THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 64/07

NOT REPORTABLE

In the matter between:

MACRU FARMING CC **APPELLANT**

v

THE STANDARD BANK OF SOUTH AFRICA LTD **RESPONDENT**

Coram: Farlam, Van Heerden, Cachalia JJA

Heard: 11 March 2008

Delivered: 27 March 2008

Summary: Appeal against the grant of a final winding-up order – whether High Court had failed to investigate the surrounding circumstances that applicant had been improperly induced to institute winding-up proceedings. Held that the facts showed no such inducement. Appeal dismissed.

Neutral citation: This judgment may be referred to as *Macru Farming CC v Standard Bank of South Africa Ltd* (64/2007) [2008] ZASCA 20 (27 March 2008).

CACHALIA JA

[1] This is an appeal against an order granted by Landman J in the Mmabatho High Court confirming a provisional order for the appellant's final winding-up.

[2] The respondent, as the appellant's creditor, instituted urgent proceedings on 24 October 2005 to wind-up the appellant. It based its application on the appellant's inability to pay its debts as contemplated in s 68(c), read with s 69(1)(c) of the Close Corporations Act 69 of 1984 (the CC Act). The matter came before Zwiegelaar AJ, who granted a provisional winding-up order on 31 October 2005.

[3] When the matter came before Landman J on 15 December 2005, counsel for the appellant conceded that the appellant was commercially insolvent and unable to pay its debts. It nevertheless opposed confirmation of the rule on the ground that the court should, in the exercise of its discretion in terms of s 347(1)[1] of the Companies Act 61 of 1973, read with s 66 of the CC Act, postpone the hearing to give it the opportunity to sell its assets on its own and use the proceeds of the sale to settle its debts. In effect, what the respondent contended for was an order entitling it to liquidate its assets and to distribute the proceeds thereof amongst its creditors.

[4] The court below refused the request for a postponement and confirmed the provisional order on 23 January 2006. The reasons given were:

'(a) The two major creditors, the applicant and Agri Feed Operations Limited, are opposed to the request. They seek confirmation of the rule.

(b) The realisation of the respondent's immovable and movable assets is likely to be a complex exercise which will take some time to be implemented.

(c) More importantly, the exercise involving the realisation of those assets will be executed privately and outside the control of the creditors.

(d) The respondent has attempted to hold an auction on 10 November 2005. This was in conflict

[1] Section 347(1): 'The Court may grant or dismiss any application under section 346, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.'

with the provisional liquidation order. The respondent's actions support the proposition that the realisation of the respondent's assets should be done under the supervision of the Master and in accordance with the procedure provided for the winding-up of estates.

(e) There appears to be no prospect of saving the close corporation. Respondent intends selling the land upon which farming operations are conducted as well as its farming implements and equipment.'

[5] In the light of the appellant's concession in the court below that it was commercially insolvent and unable to pay its debts, it could not attack these reasons. Instead, leave to appeal was sought and granted by Zwiegelaar AJ primarily on the ground that Landman J, in exercising his discretion to grant the final winding-up order, had failed to investigate the surrounding circumstances leading to the appellant's liquidation. The appellant contends that, had the court below done this investigation, it would have established that the respondent had been improperly induced to bring the application. If this contention were correct, it would follow that by disregarding such circumstances, the court below had not properly exercised its discretion when it placed the appellant under a final winding-up order. This court would accordingly be at large to substitute its own discretion for that of the court below.

[6] In this court counsel for the appellant had difficulty explaining the appellant's reliance on this ground of appeal when the remedy it had sought in the court below was a postponement of the proceedings, not a discharge of the rule. For if the respondent's predominant motive or purpose was something other than the bona fide bringing about of the appellant's liquidation for its own sake, the appropriate remedy to seek would have been that the rule be discharged.

[7] Be that as it may, the appellant now relies on the following 'facts' to support its contention that the respondent obtained the winding-up order improperly:

7.1 The appellant's former attorney disclosed privileged information to a liquidator as a result of which rumours regarding the appellant's financial

affairs circulated, causing the respondent to call up the overdraft facility;

7.2 the respondent failed to comply with its 'Code of Banking Practice', which required it to take reasonable steps to develop a plan to assist the appellant with its financial difficulties before resorting to liquidation.

[8] With regard to the first complaint, there is no suggestion on the papers that the respondent procured any information from the errant attorney. Once it is accepted that the appellant had indeed exceeded its overdraft facility with the respondent on more than one occasion, and this is not disputed, the respondent was entitled to call it up. The fact that there may have been 'rumours' circulating regarding the appellant's parlous financial situation does not detract from this entitlement.

[9] I turn to the second complaint – the respondent's alleged failure to comply with its 'Code of Banking Practice'. The Code commits the bank to assist its clients to develop a plan to deal with their financial difficulties, consistent with the bank's interest and its clients. It does not prevent the respondent from instituting liquidation proceedings. The facts show that before instituting winding-up proceedings, the respondent held a meeting with the appellant on 23 August 2005 to discuss the latter's precarious financial position. The appellant acknowledged its indebtedness to the respondent and further agreed to the respondent perfecting the general notarial bond which it had registered over all the appellant's movable property in 2003. This was done on 25 August 2005.

[10] On 29 August 2005 the appellant advised the respondent that it wished to sell some of its movable assets so that it might liquidate amounts owed to its creditors. The respondent subsequently advised the appellant's attorneys that it was not amenable to the appellant alienating any of its assets and also that it intended launching winding-up proceedings. On 17 October 2005 the respondent learnt that Agri Feed Operations Limited, the appellant's other major creditor, had also launched

urgent proceedings to perfect its notarial bond.

[11] Against this background the respondent, on 24 October 2005, instituted urgent winding-up proceedings, the urgency being created by the fact that the appellant intended to sell certain of its assets. Had the impending sale gone ahead and the movable assets which were the subject matter of the respondent's notarial bond been sold, the respondent would have lost its security. In addition, the general body of creditors would have been prejudiced. In these circumstances it would have been irresponsible for the respondent not to liquidate the appellant. The appellant's reliance on the Code is therefore misplaced.

[12] In my view the appellant's attempt to impugn the conduct of the respondent has no merit. Had the court below given consideration to the 'facts' referred to in para 7 above, it would doubtless have come to the same conclusion.

[13] The appeal is dismissed with costs.

A CACHALIA
JUDGE OF APPEAL

CONCUR:

FARLAM JA
VAN HEERDEN JA