repayments which inter alia recorded:

'Amendment to the finance charges in terms of clause 5, and extension of the repayment terms in clause 6 of the Loan Agreement (Term Loan 407410)

The outstanding balance and repayment terms in the Loan Agreement (Term Loan 407410) be extended and be repayable as follows:

R1 000 000 – payable on 01 February 2020; and,

R1 118 476 together with interest – payable on 01 September 2020.'

[28] At that time, the respondent on the above calculations owed the applicant some R2 118 476 with interest, which is remarkably close after taking into account interest, to the figure (R2 645 498.75 as at 26 February 2021) which was demanded by the applicant from the respondent and on which the application for provisional liquidation is based. The admission of liability and the calculations based on the above appropriations are accordingly consistent, which carries significant probative force. It is improbable that Mr Pillay would have signed this addendum if, as at March 2019, he believed that account 407410 was in credit.

[29] On 13 September 2019, Mr Pillay had written to the applicant in relation to the release of unit 6 at 90 Coronation Road from the mortgage bond in favour of the applicant, requesting that the applicant reduce its release fee. That is indicative of the fact that the respondent knew that there was an amount outstanding on the loan account. It accords with the terms of the final addendum referred to earlier.

[30] On 5 January 2021, Mr Pillay again requested that the applicant restructure the loan agreement. There would have been no reason to do so unless he knew that there

was an amount outstanding and that account 407410 had not been settled in full, as he alleges, by the payment of the R4 000 000.

[31] As the applicant was entitled to appropriate the payment of R4 000 000 in the manner it did, the extent to which the appropriation of the R4 000 000 did not extinguish the indebtedness on account number 407410 remained as an outstanding debt which the applicant could invoke as the basis for its application for liquidation.

[32] The alleged irregular interest calculations complained of for November 2017 (R18 012.21), December 2017 (R17 668.59), January 2018 (R18 451.13), February 2018 (R18 658.77), March 2018 (R17 042.74), April 2018 (R2 052.70), May 2018 (R18 119.58) and June 2018 (R18 922.64), totalling R128 928,36, even if disregarded in their entirety, would still leave a debt due by the respondent to the applicant considerably in excess of R200.⁹

[33] Although the respondent in its answering affidavit has stated that, if it is found to be indebted to the applicant in any amount whatsoever, that it will pay such amount over immediately, and arrangements therefor already having been made, failing which it will consent to its winding-up, it has not annexed its latest financial statements or indicated that it is possessed of available liquid resources to give effect to what it has indicated it would do.

[34] The applicant has shown that *prima facie* the respondent is unable to pay its debts within the meaning of s 69 of the Close Corporations Act. There is no reason why a provisional order for its winding-up should not follow. The respondent, for the reasons stated above, has not shown that such indebtedness is disputed on bona fide and reasonable grounds.

[35] The respondent has also brought an application to compel the furnishing of certain documents requested by a subpoena. I express no view as to the correctness of such a procedure. The founding affidavit in that application was signed on 1 September

⁹ See s 69 of the Close Corporation Act 69 of 1984.

2022, the notice of motion is dated 31 August 2022, and the papers were issued by the registrar on 6 September 2022. The answering affidavit reveals that the subpoena had been responded to with the applicant providing whatever documents it could on 29 August 2022. The respondent sought an order that the costs of that application be costs in the liquidation, alternatively that the applicant pay the costs of this application in the event of it being opposed.

[36] This application was ill-conceived and should be dismissed with costs. This costs order in favour of the applicant, shall form part of the rule I intend issuing for interested parties to show cause why, insofar as that may be necessary, it should not form part of the costs of the liquidation.

[37] The following order is granted:

1. A rule nisi is issued calling upon all persons interested to show cause before this Honourable Court on 25 November 2022 at 9h30 or as soon thereafter as the matter may be heard, why the respondent should not be finally wound-up, and why the costs of this application, and the applicant's costs in relation to the application to compel compliance with a subpoena issued by the respondent, should not be costs in the liquidation;
2. This order operates with immediate effect as a provisional order for the winding-up of the respondent;
3. Service of this order is to be effected by:
 - (a) Publication forthwith in both the *Government Gazette* and the *Mercury* newspaper;
 - (b) Service on the South African Revenue Service;
 - (c) Service on the registered address of the respondent at 303 Crimby Avenue, Westcliff, Chatsworth;
 - (d) Service on the employees of the respondent, if any; and
 - (e) Service on any registered trade union that represents any of the employees of the respondent, if any.

KOEN J

APPEARANCES:

For the applicant:

Ms L.K. Olsen

Instructed by:

Edward Nathan Sonnenbergs Inc

c/o Stowell and Co

Pietermaritzburg

For the respondent:

Mr G Harrison

Instructed by:

Logan Naidoo and Associates

c/o Mastross Inc

Pietermaritzburg