



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: 1699/2018

In the matter between:

MYBURGH GROEP (PTY) LTD

Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD

Respondent

In re:

THE STANDARD BANK OF SOUTH AFRICA LTD

Applicant

and

JACQUES DU TOIT N.O

1st Respondent

(In his capacity as Business Rescue practitioner of
MYBURGH GROEP (PTY) LTD)

MYBURGH GROEP (PTY) LTD

2nd Respondent

(Registration No: 2015/084718/07)
(Under business rescue supervision)

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

3rd Respondent

CORAM: DAFFUE, J

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 29 MARCH 2019

- [1] The Myburgh Group (Pty) Ltd (“Myburgh”) is the applicant in this application for leave to appeal, it having been finally wound up on 15 November. Standard Bank of SA Ltd, (“the Bank”), the creditor who successfully launched the winding-up application, is the respondent in this application. It opposes the application. In their heads of argument the legal representatives referred to the parties as cited in the winding-up application. I shall refer to them herein as “Myburgh” and “the Bank” to avoid confusion.
- [2] Due to administrative errors, the application for leave to appeal, which was filed as long ago as 16 November 2018, was brought to my attention on 7 February 2019 only. By agreement with the parties, heads of argument were filed for me to consider the application in chambers.
- [3] I referred to relevant authorities and held in *Matoto v Free State Gambling and Liquor Authority and others* (4629/2015) [2107] ZAFSHC 80 (8 June 2017) that the bar for granting leave to appeal has been raised with the introduction of s 17(1) of the Superior Court Act, 10 of 2013. Leave to appeal should only be granted whenever a court comes to a well-considered conclusion that there are grounds on which the court of appeal would come to a different conclusion.

- [4] I do not intend to deal with any of the grounds of appeal in any detail as I believe the judgment speaks for itself. I shall briefly refer to pertinent issues.
- [5] I have fully dealt with the defence based on s 45 of the Companies Act, 71 of 2008 in paragraphs [29] to [32] and nothing more needs to be said, save that even if the omnibus guarantee is disregarded which I found should not be the case, Myburgh's overdraft facility remains intact, meaning a debt in excess of R78m.
- [6] The alleged non-fulfilment of the suspensive agreement is a red herring. I dealt with the issue in paragraph [34] of the judgment.
- [7] The reliance on alleged non-compliance with the National Credit Act, 34 of 2005 ("NCA") is without substance. I stated in paragraph [35] that I was satisfied that the Bank sufficiently dealt with the points raised in the answering affidavit. It must be pointed out that the SCA held in *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA) at para [4] that it is not necessary to comply with s 129(1)(a) of the NCA before commencing with sequestration procedure. Sequestration procedure does not in essence constitute proceedings to enforce a credit agreement, thus for the recovery of a debt, but its purpose is to establish a *concursum creditorem*. See also: *Investec Bank Ltd v Mutemeri and another* 2010 (1) SA 265 (GSJ) at paras [27] – [31].
- [8] In winding up procedure it does not assist a debtor to show that the applicant's claim should be reduced, e.g. by eliminating excessive finance charges. See: *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and others* 1976 (2) SA 856 (W) at 861F.
- [9] The allegation that reckless credit was advanced to Myburgh is without substance. Myburgh relied on this defence in the answering affidavit, but this has been dealt with fully and

comprehensively in the replying affidavit. Although I did not deal specifically with Myburgh's allegation in my judgment, I duly considered the allegations, heads of argument and oral arguments. The Bank explained the plethora of documents and information relied upon to assess Myburgh and the other entities within the Group. In particular, and save for its own investigations, it relied on information obtained from Mr Dudley Myburgh.

- [10] Finally, I am satisfied that Myburgh's version pertaining to the Addendum entered into in respect of the increased overdraft facility is devoid of any merit. The allegation that it does not contain the full terms and conditions of the credit facility agreement, especially insofar as no reference to interest appears in the document, is incorrect. Myburgh and its legal representatives elected to turn a blind eye to the written terms and conditions attached to the credit facility agreement ("the Addendum") entered into on 9 October 2017. See: last paragraph of the Addendum at p 55 and pp 57 – 62. Interest is dealt with in paragraph 8 of the terms and conditions.
- [11] In conclusion it is reiterated that Myburgh's senior counsel all but conceded in his heads of argument filed in the winding-up application the indebtedness of R78 588 837.98 in respect of the overdraft facility. See: my judgment, paragraph [20]. In Mr Dudley Myburgh's affidavit of 19 March 2018 deposed to for purposes of business rescue, he admitted an indebtedness towards the Bank in an amount of R189m. See: my judgment, paragraph [26].
- [12] I have not been persuaded that the application for leave to appeal is meritorious, falling within the parameters set out in s 17 of the Superior Court Act.
- [13] Consequently the following order is made:

The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

J P DAFFUE, J

On behalf of Applicant : Mr HSL Du Plessis
Instructed by : c/o Blair Attorneys
Bloemfontein

On behalf of Respondent(s) : Advv P Zietsman SC & J Els
Instructed by : Phatshoane Henney Inc
Bloemfontein