IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 91998/2015

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: Yes/~~No~~
3. Revised: Yes/~~No~~

8 February 2017

[redacted]

(Signature)

8/2/2017

In the matter between:

MAHEM VERHURINGS CC **Applicant**

and

FIRSTRAND BANK LTD **Respondent**

JUDGMENT

DE VILLIERS, AJ:

Introduction

1 This is an application for leave to appeal against my order for the liquidation of the applicant issued on 15 December 2016. In order to avoid confusion, I refer herein to the respondent, the applicant in the main application, as "**the bank**" and to the applicant, the respondent in the main application, as "**the CC**".

2 The CC contends that I ought to have dismissed the original application. It does not contend that I erred in not referring the original application for oral evidence (in fact it was argued that I was precluded from doing so as neither party requested a referral) or that I ought to have granted a provisional liquidation order as opposed to a final one.

The issues on appeal

3 The notice of application for leave to appeal relies on the following grounds as the basis for seeking leave to appeal, as I understand it. The argument did not follow this order, and where applicable I reflect it too:

3.1 One, in various paragraphs spread throughout the notice, the CC avers that the bank in law was not entitled to rely on the statutory demand in terms of section 69 of the **Close Corporations Act**, 69 of 1984 ("**the CC Act**")[1] as the basis for deemed inability to pay debts and ultimately for the liquidation of the CC. According to this argument, the bank had to prove in its founding papers that the CC was commercially insolvent to rely on the statutory demand, did not do so and hence the bank in law was not entitled to rely on a statutory demand as the basis for the liquidation application.[2] The CC alleges in the alternative that the statutory demand and the liquidation application constituted legal action to collect outstanding debt in conflict with an agreement. In argument, it became clear that-

3.1.1 Despite disavowing reliance on **HBT Construction and Plant Hire CC v Uniplant Hire CC**,[3] in fact the CC's argument in essence is still based on Para 13 of that judgment.[4] There is one difference, it appears to me that the argument was that the CC did not seek to argue (as opposed to its notice of application for leave to appeal)[5] that the bank had to prove in its founding papers that the CC was commercially insolvent, but instead that this

alleged "*jurisdictional fact*" simply had to be shown on the papers (founding, answering, and replying affidavits). I make no finding that this about turn is permissible as it to my mind would not have changed the outcome of the application. It was common cause in argument that the **HBT Construction**-decision has been overruled by **Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd**.[6] The cases referred to in the main judgment where later judges differed from the findings in **HBT Construction**-case (and at least one more) for this reason do not need to be addressed. It appears that it was for this reason that I was not referred to those cases in argument when the main application was argued. I would have welcomed the references in the light of the unnecessary reference to **HBT Construction**-case, but I accept that there was no intention to mislead;

3.1.2 The CC also argued that I erred in rejecting its reliance on the agreement referred (which I address below). The CC relies as the principle basis of its case of the legal position on its interpretation of **Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another**,[7] which according to it both extended the **Badenhorst**-rule,[8] and obliged me to apply the extended **Badenhorst**-rule to the its defence based on the agreement;

3.2 Two, the notice reflected an argument that it was not proven that the CC was unable to pay its debts in the founding affidavit.[9] Apparently linked to this argument is that I erred in rejecting purported expert evidence that the assets of the CC exceeded the bank's claim,[10] and erred in relying on evidence in reply.[11] In argument, it became clear that-

3.2.1 The CC does not seek to argue that I in law was obliged to ignore new averments in reply, but it seems to be common cause that I had a discretion to accept new evidence in reply in appropriate circumstances. I assume that the argument was that this would be the case where evidence is relevant and came to the bank's knowledge after it deposed to the founding affidavit, as I had found in the main judgment. My finding has not been questioned. I stated in the main judgment that the submission that I had to ignore new matter in reply was wrong in law and could even be misleading. I must spell out that I do not believe that there was an intention to mislead when the submission was made. I did convey this to counsel during the argument of this application. I, myself, made errors in the main judgment.[12] In hindsight, I should have toned down my criticism. The task of an advocate is hard enough not to be exposed to judicial criticism expressed too easily;

3.2.2 The CC is of the view that I was compelled to have accepted the answering affidavits in the liquidation proceedings brought by Beaumont Assist (Pty) Ltd and handed up during argument. The main argument was that I ought to take cognisance of documents handed up as they were accessible to the public (were matters of public record) in order to give effect to *audi alteram partem*;

3.3 Three, and as foreshadowed above, the notice reflected an argument that I erred in not applying the **Badenhorst**-rule to the defence that the CC raised, namely that the bank was precluded by an oral agreement (the terms reduced to writing) to have brought the application for liquidation as it constitutes legal action to collect outstanding debt.[13] In fact, it is argued, I should have found that the application was brought *mala fide*.[14] Linked to this argument is that

I erred in not applying the *ratio decidendi* in **Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another**,[15] and dicta in **Firstrand Bank Limited v Nomic 153 (Pty) Limited**,[16] a judgment which I had pointed out in the main judgment.[17] Linked to this ground is that I erred in finding in motion proceedings that the defence that the CC raised, failed.[18] In argument, it became clear that-

3.3.1 In argument the first point raised by the CC was that I erred in interpreting the agreement as the outcome of my finding was in conflict with the stated purpose of the agreement even if I had to apply **Plascon Evans** principles;[19]

3.4 Four, the notice reflected that I erred in not dismissing the application based on repudiation, the *exceptio non adimpleti contractus* and non-compliance with the undertaking by the bank and/or the repudiation of such an undertaking by the bank.[20] What I ought to have found with regard to these issues has not been stipulated in the notice. These matters did not seem to me to be determinative of the matter and received little attention at the hearing. I do not address them further herein. I am unable to see how the obligation to make payment in terms of a written agreement could be reciprocal to any obligation under the oral agreement relied upon, or how any alleged breach of that agreement could constitute a reason for non-payment under the underlying written agreement.

4 I was not referred during argument to authority to contradict the findings that I have made.

The test on seeking leave to appeal

5 The test that I have to apply in considering an application for leave to appeal is set out in section 17(1) of the **Superior Courts Act**[21] (underlining added):

> *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) ..."*

6 The CC stated that it relied on both grounds.

7 With regard to the first ground, Bertelsman J held in **The Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others**[22] that the new act has raised the bar, there now must be a measure of certainty that there is a reasonable prospect of success. This approach has been held to be correct in this division in **Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others**,[23] a judgment by Ledwaba DJP, Pretorius J and Mothle J concurring in Para 25.[24] I am bound by this decision and I agree with it.

8 With regard to the second test, I must find that "*there is some other compelling reason why the appeal should be heard*". I was not referred to any authority to assist me with the interpretation of the second test, and I could find none.

9 In essence the CC contends that I ought to grant leave to appeal as there is a conflicting judgment in another division with regard to the **Badenhorst**-rule as formulated in this division,[25] namely the **Firstrand Bank Limited v Nomic 153 (Pty) Limited** to which I have referred the parties in the main judgment, but did not follow.

10 It seems to me, that I am not obliged by statutory law to give leave to appeal merely because there is such a judgment. The law is not that an applicant is entitled to leave to appeal simply because the presiding judge differed from another decision. Had this been case, it would have been stated as a separate ground for the granting leave to appeal. Something more is required of me before I can find that "*there is some other compelling reason why the appeal should be heard*". It seems to me that the legislation merely gives as an example for a finding by a judge of a compelling reason to grant leave to appeal "*conflicting judgments on the matter under consideration*". This is then an example as a factor upon which I could form an opinion that "*there is some other compelling reason why the appeal should be heard*".

11 I find it difficult to conceptualise a circumstance where I am convinced that there are no prospects of success on appeal (the first ground) and still find that I must give leave to appeal simply because I have differed from another case in my reasoning. It seems to me, that I must still consider the prospects of success. Indeed, this was what was held in **Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others**[26] at Para 24:

> "*That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. ...*"

12 I am bound by this decision and I agree with it.

13 In this case, the case that I differed from is in another division, constituted a summary of the law that has not been reasoned (and in my view incorrectly summarised the law), has not been followed, and seemingly does not cause any confusion in this division or anywhere else.

14 Even if I were wrong in my reasoning, the flexibility characteristic of the **Badenhorst**-rule would have meant that I was not obliged to have applied it. That characteristic stands central in this case. The court in the **Kalil**-case[27] did not apply the **Badenhorst**-rule to determine matter. It determined

the matter, by finding that the factual disputes, including about the *locus standi* of the applicant as creditor, ought to be dealt with by *viva voce* evidence. In fact, the Supreme Court of Appeal has found in **Louw v W P (Koöperatief) Bpk**[28] at 431F to G that the **Badenhorst**-rule should not be applied to a dispute where the defence against sequestration was based upon an interpretation of mortgage bonds and articles of association, even if that dispute was about the existence of the debt. I referred in the main judgment to **Total Auctioneering Services and Sales CC t/a Consolidated Auctioneers v Norfolk Freightways CC**,[29] a judgment by Willis J, Horn J and Bashall AJ concurring. In that case the court did not apply the **Badenhorst**-rule in considering the granting a provisional order. The court expressly rejected in Para 15 the argument that it was obliged to refuse the application as required by the **Badenhorst**-rule. I am bound by this reasoning, and not by the reasoning in **Firstrand Bank Limited v Nomic 153 (Pty) Limited**.

15 As far as I can determine, there is certainty, predictability, and uniformity in this division in the application of the **Badenhorst**-rule and the **Plascon Evans** principles. The counsel in this matter did not refer me to any comparable factual case. I could find none. In my view, that makes the decision to grant leave to appeal for compelling reasons even harder to make.

16 The **Badenhorst**-rule has served before the Supreme Court of Appeal at least four times in the past.[30] This too makes a referral on compelling grounds more difficult. In fact, in the last decision by the Supreme Court of Appeal referred to in the previous endnote, **Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd**, the whole focus still was on a debt disputed, not on any other factual disputes. This too me seems the focus in **Kalil v Decotex (Pty) Ltd and Another**,[31] especially at 980C:

> "... *In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable*

> *grounds, the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds. …"*

17 Taking a step back, it was common cause the bank was a creditor. The only issue was if the bank was entitled to seek liquidation when the CC stopped making payment of instalments due in terms of the loan in issue. That defence is based on an oral agreement, with the material terms reduced to writing. That, I have found, is a dispute to which the **Badenhorst**-rule does not apply. In this division, that is a question to be resolved through **Plascon Evans** principles[32] where final relief is claimed. As I have stated, even if were wrong on the on the applicability of the rule, the flexibility of the **Badenhorst**-rule would have meant that I was not obliged to have applied it.

18 Leaving aside the question if I am obliged by statutory law to give leave to appeal as a result of the mere existence of a conflicting judgment, it was argued on behalf of the CC that I erred in law in applying the *stare decisis* principle. The argument was that I was bound by **Firstrand Bank Limited v Nomic 153 (Pty) Limited** (and by implication not by the **Badenhorst**-decision itself) as the Western Cape case was a decision by three judges.

19 In as far as that argument purports to reflect that the **Badenhorst**-rule must be applied in an inflexible manner, it is bad in law, with respect. Still, if the CC's argument were correct, I would have been obliged to give leave to appeal as there would have been a conflicting judgment that bound me, but which I had failed to follow.

20 The law is clear, judges have to apply the *stare decisis* principles. Not only am I bound by this principle, see **Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another**[33] at Para 28 to 30, but I support it fully. Anyone who ever has had to advise a client whether or not to proceed with litigation using hard-earned funds, would know the value of predictability. It indeed is a manifestation of the Rule of Law that judges are

not free to decide matters as if they are not bound by the *stare decisis* principles.

21 The CC quoted no authority was quoted for the submission that I erred in applying the *stare decisis* principles. The submission is wrong in law in my view, and I have dealt with the law in the main judgment. A single judge in the North Gauteng Division must follow the Constitutional Court, the Supreme Court of Appeal, a decision of a larger court in the North Gauteng Division, and a decision of a larger court in the South Gauteng Division (a division having co-ordinate jurisdiction), but is not bound by a decision of a larger court in another division. Obviously, one will not easily differ from a larger court out of respect and as more judges ruled on the matter. But, when faced with conflicting decisions in this division, one follows the local division. A single judge in the North Gauteng Division must follow a single judge in the North Gauteng Division and South Gauteng Division unless that judgment is wrong. In addition of course would be considerations such as if the other decision had given a judgment in error by for example overlooking legislation or another binding decision.

22 In addition in considering compelling circumstances, I believe that I must consider the reality of life that litigants are not involved in litigation for issues of interest of academic purity. They spend money to seek finality in their disputes, based on the facts of their cases. They have an interest in finalising their disputes, and not to incur additional costs on appeal.

23 In short, in my view the decision to grant leave to appeal or not, in this case has to be determined primarily by considering if there is a measure of certainty that there is a reasonable prospect of success on appeal.

24 I do not again address the **Badenhorst**-rule. In my view any appeal based on my failure to apply it, or based on *stare decisis* for not following **Firstrand Bank Limited v Nomic 153 (Pty) Limited**, has no reasonable prospect of success on appeal and I can find no compelling reason to grant leave to appeal on these two grounds.

25 I deal next with the four groups of reasons why the CC avers I erred and ought to have dismissed the application as identified above.

One, the statutory demand and new Companies Act argument

26 I have rejected the argument about an initial onus as incorrect in law in my main judgment.[34]

27 In my view, an applicant can bring a case based on the statutory demand [section 69(1)(a) of the **CC Act**] without proving at the same time that the respondent is commercially insolvent [section 69(1)(c) of the **CC Act**] and use simply statutory demand as the basis for liquidation.[35] This much is clear from those sections and the "*or*" that separates the sub-sections. As argued by the bank, the CC's argument would render section 69(1)(a) of the **CC Act** superfluous as the demand would play no role if the applicant in any event has to prove commercially insolvency. Commercial insolvency is assumed by the reaction to the statutory demand (and from the other facts of the matter). The same applies if one has regard to section 345 of the **Companies Act** 61 of 1973 ("**the Old Companies Act**") with regard to the statutory demand and commercial insolvency.

28 As I read the **Desert Star**-case it does not require the formalistic approach contended for by the CC. The concept of *formulae* died with the Roman empire.

29 Even if I were wrong on the law, then in any event on the papers read as a whole, there is ample proof of commercial insolvency. I do not repeat those facts about instalments not paid, the reasons for the non-payments, the demands, the lack of reaction, the stopping of all payments, the additional finance sought, the terms of that finance, and the like. It is now conceded that I should consider the papers as a whole as opposed to an in limine onus to be satisfied in the founding papers.

30 In my view, with respect, the statutory demand and new **Companies Act** argument has no prospects of success on appeal; or put differently, there is not a measure of certainty that there is a reasonable prospect of success..

31 It has not been alleged that I had exercised my limited remaining discretion incorrectly.

32 In reaction to the demand, the CC did not produce proof of its solvency and did not argue that the unpaid payments were not due. Instead it argued that the bank was precluded by an oral agreement to have made the demand (as it allegedly constituted legal action to collect outstanding debt) or to have brought the application for liquidation (for the same reason). Should the CC's defence based on the oral agreement fail, as I have found it had to and did, the bank is entitled to a winding up order on basis of the statutory demand.

Two, was it proven that the CC was unable to pay its debts?

33 Due to the statutory demand ground for liquidation, this ground is in reality an alternative ground for the liquidation of the CC. Having refused leave to appeal on the first ground, these arguments are superfluous. However, I address them in case it were to be found that I erred in in main and in my alternate findings on the first ground of appeal.

34 The notice of application for leave to appeal contains a number of references to the founding affidavit as if it were to be considered in isolation. For sake of completeness, I reiterate that such an approach is wrong in law, with respect. The only time in an opposed application where only the facts mentioned in the founding affidavit stand to be considered, is when a respondent raises an *in limine* attack that the application stands to be dismissed if one has regard to the founding affidavit only, assuming that those facts are correct. See **Valentino Globe BV v Phillips and Another**.[36] Such a defence was not raised this matter. Once an applicant passes that *in limine* test, I have to have regard to all facts before me, whether they

appear in the founding, answering or replying affidavits, subject off course to *inter alia* the **Plascon Evans**-test.[37]

35 Reverting to the argument presented, I understood the original argument by the CC that I in law was obliged in law to ignore new matter in the replying affidavit. There is no doubt that it would be bad in law. It now seems to be common cause that I was entitled to rely on the new matter in reply, matter that came to the bank's knowledge after the founding affidavit was deposed to, and that I was entitled to rely on the CC's decision not to answer the new matter. This is in my view the correct approach in law.

36 It seems that the remaining argument is that I was obliged to have accepted the answering affidavits in the liquidation proceedings brought by Beaumont Assist (Pty) Ltd and handed up during argument (and it is suggested that those affidavits would have disproved reliance by the bank on the later sequestration application).

37 I remain unpersuaded by this argument. The CC had the election to seek to strike out admissible new matter in reply,[38] or it could have sought leave to answer admissible new matter in reply.[39] Instead, it argued that new matter could be ignored (I have addressed this earlier herein) and in the alternative it sought to hand up the answering affidavit in the liquidation proceedings brought by Beaumont Assist (Pty) Ltd.

38 I have no doubt that I was correct in refusing the papers so handed up. The only permissible way was for the respondent to deliver a fourth affidavit, with the leave of the court. That leave ought to have been a formality in a similar case. The CC then had to attach to the fourth affidavit the answering affidavit in the liquidation proceedings brought by Beaumont Assist (Pty) Ltd and it ought to have referred the court and the bank to any relevant portions thereof. This is the only way in which *audi alteram partem* could be applied, and the only approach that would have been fair to the bank. The bank is entitled to be advised before the hearing of the case it would encounter, and the court is obliged to prepare for that hearing having regard to all the

affidavits to consider. Our law is clear about the function of affidavits, and how material facts are to be placed before a court. See **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic Of South Africa and Others**.[40] The principle was stated by Joffe J in the aforesaid case at 324F:

> *"Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met. ..."*

39 In my view, with respect, the argument about handing up affidavits simply because they are accessible to the public, has no prospects of success on appeal; or put differently, there is not a measure of certainty that there is a reasonable prospect of success.

40 I have concluded that the on the papers read as a whole, there is ample proof of commercial insolvency. Also on this ground, should the CC's defence based on the oral agreement fail, the bank is entitled to a winding up order.

41 That leaves another argument raised in the notice of application for leave to appeal, the purported expert evidence that the CC has assets in excess of the bank's claim. In my view, I rejected the purported expert evidence on unassailable law and no case law to the contrary has been brought to my attention. I point out that CC made no attempt to prove solvency, actual or commercial. In my view, this argument has no prospects of success on appeal; or put differently, there is not a measure of certainty that there is a reasonable prospect of success.

42 I deal next with the defence raised by the CC about an agreement.

Three, error in interpretation

43 As reflected earlier, in my view this matter is one where I have to apply the **Plascon Evans** principles in considering the defence of an agreement precluding liquidation proceedings. It appeared at the hearing for leave to appeal that the CC's real argument was that I erred in interpreting the agreement as the outcome of my finding was in conflict with the stated purpose of the agreement.

44 The CC relies upon an oral agreement, the material part had been reduced to writing (emphasis added):

> "***That pending the finalisation of the application for business rescue and the counter application for liquidation under case number 1350612015:***
>
> *1. 1* ***That Firstrand Bank Ltd*** *("the bank"), the intervening creditor under case number 1350612015 and Wesbank Ltd ("Wesbank"),* ***shall refrain from taking any form of legal action to collect outstanding debt against*** *Messrs Lambertus Nicolaas De Beer (Snr),* ***Gert Jacobus De Beer*** *and Lambertus Nicolaas De Beer (Jnr), in their personal capacities as sureties and co-principal debtors or otherwise,* ***or any of the entities in which they are involved, directly or indirectly including****, but not limited to, Tambotie Boerdery Trust and Sering Boerdery CC or any of the sureties liable to the Bank for outstanding debt."*

45 The CC's pleaded defence was (underlining added, and averments about *mala fides* left out for now):

> "*The application under the abovementioned case number is legal action that is covered by the undertaking*";
>
> "*In the circumstances the application under the abovementioned case number is not legally competent, constitutes mala fide conduct on the part of the Respondent and should be dismissed with costs on a scale as between attorney-and-own client*";

46 I had to interpret this agreement.

47 Our law has undergone some changes in this regard. I reflect the authority on the main principles briefly.

48 In **KPMG Chartered Accountants (SA) v Securefin Ltd and Another**[41] the court deal with a case where the parties had presented expert and factual evidence on the interpretation of an agreement (underlining added, and footnotes omitted):

> *"[38] Much of the evidence dealt with the interpretation of the verification contract. Indeed, each party called an expert on the issue and they testified for about 14 days on the interpretation of the contract. The factual witnesses, too, spent most of their time dealing with interpretation issues. The parties were able to create a record consisting of 6600 pages of evidence and exhibits. It is difficult to understand why the trial judge permitted the evidence or the cross-examination or overruled the objection to the leading of some of the evidence. Obviously, courts are fully justified in ignoring provisionally objections to evidence if those objections interfere with the flow of the case. It is different if a substantive objection is raised which could affect the scope of the evidence that will follow. In such a case a court should decide the issue and not postpone it. It is accordingly necessary to say something about the role of evidence and, more particularly, expert evidence in matters concerning interpretation.*
>
> *[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (**Johnson v Leal** 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: **Hodge M Malek (ed) Phipson on Evidence** (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (**Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd** 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (**Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See **Van der Westhuizen v Arnold** 2002 (6) SA 453 (SCA) ([2002] 4*

All SA 331) paras 22 and 23, and ***Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another*** *2008 (6) SA 654 (SCA) para 7.)*

[40] Trollip JA in ***Gentiruco AG v Firestone (SA) (Pty) Ltd*** *1972 (1) SA 589 (A) at 617F - 618C dealt with the admissibility of expert evidence in interpreting a document (a patent specification in that case) and quoted with approval from a speech of Lord Tomlin in* ***British Celanese Ltd v Courtaulds Ltd*** *(1935) 52 RPC 171 (HL):*

> *'The area of the territory in which in cases of this kind an expert witness may legitimately move is not doubtful. . . . He is entitled to explain the meaning of any technical terms used in the art. . . . He is not entitled to say nor is counsel entitled to ask him what the [document] means, nor does the question become any more admissible if it takes the form of asking him what it means to him as an [expert].'*

Lord Tomlin spelt out the disadvantages of allowing expert evidence on interpretation:

> *'In the first place time is wasted and money spent on what is not legitimate. In the second place there accumulates a mass of material which far from assisting the Judge renders his task the more difficult, because he has to sift the grain from an unnecessary amount of chaff. In my opinion the trial Courts should make strenuous efforts to put a check upon an undesirable and growing practice.'*

*That was in 1935, but the chaff is still heaping up, the undesirable practice keeps growing and courts make no effort to curtail it. An expert may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. The witness may not be asked what the document means to him or her. The witness (expert or otherwise) may also not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ quite rightly responded with, 'So what?' (***Scanvaegt International A/S v Pelcombe Ltd*** *1998 EWCA Civ 436.) All this was sadly and at some cost ignored by all."*

49 The **Securefin**-case has been referred to many times by the Supreme Court of appeal. I refer to two of those cases below, but point out that those cases and others did not detract from the law as set out in paragraph 39 above. This was held in **B Braun Medical (Pty) Ltd v Ambasaam CC**[42] (underlining added, and footnotes omitted):

"*[14] A great deal of inadmissible evidence was led before the court a quo concerning the parties' intention in concluding, and their interpretation of the terms of the contract of carriage. As pointed out by this court:*

> *'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (**Johnson v Leal** 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: **Hodge M Malek (ed) Phipson on Evidence** (16 ed 2005) paras 33 – 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (**Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd** 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible (**Delmas Milling Co Ltd v Du Plessis** 1955 (3) SA 447 (A) at 455B – C). The time has arrived for us to accept that there is no merit in trying to distinguish between background circumstances and surrounding circumstances. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms context or factual matrix ought to suffice. (See **Van der Westhuizen v Arnold** 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and **Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another** 2008 (6) SA 654 (SCA) para 7.)'*

[15] It is therefore clear that 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses'. In addition —

> *'to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible'.*

I do not understand anything stated in later decisions of this court to constitute a departure from those principles."

50 One of the cases that referred to the **Securefin**-case, but in terms of the **B Braun Medical**-case did not detract from it, is **Natal Joint Municipal Pension Fund v Endumeni Municipality**.[43] The court held (underlining added, and footnotes omitted):

> "*[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in* ***Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School****. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*
>
> *[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in* ***Jaga v Dönges NO and Another; Bhana v Dönges NO and Another****, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to*

interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

> *'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'*

More recently, Lord Clarke SCJ said 'the exercise of construction is essentially one unitary exercise'.

[20] Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, 'the intention of the contracting parties', because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself. Despite their use by generations of lawyers to describe the task of interpretation it is doubtful whether they are helpful. Many judges and academics have pointed out that there is no basis upon which to discern the meaning that the members of parliament or other legislative body attributed to a particular legislative provision in a situation or context of which they may only dimly, if at all, have been aware. Taking parliament by way of example, legislation is drafted by legal advisers in a ministry, redrafted by the parliamentary draftsmen, subjected to public debate in committee, where it may be revised and amended, and then passed by a legislative body, many of whose members have little close acquaintance with its terms and are motivated only by their or their party's stance on the broad principles in the legislation. In those circumstances, to speak of an intention of parliament is entirely artificial. The most that can be said is that, in a broad sense, legislation in a democracy is taken to be a reflection of the views of the electorate expressed through their representatives, although the fact, that democratically elected legislatures sometimes pass legislation that is not supported by or unpopular with the majority of the electorate, tends to diminish the force of this point. The same difficulty attends upon the search for the intention of contracting parties, whose contractual purposes have been filtered through the language hammered out in negotiations between legal advisers, in the light of instructions from clients as to their aims and financial advice from accountants or tax advisers, or are embodied in standard form agreements and imposed as the terms on which the more powerful contracting party will conclude an agreement."

51 Another case that referred to the **Securefin**-case, but in terms of the **B Braun Medical**-case did not detract from it, is **Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk**.[44] The court held at Para 12 with reference to an earlier decision (underlining added, and footnotes omitted):

> *"[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach."*

52 The CC's argument was reflected as follows in the application for leave to appeal (underlining added):

> *"31. The Court materially misdirected itself and erred by making a final finding, that the undertaking to refrain from taking any form of legal action to collect outstanding debt did not cover and was not intended to cover the liquidation application in casu notwithstanding the evidence on behalf of the Respondent (which the court a quo could not and had not rejected)[45] that the undertaking was sought and provided under circumstances where the intention of the parties were that the affected entities inclusive of the Respondent would be allowed to proceed with their business activities.*
>
> *32. In the circumstances the Honourable Court materially misdirected itself by finally deciding a factual dispute as to the intention of the parties with the undertaking that the Applicant shall refrain from taking any form of legal action to collect outstanding debt against inter alia the Respondent and specifically by effectively dismissing the Respondent's claim and evidence that such an undertaking was sought and given in order to ensure that inter alia the Respondent would be able to proceed with its normal business activities."*

53 In a sense the application for leave to appeal ends here, evidence as to the intention of the parties would be inadmissible. Still, I had another look at the papers, should I be wrong.

54 The contextual background is the following:

54.1 The sole member of the CC deposed to the answering affidavit. He alleged that the CC formed part of the "*de Beer group of entities*". The averment lacks any factual detail. The deponent did not elaborate about who the other entities were, what membership of "*de Beer group of entities*" meant with regard to any sharing in by the other entities in income generated by the CC, and did not explain how such other entities could have an alleged, unspecified, but "*direct or indirect interest*" in the CC owned by him. The averment about interests in the CC is denied in reply and the denial is a matter of logic;

54.2 The deponent refers to litigation between two entities in the "*de Beer group of entities*", Sandstone Projects Trust sought to place Koedoeskop River farms Alpha CC under business rescue in February 2015 on an urgent basis. It is not stated where the CC finds itself in this litigation, but the bank intervened. As will appear below, the suggestion is that the litigation was not at arms' length. Sandstone Projects Trust and Koedoeskop River farms Alpha CC had the same lawyers;

54.3 The outcome of the bank's intervention was that a draft order was prepared by the legal representatives, presumably acting on instruction. The order reflects that the application that Koedoeskop River farms Alpha CC be placed under business rescue was postponed *sine die* and that instead Koedoeskop River Farms Alpha CC was placed under provisional liquidation by agreement. The heading to the agreement in issue refers to this matter. I repeat if for sake of convenience-

> *"That pending the finalisation of the application for business rescue and the counter application for liquidation under case number 1350612015 ..."*

54.4 The deponent does not state that he formed part of the negotiations, or had any other knowledge thereof. The bank denied his personal knowledge;

54.5 In reaching the agreement that led to the draft order, the parties were represented by attorneys and senior counsel. It appears that Sandstone Projects Trust and Koedoeskop River Farms Alpha CC had the same set of lawyers. Two names were given of the two senior counsel, adv. Leathern SC for the bank, and adv. Badenhorst SC for Sandstone Projects Trust and Koedoeskop River Farms Alpha CC. The deponent avers that adv. Badenhorst SC acted for the whole of the "*de Beer group of entities*", but gave no grounds for this conclusion;

54.6 The written agreement that the CC relies upon was prepared by adv. Leathern SC for the bank. It was intended as a draft letter of undertaking by the bank. The bank avers that it remained a draft;

54.7 The deponent gives the following evidence about the intent with the agreement-

> "*The agreement evidenced by annexure "A4" was reached and concluded to ensure that all persons and entities that forms part of the "De Beer group of entities" will remain intact operative and in business pending the finalisation of the business rescue application and the liquidation application.*"

Not only is this evidence inadmissible, but it is not based on any stated facts. The bank has a conflicting version, if admissible;

54.8 The deponent further gives the following evidence about the intent with the agreement-

> "*The purpose of the agreement reached was thus to enable the persons and entities within the "De Beer group of entities" to keep on trading in an attempt to settle the obligations the different entities.*"

It is not suggested that there was an oral agreement that, for example, the CC could stop making payments to the bank with impunity. The bank denies in reply that the CC had any such right, a denial in accordance with the terms of the underlying loan agreement and logic.

55 In my view, to the extent admissible, these facts do not lead to the interpretation that the CC seeks. Assuming that the draft undertaking was an agreement, the author refers to liquidation proceedings and still in the operative part seeks to limit a very specific type of litigation, "*any form of legal action to collect outstanding debt*". I remain of the view that this undertaking excluded liquidation proceedings.

56 Even if were wrong in these conclusions, it is now common cause that the agreement has fallen away after the commencement of these liquidation proceedings. Koedoeskop River Farms Alpha CC was placed under final liquidation on 5 May 2016. The bank, it is common cause, at least had *locus standi* as a contingent creditor when it commenced proceedings, see **Express Model Trading 289 CC v Dolphin Ridge Body Corporate**[46] at Para 14. In my view it is entitled to the order that I granted. In addition, there is merit in the bank's averment that by stopping payment, the CC breached the agreement and cannot rely thereon.

57 Consequently, the CC did not show that there is a measure of certainty that there is a reasonable prospect of success

Conclusion

58 Consequently I make the following order:

The application for leave to appeal is dismissed with costs.

[redacted]

DP de Villiers

Acting Judge of the High Court

Gauteng Division

Heard on:	**1 February 2017**
On behalf of the Applicant:	**L Meintjes**
Instructed by:	**Rorich, Wolmarans & Luderitz Inc**
On behalf of the Respondent:	**GF Heyns**
Instructed by:	**Hartzenberg Inc**
Judgment handed down:	**8 February 2017**

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[1] *"(1) For the purposes of section 68 (c) a corporation shall be deemed to be unable to pay its debts, if-*

(a) a creditor, by cession or otherwise, to whom the corporation is indebted in a sum of not less than two hundred rand then due has served on the corporation, by delivering it at its registered office, a demand requiring the corporation to pay the sum so due, and the corporation has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the corporation is returned by a sheriff, or a messenger of a magistrate's court, with an endorsement that he or she has not found sufficient disposable property to satisfy the judgment, decree or order, or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the corporation is unable to pay its debts.

(2) In determining for the purposes of subsection (1) whether a corporation is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the corporation.

[2] Para 1, 2, 7, 8, 18 to 19, 21 to 24;

[3] 2012 (5) SA 197 (FB);

[4] *"No proof of any nature was tendered by the applicant that the respondent is insolvent, which has the effect that it must be taken that the respondent is indeed still solvent. If solvent, s 68 is no longer available to the applicant."*

[5] *"1. No. case has been made out in the founding papers that the Respondent is I was commercially insolvent. Accordingly, it must have been taken that the Respondent is I was commercially solvent";*

"2. In circumstances where no case has been made out in the founding papers that the Respondent is commercially insolvent, the Applicant was not legally entitled to rely on "deemed inability to pay debts" as a ground to establish insolvency";

"19. The Court should instead have found that it was argued on behalf of the Respondent that in order for the Applicant to be entitled to rely upon the statutory demand upon which it in fact strongly relied for its application to succeed, the Applicant had to show that it was entitled to rely on such statutory demand, which entailed that the Applicant had to demonstrate in its founding papers that the Respondent was commercially insolvent as it otherwise would not have been entitled to rely on the statutory demand as a ground for the winding-up of the Respondent";

"22. In the circumstances the matter was approached at all relevant times by the Respondent on the basis that the Applicant in the present matter did not make out a case in its founding papers for the commercial

insolvency of the Respondent and therefore was not entitled to rely on statutory demand and as a consequence could not succeed with its application for the winding-up of the Respondent on the basis of the statutory demand";

"*24. The Court should have found that the founding affidavit contains no iota or title of evidence in support of commercial insolvency and further that none of the content of the founding affidavit supports a finding of commercial insolvency as a result of which the Applicant was not entitled to rely on the statutory demand*";

[6] 2014 (2) SA 518 (SCA);

[7] 2011 (2) SA 266 (SCA);

[8] **Badenhorst v Northern Construction Enterprises (Pty) Ltd** 1956 (2) SA 346 (T) at 348 A to C;

[9] Para 3;

[10] Para 6 and 25;

[11] Para 11 to 17;

[12] I am embarrassed by paragraph 3.13 of the main judgment where I wrote:

> "*The respondent only took issue further with any of applicant's conclusion that it was entitled make he statutory demand*".

I made an error in the editing as in fact the sentence should have been deleted as it appears at the end of Para 3.11 as:

> "*The respondent did not take issue with any of the averments set out so far, save for the applicant's conclusion that it was entitled to payment of the full amount due*";

[13] Para 4, 10, 11, 26 to 32;

[14] Para 10 and 11;

[15] Para 26 to 28 and 30;

[16] (A165/2013) [2014] ZAWCHC 20 (20 February 2014);

[17] Para 29 to 30;

[18] Para 31 to 32;

[19] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E to 635C;

[20] Para 33;

[21] 10 of 2013;

[22] LCC14R/2014, (a judgment delivered on 3 November 2014);

[23] (19577/09) [2016] ZAGPPHC 489 (24 June 2016);

[24] "The Superior Courts Act has raised the bar for granting leave to appeal in **The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others**, Bertelsmann J held as follow:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.""

[25] **Badenhorst v Northern Construction Enterprises (Pty) Ltd** (supra) 1956 (2) SA 346 (T) at 348 A to C;

[26] 2016 (3) SA 317 (SCA);

[27] **Kalil v Decotex (Pty) Ltd and Another** 1988 (1) SA 943 (A);

[28] 1998 (2) SA 418 (SCA);

[29] (A5024/2012) [2012] ZAGPJHC 211 (30 October 2012);

[30] **Kalil v Decotex (Pty) Ltd and Another** (supra) 1988 (1) SA 943 (A), **Masterspice (Pty) Ltd v Broszeit Investments CC** 2006 (6) SA 1 (SCA), **Exploitatie- En Beleggingsmaatschappij Argonauten 11 BV and Another v Honig** 2012 (1) SA 247 (SCA), and **Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd** (1030/2015) [2016] ZASCA 168 (24 November 2016);

[31] **Kalil v Decotex (Pty) Ltd and Another** (supra) 1988 (1) SA 943 (A);

[32] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** (supra) 1984 (3) SA 623 (A) at 634E to 635C;

[33] 2011 (4) SA 42 (CC);

[34] Para 12 to 17, 22 to 25;

[35] The section has been quoted in the first endnote;

[36] 1998 (3) SA 775 (SCA) at 779E to I;

[37] **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** (supra) 1984 (3) SA 623 (A) at 634E to 635C. See **Executive Officer, Financial Services Board v Dynamic Wealth Ltd And Others** 2012 (1) SA 453 (SCA) at Para 19.

[38] In a case such as the present the invariable outcome is that the application would fail and that instead leave be given to answer new matter;
[39] In a case such as the present the invariable outcome is that the application would have succeeded;
[40] 1999 (2) SA 279 (T) at 323F to 325C;
[41] 2009 (4) SA 399 (SCA);
[42] 2015 (3) SA 22 (SCA);
[43] 2012 (4) SA 593 (SCA);
[44] 2014 (2) SA 494 (SCA);
[45] 2014 (2) SA 494 (SCA);
[46] 2015 (6) SA 224 (SCA);