

In the matter between:

GREEN GLADES PROPERTIES (PTY) LTD

APPELLANT

And

INVESTEC BANK

RESPONDENT

This is an appeal against the judgment of the court *a quo* 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.

In 2005 the appellant secured a loan, from the respondent, to undertake the development of the Vaal property. The loan was secured by a mortgage bond over the Vaal property. The appellant failed to pay the loan. In an attempt to reach a settlement, the parties concluded a moratorium agreement in terms of which the development of the property would be abandoned and the appellant would be provided with time to liquidate its assets in order to repay the debt to the respondent. In return the respondent would not proceed with legal action against the appellant. Two properties were involved, which had to be sold. The appellant was, in terms of the moratorium agreement, obliged to inform the respondent of all developments regarding the marketing and sale of these properties, and the properties were to be sold within a reasonable time.

The appellant’s primary defence in the winding up application was that the moratorium agreement precluded the bringing of the winding up application or any legal proceedings against it for the recovery of the loan.

On appeal, the Court held that the appellant’s defence was misplaced as it had failed to comply with the terms of the moratorium agreement within a reasonable time as contemplated therein.

Furthermore, the Court held that, in bilateral contracts there is a presumption that neither party is entitled to enforce the contract, unless it has performed or tenders to perform its obligations. Consequently, the respondent's obligation to refrain from bringing legal proceedings for recovery of the loan was conditional upon the tender of performance by the appellant of its obligations in terms of the moratorium agreement. In the circumstances, the court held that a reasonable period for the sale of the Vaal property had elapsed by the time the winding up application was launched, and there was no prospect of such sale ever taking place. Further, the appellant's refusal to pay the proceeds of the sale of the second property over to Investec, and to provide details to Investec relating to proceeds available after the transfer of that property, suggested that the appellant did not wish to perform its obligations in terms of the moratorium agreement. The appeal was therefore dismissed.