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Firstrand Bank Limited t/a First National Bank v Sentio Building (Pty) Limited

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(36162/13) [2016] ZAGPJHC 377 (1 April 2016)

INTRODUCTION

The case of *Firstrand Bank Limited t/a First National Bank v Sentio Building (Pty) Limited*, concerned an application by Firstrand Bank ("**the applicant**") for the final winding-up of Sentio Building (Pty) Limited ("**the respondent**") on the basis that the respondent was unable to pay its debts as contemplated in sections 344(f) and 345 of the Companies Act 61 of 1973 ("**the old Companies Act**"), read with section 9 of Schedule 5 to the Companies Act 71 of 2008 ("**the new Companies Act**").

The central dispute arose after the parties entered into a settlement agreement which was subsequently made an order of court. The respondent failed to comply with the payment obligations contained in that agreement. The applicant consequently sought to proceed with its original winding-up application. The respondent argued that the settlement agreement had finally disposed of the original winding-up proceedings and that the applicant was therefore required to institute proceedings *de novo*.

The primary issue before the Court was whether the applicant was entitled to proceed with its original winding-up application after the respondent had breached the payment obligations contained in the settlement agreement.

More specifically, the Court had to determine the proper interpretation of clause 5 of the settlement agreement.

Clause 5 provided that, should the respondent fail to make any of the agreed payments on the stipulated due date, the applicant would be entitled to an order placing the respondent under final winding-up. The respondent contended that the settlement agreement constituted a *novation necessaria*, creating an independent cause of action which replaced the original dispute. It relied on clause 6, which provided that the agreement constituted full and final settlement of all disputes arising from the winding-up application.

According to the respondent, the applicant was therefore required to institute fresh proceedings rather than proceed with the original application.

The applicant, however, argued that clause 5 expressly reserved its right to proceed with the original winding-up application if the respondent failed to comply with the settlement agreement. The parties agreed that the resolution of this issue depended on the proper construction of clause 5.

THE COURT'S FINDING

The Court first considered whether the substantive and formal requirements for a final winding-up order had been established. The respondent admitted its indebtedness to the applicant and had failed to comply with the payment obligations imposed by the settlement agreement. The Court found that the respondent was deemed unable to pay its debts in terms of sections 345(1)(a) and 344(f) of the old Companies Act. Importantly, the respondent had provided no evidence to rebut the presumption of commercial insolvency. Its failure to comply with the settlement agreement provided further evidence of its commercial insolvency. Thus, the Court was satisfied that the formal and substantive requirements for a final winding-up order had been met.

The Court then turned to the interpretation of clause 5. Meyer J emphasised that the provision had to be interpreted according to the established principles of contractual interpretation. The starting point is the language of the provision, considered within its context and having regard to its purpose and background. The Court relied on *Natal Joint Municipal Pension Fund v Endumeni Municipality* [1] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2] in confirming that interpretation is a unitary exercise.

The Court also considered the principles applicable to settlement agreements that have been made orders of court. The Court held that once a settlement agreement has been made an order of court, it becomes an order like any other and must be interpreted accordingly.

The Court rejected the respondent's interpretation of clause 5. It found that the respondent's interpretation was neither sensible nor supported by the language, context or purpose of the settlement agreement. The settlement agreement constituted a compromise of the original winding-up application and imposed clear payment obligations on the respondent.

Accordingly, the Court found that the applicant had conditionally abandoned its right to seek the winding-up of the respondent, with the condition being that the respondent strictly comply with the payment obligations contained in the settlement agreement.

The Court further explained that, ordinarily, a settlement agreement excludes proceedings based on the original cause of action. However, this is not the case where the agreement expressly, or by necessary implication, provides that a party may revert to the original cause of action if the settlement terms are breached.

The Court rejected the argument that the applicant was required to launch a new winding-up application. It noted that nothing in clause 5 required the applicant to institute fresh proceedings. In fact, the wording of the clause entitled the applicant to an order placing the respondent under final winding-up upon the occurrence of the stipulated breach. The settlement agreement also did not provide for the withdrawal of the original winding-up application.

The respondent also argued that clause 5 amounted to a consent to winding-up and was therefore contrary to public policy.

The Court rejected this argument. Although the settlement agreement preserved the applicant's contractual entitlement to seek a winding-up order, that entitlement remained subject to the Court being satisfied that a final winding-up order was competent, proper and appropriate in all the circumstances.

CONCLUSION

The Court emphasised that the court considering the winding-up application is not bound simply to give effect to what the parties agreed. A court may only make an order that is competent and proper.

Consequently, clause 5 did not constitute an automatic or impermissible consent to liquidation. The Court retained its judicial discretion to determine whether a final winding-up order should properly be granted. The Court was satisfied that the respondent was unable to pay its debts and that the formal and substantive requirements for a final winding-up order had been established.

Please note: Each matter must be dealt with on a case-by-case basis, and you should consult an attorney before taking any legal action.

[1] (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

[2] (802/2012) [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) (28 November 2013)



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