REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A5020/12

(1) REPORTABLE: no
(2) OF INTEREST TO OTHER JUDGES: yes
(3) REVISED.

22 October 2012
DATE

SIGNATURE

In the matter between

GREEN GLADES PROPERTIES (PTY) LTD **APPELLANT**

and

INVESTEC BANK **RESPONDENT**

J U D G M E N T

KATHREE-SETILOANE J:

[1] This is an appeal against the judgment of Blieden J in an application brought by Investec Bank Ltd ("Investec") to wind up Green Glades (Pty) Ltd ("Green Glades"), a property developer, on the basis of Green Glades' inability to pay its debts in terms of s 344(f) read with s 345(i)(c) of the Companies Act, 61 of 1973 ("the Act"). Blieden J made an order placing Green Glades under final winding up. Leave to appeal against the judgment

and order of Blieden J was granted to Green Glades by Claassen J. Before I deal with the appeal, it is necessary to set out the factual background to the matter.

Background

[2] Green Glades is a property developer. It acquired the rights to undertake a development on the banks of the Vaal River ("the Vaal property"). Green Glades acquired the capital for the development of the Vaal property from Investec pursuant to a written loan agreement between itself and Investec. The loan agreement was concluded on 11 December 2005. Green Glades was represented by its Managing Director, Mark William McCreedy ("McCreedy"). In terms of the loan agreement Investec advanced in excess of R43 000 000 to Green Glades payable over a period of 36 months. Green Glade's indebtedness to Investec was secured by, *inter alia*, a mortgage bond over the Vaal property. As at 24 August 2009, Green Glades was indebted to Investec in an amount exceeding R43 000 000. This amount remains unpaid.

Proceedings before Louw J

[3] On 7 August 2009, an oral agreement, (the moratorium agreement) was concluded between the parties in terms of which the development of the Vaal property would be abandoned, and Green Glades would be provided with time to liquidate its assets in order to repay the debt to Investec. Two groups of assets were involved; the Vaal property and a business property in Illovo owned by Slaton Properties (Pty) Ltd ("Slaton"), which was controlled by McCreedy ("the Slaton property"). Both the Slaton and Vaal properties had to be sold. The proceeds of the sales would be paid to Investec. The proceeds of the Slaton property would be paid to Investec in respect of interest, pending the sale of the Vaal property, and the proceeds of the Vaal property would be used to liquidate the capital outstanding on the loan. Investec would not proceed with legal action against Green Glades. McCreedy was obliged to keep Investec abreast of all developments regarding the marketing and sale of the properties. The properties had to be sold within a reasonable time.

[4] During October 2009 Investec instituted proceedings against Green Glades (and the sureties) for the recovery of the debt, and for an order declaring the Vaal property executable ("the recovery proceedings"). This application was dismissed by Louw AJ on the grounds that it was brought prematurely, as the moratorium agreement precluded the institution of proceedings to recover the indebtedness for a reasonable period of time.

[5] Louw AJ also found that by the end of December 2008, Green Glades had received some R43 000 000 from Investec, and it was, at that stage, already in default and obliged to pay the amount received. Green Glades did not, however, have the R43 000 000 in liquid form to settle the debt.

[6] Louw AJ further found that:

"the properties have now, as a matter of fact, indeed been sold for substantial amounts that would more than cover the R43 million debt and interest owing to Investec. The Illovo property had been sold for R10 000 000. It was presently in the process of being transferred to the purchaser, and the sale proceeds will soon be received and paid to Investec. Green Glades has also entered into an agreement of sale whereby it has sold the properties that it acquired [the Vaal property] and that it would develop for a purchase price of R74 million."

Proceedings before Blieden J

[7] The moratorium agreement was central both in the recovery proceedings as well as in the winding up application before Blieden J, in the court *a quo*. Green Glade's primary defence, in the application before Blieden J, was that the moratorium agreement precluded the bringing of the winding up application. Its alternative defence was that despite Green Glade's commercial insolvency, the court *a quo* should exercise its discretion, in terms of s 347(1) of the Act, against the granting of the winding up order. The basis for this defence was that the Vaal property had already been sold and had sufficient value to repay the full extent of the debt which was claimed by Investec.

[8] Blieden J found that:

> (a) the moratorium agreement did not preclude the bringing of the winding up application;
>
> (b) Green Glades was, in any event, not entitled to rely on the moratorium agreement as it had not itself complied with its own obligations under that agreement, and the reasonable time for performance, as contemplated in the moratorium agreement, had lapsed.

He, accordingly, concluded that the application before him was not a matter in which the court should exercise its discretion against the winding up of Green Glades.

The appeal

[9] As alluded to earlier, one of the terms of the moratorium agreement was that *"Investec would not proceed with legal action against Green Glades for the outstanding loan amount"*. Green Glades has interpreted this term to mean that Investec would refrain from instituting legal proceedings against it *"for recovery of the loan"*. Much has been said by our courts on the question of whether or not an application for the winding up of a debtor's estate is a proceeding *"for the recovery of a debt"* (*Collett v Priest* 1931 AD 290 at 298; *Prudential Shippers (Pty Ltd v Tempest Clothing Company (Pty) Ltd an d Others* 1976 (2) SA 856 (W) at 853D-865A; *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) at paras 27 to 31). It is not necessary, in my view, to decide this question in this appeal.

[10] Before us Green Glades' Counsel attacked the judgment of the Court *a quo* on, amongst others, the basis that Blieden J erred in not upholding Green Glades' contention that the moratorium agreement precluded the bringing of the winding up application. I am of the view that even if the moratorium agreement is to be interpreted to preclude the bringing of the winding up application by Investec, Green Glade's reliance on it remains misplaced, as it

has failed to comply with the terms of the moratorium agreement within a reasonable time as contemplated in the agreement. The moratorium agreement is, on its own terms, a bilateral one in which each party undertakes obligations toward the other. There is a presumption in bilateral contracts that neither party is entitled to enforce the contract, unless it has performed or tenders to perform its obligations (*Hauman v Nortje* 1914 AD 293 at 300; *Wolpert v Steenkamp* 1917 AD 493 at 499; *Rich v Lagerwey* 1974 (4) SA 748 (A) at 761-762). It follows that Investec's obligation to refrain from bringing legal proceedings for recovery of the loan, was conditional upon the tender of performance by Green Glades of its obligations in terms of the moratorium agreement upon which it relies. It was thus incumbent upon Green Glades, in seeking to enforce the moratorium agreement, to have either shown that it had performed in terms of the agreement or that it had tendered to perform in terms thereof.

The Slaton Property

[11] The Slaton property has been sold for R10 000 000. It has also been transferred into the name of the purchaser. Green Glades furnished an irrevocable undertaking, in its answering affidavit in the recovery application, in the following terms:

" As a show of [Green Glade's] and Slaton's good faith, Green Glades and Slaton are prepared to furnish an irrevocable undertaking to [Investec] that the proceeds available after the transfer of the Slaton property to the purchaser be paid to it in terms of the [moratorium] agreement concluded on the 7th August 2009".

[12] Despite the irrevocable nature of this undertaking, Green Glades has not paid the proceeds of the sale of the Slaton property over to Investec as contemplated in the moratorium agreement. It contends that its reason for not doing so is that it is not obliged to do so, as such payment can *"obviously not occur when one party denies the existence of that agreement".* It is important to bear in mind, in this regard, that Investec had conceded in the winding up application that the winding up application had to proceed on the basis of an acceptance of the terms of the moratorium agreement, as articulated in the

judgment of Louw AJ in the recovery application. There is, therefore, no substance in this contention.

[13] In regard to the proceeds of the sale of the Slaton property, Green Glades states, in its answering affidavit, in the proceedings in the Court *a quo*:

"I confirm the proceeds referred to have been retained to continue to be provided for in terms of the agreement. The respondent has no intention of reneging on its contractual obligations."

Not only has Green Glades, to date, failed to pay the proceeds of the sale of the Slaton property to Investec, in terms of the moratorium agreement, but it has also pointedly refused to provide details to Investec relating to the proceeds available after the transfer of the Slaton property. These details were formally requested by Investec in a Rule 35(12) and (14) notice on 30 August 2010.

[14] Green Glades has furthermore failed to disclose where the proceeds of the Slaton sale are allegedly *'retained'*, and the basis upon which they are held. I am of the view that the failure of Green Glades to furnish Investec with particulars relating to the proceeds of the sale of the Salton property is in direct breach of its obligations under the moratorium agreement *"to keep Investec abreast of all developments relating to the marketing and sale of the properties"*.

[15] A further reason advanced by Green Glades for its failure to pay the proceeds of the Slaton property to Investec, is that it had not been provided with information as to the amounts due. This submission, in my vie w, is unsustainable as it is common cause that an amount in excess of R43 000 000 is owed by Green Glades to Investec. In addition, Investec's attorney, Tony Sanchez, ("Sanchez") of Blakes Maphanga sent an email to Don Thomas ("Thomas") of Green Glades, on 16 March 2012 (in response to an email from Thomas requesting financial statements for Green Glades and

Slaton Properties for the period December 2009 to February 2010), in which he stated:

"We are given to understand that you have approached our client directly for the period December 2009 to February 2010.
Please note that the entire loan facility is currently due and has been up for payment set out in the proceedings referred to [the recovery application].
In essence, the amount due and payable to our client is in the amount of R43 645 842.63 together with interest of 9% per annum, calculated 24 August 2009 to date of payment, both dates inclusive, interest to be calculated daily and compounded monthly."

[16] Thomas responded by way of an email dated 17 March 2010. It is clear from the contents of this email that what was requested by Green Glades was not a breakdown of the interest owing on the capital, but rather printouts of financial statements for purposes of updating Green Glade's or Slaton's accounting records for the year ending February 2010. In fact, Thomas specifically states in the email that the reason for requesting the statements *"is that they will include the charge of legal fees".*

[17] On 14 April 2010, Smit Jones and Pratt Attorneys representing, amongst others, Green Glades wrote to Investec's attorneys requesting a meeting between their clients and Investec. They wrote:

"[W]ith a view to placing various proposals before [Investec] in order to establish whether there is any prospect of any such proposal being acceptable to [Investec]. In this regard, inter alia, *this would include what has been raised by the parties in respect of the proceeds of the Slaton sale.*
In regards_ the above our client would in all probability require your Mr Sanchez present and our client would have no difficulty with such an arrangement. Our client does, however, suggest that any such meeting is attended by a representative of your client who is authorized to make any decision in respect of any proposal that might be acceptable to your client."

[18] The contents of this letter do not, in my view, constitute a tender to perform in terms of the moratorium agreement. Rather than tendering to pay the proceeds of the sale of the Slaton property towards servicing the interest on the capital, the letter seeks to place new proposals before Investec. Investec cannot, in the circumstances, be faulted for its refusal or failure to accede to Green Glade's request to meet for purposes of discussing new payment proposals, not provided for in the moratorium agreement.

[19] It is abundantly clear from the exchange of correspondence between Investec and Green Glades that at no stage, during March 2010 or thereafter, did Green Glades tender to perform in terms of the moratorium agreement. Nor, as contended, did Green Glades ever request a breakdown of the interest payable on the capital, for purposes of tendering performance under the moratorium agreement in respect of the proceeds of the sale of the Slaton property.

The Vaal Property

[20] Louw AJ found that an *"agreement of sale"* had been concluded, on 16 November 2009 for the sale of the Vaal property. There are, in my view, numerous anomalies relating to this agreement. Firstly, it is an agreement for the sale of shares as opposed to an agreement for the sale of the Vaal property, as contemplated in the agreement. To the extent that Green Glades intended to change the nature of the undertaking, as contemplated in the moratorium agreement, it was obliged to seek the consent of Investec to do so. This, it did not do – but instead made a unilateral change to the undertaking to sell the Vaal property, as contemplated in the moratorium agreement. Without the consent of Investec, Green Glades had no right to sell the shares rather than sell the property itself.

[21] Secondly, the entity that was alleged to purchase the shares was not yet formed as at the date of the conclusion of the agreement of the sale of shares. On the face of the sale of shares agreement, it has lapsed due to the failure of Green Glades to fulfil certain suspensive conditions, including a due diligence and the furnishing of guarantees, which were due during March

2010. Green Glades failed to inform Investec of further developments relating to the agreement relating to the sale of shares. Its letters of 9 February 2010 and of 19 May 2010 did not serve that purpose:

(a) In the letter, dated 9 February 2010, Green Glades sought by about 20 days an extension of the time period prescribed for the fulfilment of the suspensive conditions relating to the due diligence requirement, and one month for the furnishing of guarantees (which had long passed); and

(b) In the letter, dated 19 May 2010 Green Glades indicated that *"bank issued proof of funds"* was expected from *"the funder"* during the week of 24 May 2010. This never materialised.

[22] In an attempt to placate its failure to keep Investec abreast of the developments in respect of the sale of the Vaal property, Green Glades alleges, in its answering affidavit, that *"the share sale agreement is still in force and the Respondent [Investec] is kept abreast of the purchaser's endeavours to provide finance on a regular basis".* This revelation is made, in the answering affidavit, some twenty months after the sale of the Vaal property was purportedly concluded, and notwithstanding the lapse of the agreement of the sale of shares. The empty promise in this statement is underscored by the fact that, in Blieden J's words:

"no details of any nature are provided by [Green Glades] as to how it has been 'kept abreast' of the purchaser's endeavours to provide finance, nor is there any evidence of any nature that since May 2010 anything further has occurred in regard to the alleged sale of the shares agreement."

[23] In the circumstances, I am of the view that a reasonable period for the sale of the Vaal property, as contemplated in the moratorium agreement had elapsed by the time the winding up application was launched, and there was no prospect of such sale ever taking place. The agreement of the sale of shares was, in my view, a ruse to persuade Louw AJ to dismiss the recovery application.

[24] Accordingly, Green Glades had failed, to prove its compliance with its obligations in terms of the moratorium agreement or that it had tendered performance in terms of the moratorium agreement. It was thus not entitled to invoke the provisions of the moratorium agreement as a defence to the winding up application. In my view, Blieden J correctly found that Green Glades had failed to comply with its obligations in terms of the moratorium agreement, and that Investec had made out a strong case for the winding up of Green Glades on the grounds that Green Glades was unable to pay its debts in terms of s 344(f) read with s 345(i)(c) of the Act. It is accordingly just and equitable, as contemplated in s 344(h) of the Act, that Green Glades be wound up.

[25] In view of the conclusion which I have reached in respect of Green Glade's non-compliance with the moratorium agreement, and in particular its failure to sell the Vaal property within a reasonable time, as contemplated therein, there is no need to deal with Green Glade's alternative contention relating to the exercise of the discretion of the court *a quo*, in terms of s 347(1) of the Act, against the granting of the winding up application, on the basis that the Vaal property had already been sold, and had sufficient value to repay the full extent of the debt which was claimed by Investec. Accordingly, the appeal falls to be dismissed.

[26] In the result, I make the following order:

(a) The appeal is dismissed.

(b) The Appellant is ordered to pay the costs of the appeal.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT

I agree

pp Zondo

RMM ZONDO
JUDGE OF THE HIGH COURT

I agree

F KGOMO
JUDGE OF THE HIGH COURT

APPELLANT'S COUNSEL:	MR C JORDAAN SC
APPELLANT'S ATTORNEY:	SMIT JONES & PRATT
RESPONDENT'S COUNSEL:	MS DC FISHER SC
RESPONDENT'S ATTORNEY:	BLAKES MAPHANGA INC
DATE/S OF HEARING:	6 AUGUST 2012
DATE OF JUDGMENT:	22 OCTOBER 2012