**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

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| **DELETE WHICHEVER IS NOT APPLICABLE:**<br>(1) REPORTABLE: ~~YES~~/NO<br>(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO<br>(3) REVISED:<br>14 June 2021<br>DATE SIGNATURE | **CASE NUMBER: 18482/2020** |

In the matter between :

**TELEMAX (PTY) LTD** **Applicant**

(Reg No 2014/081811/07)

and

**KIEVITS KROON COUNTRY ESTATE (PTY) LTD** **Respondent**

(Reg No: 1996/006198/07)

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**JUDGMENT**

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Heard on: 3 June 2021

Judgment handed down: 15 June 2021 (by publication on CaseLines)

**VAN ZYL AJ**

**INTRODUCTION**

1. This is a final winding-up application. The Applicant is Telemax (Pty) Ltd, a company that conducts business in what it termed the information technology sphere, and the Respondent is Kievits Kroon Country Estate (Pty) Ltd, an upmarket country estate with a luxury hotel and a wellness spa situated in Pretoria. For the sake of convenience I distinguish between the Respondent as the company and the actual estate where necessary.

2. The parties were in a contractual relationship with one another, which came to its demise during November and December 2019 and the Applicant now seeks the winding-up of the Respondent on the following grounds:

    2.1 That the Respondent is unable to pay its debts in terms of section 344(f), read with section 345(1)(a) of the Companies Act (At 61 of 1973) ("*the 1973 Companies Act*"); or

    2.2 That it would be just and equitable to do so.

3. The notice of motion did not seek for a provisional winding-up and the matter was argued in front of me on the basis that the relief sought was in the form of a final winding-up. The relevance of this lies in the onus that the Applicant has to discharge in order to obtain the relief that it seeks.

**A BRIEF BACKGROUND**

4. The record comprised of the usual set of affidavits. On the Applicant's side, the founding affidavit was deposed to by Llewellyn Bailie, who described himself as the Managing Director of the Applicant. After deposing to the founding affidavit Bailie resigned as a director of the Applicant and the replying affidavit was deposed to by Ryno Mathee, a director of the Applicant. Bailie deposed to a confirmatory affidavit in support of Mathee's replying affidavit but only confirmed the contents thereof "*insofar as it relates to myself*". The answering affidavit was deposed to by Francois Stremmelaar, the Respondent's general manager.

5. There is no dispute that the Respondent required a total overhaul of its information technology ("*IT*") structure at the estate. Unfortunately, neither party provided a definition of what was meant by the term of "information technology structure" and I could also find no definitive treatment of the phrase. I deal with how the term should be interpreted further below.

6. During March 2019, the Applicant and the Respondent entered into an oral agreement. Counsel for both parties approached the matter on the basis that the parties were largely *ad idem* regarding the terms of this oral contract. While it is so for the greater part, it is not so in several critical respects.

7. In the founding affidavit, Bailie set out what he referred to as the "*material, express alternatively tacit further alternatively implied terms*" of the oral contract. Van der Linde J remarked in Niehaus v High Meadow Grove Body Corporate[1] that "*an*

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[1] Niehaus v High Meadow Grove Body Corporate 2020 (5) SA 197 (GJ) at paragraph [3].

*affidavit, by a deponent who asserts that a specific term of an agreement is* "*express, alternatively tacit, alternatively implied", helps naught. The deponent is a witness who is expected to give evidence of the agreement and its terms*". A more careful analysis of the terms of the agreement is therefore required.

8. The first point to be made is that the founding affidavit and the answering affidavit both contend for a single agreement. In reply, Mathee sought to reset the Applicant's sails by contending for a second oral agreement, but this was not confirmed by Bailie in his confirmatory affidavit (which was limited only to matters insofar as it referred to him). In any event, it is trite that a party must make out its case in the founding affidavit. It cannot do so in reply. I accordingly proceed on the basis that there was only one single oral agreement which I hereinafter refer to simply as "*the oral agreement*".

9. The parties are also in agreement that the oral agreement comprised of two phases. Phase 1 was described as "*to install a network, hosting and connectivity, physical network (being cabling and ad hoc components), a 3CX PBX telephone system, connectivity and project management for the Respondent*".

10. Phase 2 was in respect of what was described by the Applicant as "hardware and software infrastructure".

11. The Applicant was entitled to payment seven days after receipt of an invoice for payment of the services, installation and goods sold and delivered.

12. It is common cause that the Applicant was paid in full for Phase 1, but defects subsequently arose in respect of Phase 1 to the extent that on the facts before me

it is probable that the Applicant has failed to properly perform in respect of Phase 1. Claims arising from this malperformance by the Applicant on Phase 1 forms part of the Respondent's defence to the Applicant's claim against the Respondent.

13. In regard to Phase 2, the Applicant contends that what is due and payable in respect of Phase 2 appears from an invoice dated 21 November 2019 attached to its founding affidavit, which was sent by Bailie to Stremmelaar on 20 November 2019 attached to an email with the subject line "*Kievits Kroon Countery Estate phase 2 pricing breakdown*". Stremmelaar queried the email on 28 November 2019 and requested confirmation from Bailie that, *inter alia*, the five documents attached to Bailie's email of 20 November 2019 were the only information for him to consider, which Bailie confirmed on 29 November 2019. The five documents to which reference was made is the invoice of 21 November 2019 and what is referred to by Bailie in the founding affidavit as "*the four sub-invoices*". Bailie's statement is not quite correct as the four accompanying documents are quotes, not invoices. Nothing turns on this. I hereinafter refer to the invoice as "*the November invoice*" and the four accompanying documents as "*the November quotes*".

14. From Bailie and Stremmelaar's correspondence, there seems to have been some confusion as to what was eventually provided by the applicant in terms of Phase 2. This may have been what is commonly referred to as "scope creep". A handy exposition of what "scope creep" entails appears in the judgment of Mr Justice Edwards-Stuart sitting in the Technology and Construction Court in the matter of

De Beers UK Limited (Formerly: The Diamond Trading Company Limited) v Atos Origin It Services UK Limited[2]:

> "These two different types of scope increase are sometimes referred to as changes in breadth and changes in depth, respectively. Changes in breadth are, effectively by definition, true changes in scope. […] Changes in depth are sometimes referred to as "scope creep"."

15. Whether the changes came about due to a lack of clarity in the initial oral agreement or due to scope creep of either variety mentioned above during the course of executing the work, it does not matter. The parties are in agreement that what was to be provided in respect of Phase 2 appears from the November invoice and the November quotes.

16. The Applicant urged me to interpret Stremmelaar's reply on 28 November 2019 as an acceptance that the work in respect of all the aforementioned invoices had been properly rendered. Such a contention is not supported by the content of Stremmelaar's email, which only required confirmation that what appears in the invoices was the only information to consider.

17. The November invoices lists the items billed for under four headings, namely "Software", "Servers", "PCs & Laptops", "Additional 1st" and "Additional 2nd", all of which totals R1,889,812.27, inclusive of VAT.

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2 De Beers UK Limited (Formerly: The Diamond Trading Company Limited) v Atos Origin It Services UK Limited 2010 EWHC 3276 (TCC) at paragraph 239.

18. It is convenient to now turn back to the phrase "information technology structure" as used by the parties. One standard definition of "information technology" is "*the technology involving the development, maintenance, and use of computer systems, software, and networks for the processing and distribution of data*".[3] Another is "*the study or use of systems (especially computers and telecommunications) for storing, retrieving and sending information*"[4]. The Electronic Communications and Transactions Act (Act 25 of 2002 defines "*information system*" as:

> "a system for generating, sending, receiving, storing, displaying or otherwise processing data messages and includes the Internet"

19. The dictionary definition of "structure" in turn is "*the arrangement of and relations between something complex*"[5].

20. In light of these definitions, the phrase "information technology structure" means the arrangement of and relations between computer systems, software and networks for the processing and distribution of data. Cognisant that dictionary definitions should serve only as a guide[6], it also accords with the parties' understanding of what they meant by the term "information technology structure" and is reflected in what the parties understood the work in respect of Phase 1 and Phase 2 to be comprised of.

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3 "information technology", Merriam-Webster.com, 2021, https://www.merriam-webster.com (6 June 2021).

4 "information technology", Concise Oxford English Dictionary, 12th Edition.

5 "structure", Concise Oxford English Dictionary, 12th Edition.

6 De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka 1980 (2) SA 191 (T) at 196E.

21. The importance of understanding what the term “information technology structure” means lies in the fact that was being provided was an IT system, not just certain IT hardware.

22. In argument I enquired from counsel for the Applicant whether it would have been good enough for the Applicant simply to have delivered the items at the door of the Respondent in discharge of the Applicant’s performance under Phase 2. He conceded that it would not and that something more was required. The concession was properly made since the November invoice expressly refers to “installation, setup & update” in respect of “Software” and “installation” in respect of cable installation. Furthermore, it is evident from the affidavits and contemporaneous documents that the parties did not contemplate a mere sale agreement, but something more which included the rendering of labour and services to install the items listed.

23. In respect of the Software items, one of the November quotes details what is to be provided. This includes, by way of examples, the general set-up and update of the SAGE, OPERA, MICROS, ESP-SPA, PASTEL Interface, WANAMA Interface and ESP Interface software packages. It also provides for the installation of point of sale, back-up license and, in respect of the OPERA and PMS software packages, the back-office interface configuration and training.

24. In respect of the so-called Additional 1st, one of the November quotes reflect that a company called “Huge Networks” would be used as the Applicant’s subcontractor. The quote also provides *inter alia* for “trace and test” and “labour”. In respect of Additional 2nd, the same quote makes mention of various “network points”.

25. What is apparent from the parties' understanding of the oral agreement, and more particularly Phase 2 thereof, was that the items listed in the November invoice were not disparate items that could be provided in isolation from one another, but rather had to be delivered as part of the overhaul of the Respondent's IT structure at the estate.

26. Stremmelaar states that Phase 1 was not properly completed and the Applicant failed to perform in terms of the oral agreement. The facts support this.

27. The parties are in agreement that during October 2019, an independent IT expert, Jason Delport of Silver Moon was brought in to evaluate and assess the execution of Phase 1. The report produced on 25 October 2019 (hereinafter referred to as "*the Silver Moon report*") eventually dealt with aspects of both Phase 1 and Phase 2. Although there was no confirmatory affidavit from Delport confirming the Silver Moon report, both parties relied upon the report.

28. The Silver Moon report details a plethora of faults, which need not be rehashed herein for reasons which are explained below.

29. On 31 October 2019, Bailie wrote to Delport with a proposed plan of action (or as Bailie refers to it, a "snag roll out plan") to address the faults listed in the Silver Moon report. Bailie states that this snag roll out plan was approved by Delport and it included project management duties on the part of the Applicant.

30. Emails attached to the founding affidavit reflect that by 4 November 2019 the plan had not yet been agreed upon, but an email of 11 November 2019 seems to reflect

that remedial measures had begun. Bailie, however, states that the implementation of the roll out plan never transpired.

31. On Thursday, 14 November 2019, Bailie wrote to Rad Jankovic of Huge Networks. The introductory paragraph of the email is worth quoting in full:

> Hi Rad,
>
> As you are aware Ryno did a proper walkthrough with Eddie Yesterday after our meeting to confirm what was still outstanding or not completed to Telemax standards. The results were shocking to put it likely … The below identifies the areas on the property where network points where meant to be installed (including the POS points required for the new POS printers). At some point we stopped taking photos where the same issue were present almost at every point i.e. loose network points- out of the supposed 33 new network points only 30 were found & it became clear that 3 POS points were never installed. To make matters worse, NONE of the installed network points were active… only the POS points where POS printers were installed are active. I have to ask how could our contractors possibly missed this several times? Dial 9 is also still setup as "Dial 9* " I'm attaching the photos & will share the video clips via watsap. Please see below finds & description:"

32. Why the Applicant saw it fit to try and place distance between itself and Huge Networks is not clear, since Huge Networks was its subcontractor and any poor performance on its part stands as a breach by the Applicant of its contractual obligations to the Respondent.

33. Bailie also referred to emails exchanged with Huge Networks on 15, 18 and 20 November 2019, all of which still reflect that there was outstanding work to be done.

34. Bailie alleges in his founding affidavit that Stremmelaar refused to allow the Applicant access to the estate. Stremmelaar denies this. The emails relied upon by Bailie also does not support his version that access was refused, nor does he point to any email prior to rendering the invoices on 20 November 2019 which records that access was denied. The Applicant's case was in any event that it was entitled to be paid for what appears in the November 2019 invoice, which presumes proper performance when it was rendered.

35. On 27 November 2019, the Applicant's attorneys, Hills Inc, served a notice on the Applicant in terms of section 345 of the 1973 Companies Act. The invoice that is attached to the demand is the invoice provided by Bailie to Stremmelaar on 20 November 2019. As pointed out above, Bailie only confirmed to Stremmelaar on 29 November 2019 that the invoices rendered on 20 November 2019 were indeed what should be considered. Hills also only contended for a single "partly written partly oral agreement".

36. On 10 December 2019, Respondent, through its attorneys MacRoberts Attorneys, responded to the 27 November 2019 demand. Both the terms of the oral agreement, as well as that there had been proper performance was placed in issue.

37. Hills wrote back on 10 December 2019 and then responded more substantially two months later, on 10 February 2020. In neither of the letters was the challenge to the terms of the oral agreement taken up. The letter did, however, contend that proper access had not been given to address "problems" with the Respondent's IT system, but contended that this was not the Applicant's doing and responsibility.

38. It is evident that the parties' contractual relationship thereafter came to an end, but neither party has stated how exactly this happened.

**THE LEGAL PRINCIPLES**

39. The Applicant seeks a final winding-up order and has to discharge the onus of doing so on the balance of probabilities.

40. As is apparent from the analysis of the facts there are serious disputes between the parties regarding what the terms of the agreement were and whether there had been proper performance in terms of the agreement.

41. The Applicant, who throughout bears the onus, did not seek an order referring these disputes for the hearing of oral evidence as it might have done. The well known test set out in Plascon-Evans[7] is accordingly of application.

42. The papers are interspersed with disputed issues of fact. Final winding-up orders may, in terms of the test, only be granted if the facts stated by the respondents together with the admitted facts in the applicants' affidavits justify the orders.[8] In Orestisolve (Pty) Ltd T/A Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another 2015 (4) SA 449 (WCC), Roger J stated:

> "[9] The test for a final order of liquidation is different. The applicant must establish its case on a balance of probabilities. Where the facts are disputed, the court is not permitted to determine the balance of probabilities on the affidavits but must instead

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7 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), at 634E – 635C.

8 Paarwater v South Sahara Inv (Pty) Ltd [2005] 4 All SA 185 (SCA) paragraphs [3] and [4]; Budge NNO v Midnight Storm Inv 256 (Pty) Ltd 2012 (2) SA 28 (GSJ) at paragraph [14].

apply the Plascon-Evans rule (Paarwater v South Sahara Investments (Pty) Ltd [2005] 4 All SA 185 (SCA) para 4; Golden Mile Financial Solutions CC v Amagen Development (Pty) Ltd [2010] ZAWCHC 339 paras 8 – 10; Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another 2012 (2) SA 28 (GSJ) para 14).

[10] The difference in approach to factual disputes at the provisional and final stages appears to me to have implications for the Badenhorst rule. If there are genuine disputes of fact regarding the existence of the applicant's claim at the final stage, the applicant will fail on ordinary principles unless it can persuade the court to refer the matter to oral evidence. The court cannot, at the final stage, cast an onus on the respondent of proving that the debt is bona fide disputed on reasonable grounds merely because the balance of probabilities on the affidavits favours the applicant. At the final stage, therefore, the Badenhorst rule is likely to find its main field of operation where the applicant, faced with a genuine dispute of fact, seeks a referral to oral evidence. The court might refuse the referral on the basis that the debt is bona fide disputed on reasonable grounds and should thus not be determined in liquidation proceedings. (In the present case neither side requested a referral to oral evidence.)"

43. I next turn to an analysis of the facts.

**ANALYSIS**

44. The Applicant elected to ask for a final winding-up and elected also not to ask that the factual disputes be referred to oral evidence.

45. Accordingly, applying the principles set out above, it is apparent that the oral agreement was a single one and the fact that there were two phases of delivery does not bifurcate the Applicant's obligation to render performance in full.

46. The Applicant bears the onus of alleging and proving the terms of the oral agreement, even if it involves proof of a negative.[9]

47. The oral agreement is clearly not a sale agreement, but rather a contract to perform a piece of work (called a *location conduction operis*). Such a contract has three basic elements, namely, the work to be performed, the remuneration payable and the time for performance.[10]

48. It is for the Applicant to prove that everything was done that had to be done in terms of the oral agreement.[11] Unless otherwise agreed, the contractor (in this case the Applicant) may not demand payment until it has completed the work.[12] This legal principle was not properly appreciated by the parties until raised in argument by the court.[13]

49. On the probabilities the Applicant had not yet performed the work it contracted for when demand was made on 27 November 2019. Furthermore, on the facts in this matter the work contracted for under the oral agreement has to date not been performed in full. That does not mean that the Applicant cannot recover payment, even if its performance was incomplete or defective. The Applicant is not entitled,

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9 Kriegler v Minitzer [1949] 4 All SA 498 (A).

10 *Amler's Precedent of Pleadings*, 7th Edition, page 268.

11 Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens; Qwa Qwa Regeringsdiens v Martin Harris & Seuns OVS (Edms) Bpk 2000 (3) SA 339 (SCA).

12 BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 418; Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd 1979 (2) SA 56 (A) at 60.

13 Be that as it may, see: Trinity Asset Management (Pty) Ltd v Grindstone Inv 132 (Pty) Ltd 2018 (1) SA 94 (CC) at paragraph [92].

however, to recover the contract sum.[14] It can do so, depending on the circumstances, either by way of a reduced contract price or by way of an enrichment claim, but that is for another court to determine on another day.

50. The Respondent has particularised the defects in the Applicant's performance.[15] While there is a dispute as to the value of the defects, this is in my view not material to raising a defence at this stage to a claim by the Applicant for payment. Much time was spent on this in argument, but this was because the parties approached the defects complained about, particularly under Phase 1 of the oral agreement, as somehow separate from what happened in Phase 2 in respect of which the Applicant claimed. They also approached the Phase 2 defects as though a valuation is required. In terms of the law on a contract for the performance of a piece of work, disputing performance and itemising the defects complained of is a defence to the entire claim and it remains for the contractor (i.e. the Applicant) to then either prove that proper performance was rendered or what the reduced value would be.

51. Unless the Respondent wants to claim consequential damages from the alleged breach of contract by the Applicant, it need not raise a counterclaim as a defence to the Applicant's claim as currently formulated. A denial that there has been proper performance suffices and the probabilities in the present matter favour the Respondent. Accordingly, the situation where I need to consider the matter on the

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14 *Amler's Precedent of Pleadings*, 7th Edition, page 267.

15 Badenhorst v Prinsloo 1967 (1) SA 212 (O) at 215.

basis of a counterclaim by the company against an established creditor and then exercise my discretion in that context[16], does not arise.

52. The Applicant claims for the full value of the oral agreement (i.e. the full price for both Phase 1 (in respect of which it has already been paid) and Phase 2). On the facts before me, the Applicant has not performed properly on either of the Phases and its claim for full payment accordingly does not fall due for payment.

53. Until the Applicant has proven on a balance of probabilities that it has performed properly, it is at best a contingent creditor of the Respondent.

54. The Respondent was therefore fully entitled to refuse to make payment. The Applicant can therefore also not in the circumstances rely on the provisions of clause 345(1)(a) of the 1973 Companies Act to prove that the Respondent is insolvent.

55. In regard to whether I should, on the basis of the Applicant being a contingent creditor, nonetheless allow a winding-up of the Applicant, the parties agreed that I have a discretion. In this regard the following:

    55.1 I was urged by counsel for the Respondent to consider that the Applicant's claim may eventually be dismissed by the liquidator. This is not a relevant argument. It is the Applicant's prerogative to institute the

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16 Companies Part 3: Volume 4(3) - Second Edition, Winding-Up By The Court In Terms Of The Companies Act 61 Of 1973, §85.

liquidation proceedings, even though it might not be able to successfully prove a claim before the liquidator.[17]

55.2 But even if one were to assume that the section 345(1)(a) notice can be relied upon, Rogers J stated the following in Orestisolve *supra*[18]:

> "Another circumstance which, in my view, would favour an exercise of the court's discretion against winding-up is where, despite the deemed inability to pay debts created by s 345(1)(a), the evidence shows that the company is not in fact commercially insolvent. It may also be relevant in this regard that the company's failure to pay is attributable to a genuine dispute concerning the claim, even if the court in the event considers the grounds of dispute are ill-founded."

55.3 The Applicant has failed to actually prove that the Respondent is commercially insolvent. Instead, it relied upon innuendo based on the Respondent's failure to provide either its annual financial statements or put up security for the claim. While the Respondent can be criticised for taking a lackadaisical approach to responding to this aspect (i.e. by not providing a statement from its auditors), mere speculation does not suffice to prove a fact.

55.4 Stremmelaar states in his affidavit that the Respondent is acknowledged to be one of the top ten getaways in Gauteng, that it has one of the

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17 Absa Bank Ltd v Hammerle Group 2015 (5) SA 215 (SCA) at paragraph [16].

18 Orestisolve (Pty) Ltd t/a Essa Inv v NDFT Inv Holdings (Pty) Ltd 2015 (4) SA 449 (WCC) at paragraph [21].

leading health spas in the country, that the estate has outstanding conferencing facilities, that the Respondent has received awards and accolades, that the Respondent is a brand name in South Africa and is renowned as one of the most exclusive leisure and conferencing facilities in Africa. The Applicant applied to have the paragraphs in which these statements appear struck-out on the basis that they are irrelevant. The evidence is clearly relevant and Stremmelaar, in his capacity as the general manger, is able to attest to these facts. The striking-out application accordingly fails.

55.5 Besides seeking to strike out these statements of Stremmelaar, the Applicant did not seek to provide facts countering what Stremmelaar said. Even if it were commercially insolvent, on those facts the Respondent is a business in whose favour a court would exercise its discretion given what has been said of its business, it's evident assets and what must be a not insignificant number of employees dependent upon the Respondent for their livelihoods.[19]

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[19] Orestisolve *supra* at paragraph [17]: "*Although the ex debito justitiae maxim has been repeated in recent cases, there are other decisions holding that the legislative policies underlying the new Act require the discretion to be viewed more broadly in favour of saving ailing companies (see Absa Bank Ltd v Newcity Group (Pty) Ltd and Other Cases [2013] 3 All SA 146 (GSJ) paras 29 – 33; Dippenaar NO and Others v Business Venture Investments No 134 (Pty) Ltd [2014] 2 All SA 162 (WCC) paras 45 – 46). Where there are competing applications for liquidation and business rescue, the policy considerations underlying the business rescue procedure must inevitably derogate from the traditional approach. The two cases just mentioned extended this approach to circumstances where, although there were not competing business rescue applications, there was evidence that the companies could be saved by transactions of which particulars were furnished*."

**THE JUST AND EQUITABLE GROUND**

56. The highlight of the Applicant's case in regard to just and equitable is the allegation that the Respondent is currently trading in insolvent circumstances "*that are submitted to be reckless and negligent, which not only needs to be stopped, but also needs to be investigated*".

57. Smit JP said in that Katsapas v Norvalspont Investments (Pty) Ltd[20] at 406F - H that in circumstances where a minor creditor applies for the winding-up of a company a winding-up will only be ordered if the applicant can show that due to the mismanagement the company it will rapidly be reduced to a condition of insolvency so as to prejudice the creditors' prospects of being paid. The Applicant falls squarely in the position of a minor creditor and the above *dictum* applies to it.

58. The Applicant has not in any way substantiated the statement that the Respondent is trading recklessly and negligently in insolvent circumstances, nor have any facts been put before me to show any mismanagement of the Respondent and its financial affairs. The mere statement of what should be a conclusion on the facts, does not suffice.

59. In contrast stands Stremmelaar's statements referred to above, which paints a picture of a company being managed as a successful business.

60. In the premise the reliance on just and equitable ground also cannot succeed.

61. In the circumstances the application for a final winding-up order must fail.

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[20] Katsapas v Norvalspont Investments (Pty) Ltd 1969 (4) SA 403 (O) at 406F – H.

**ORDER:**

62. In the premises I make the following order:

62.1 The Applicant's application is dismissed.

62.2 The Applicant is to pay the costs of the application on the party and party scale.

**DIRK R. VAN ZYL**

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

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| For the Applicant: | Adv Johan Prinsloo |
| Instructed by: | Hills Inc |
| | |
| For the Respondent: | Adv M.P van der Merwe SC |
| Instructed by: | MacRobert Incorporated |