IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 7874/2010
17553/2010
18001/2010

In the matter between:

GOLDEN MILE FINANCIAL SOLUTIONS CC	Applicant
And	
AMAGEN DEVELOPMENT (PTY) LTD	Respondent
KEVIN GADD ARCHITECTS CC	First Intervening Creditor
TAKE SHAPE PROPERTIES 1 CC	Second Intervening Creditor
ANNEMARIE LIEBENBERG	Third Intervening Creditor

JUDGMENT DELIVERED ON 18 NOVEMBER 2010

CLOETE, AJ

[1] This is an opposed application for the final winding up of the respondent. There are two intervening creditors who support the main application and, in the alternative, approach this court in their own right for the liquidation of respondent in the event of the main application being unsuccessful. A third intervening creditor (Take Shape Properties 1 CC) withdrew its claims prior to the hearing of this matter.

[2] The applicant obtained a provisional winding up order on 29 April 2010 with return date 2 June 2010. Due to the respondent's opposition, the return date was extended to 19 August 2010. After the applications of the intervening creditors, the return date was again extended to 15 September 2010, and then again to 4 November 2010, upon which date the matter was argued before this court.

[3] The two intervening creditors who persist with their claims are Kevin Gadd Architects CC ("Gadd") and Annemarie Liebenberg ("Liebenberg"). When the matter was argued, the applications of Gadd and Liebenberg to intervene in these proceedings were not opposed by the respondent, although the respondent opposed the balance of the relief sought by them.

[4] The claims of the applicant, Gadd and Liebenberg arise out of the same property development on the farm Haasendal in the district of Brackenfell. The applicant *inter alia* loaned bridging finance to respondent, Gadd was the architect involved in the development and Liebenberg sold a portion of the land developed to respondent. During the course of argument, all parties agreed that it is the commercial insolvency and not the factual insolvency of the respondent which has application in the event that the applicant and/or either or both of the intervening creditors are able to show an indebtedness to them on the basis of the established principles in matters of this nature.

[5] For sake of convenience I will deal firstly with the main application, and thereafter with the applications of Gadd and Liebenberg respectively. Where I make reference to "the parties" in each application, I am referring to the parties in that particular application.

THE MAIN APPLICATION

[6] The applicant avers that during the period March 2007 to February 2008 it concluded five bridging finance agreements with the respondent in terms of which it loaned and advanced capital to the latter. The capital amount also attracts interest and finance charges in the form of discounting fees which are payable by the respondent. On 3 November 2009 the applicant served a letter in terms of s 345(1) of the Companies Act, 61 of 1973 ("the Companies Act") at the registered office of the respondent. There was no reaction to this letter and on 21 April 2010 an application was made for the provisional winding of the respondent, which was granted on 29 April 2010.

[7] Respondent disputes its indebtedness to the applicant, alleging that the latter has miscalculated the amount due by it, and calls for a debatement of account. In particular, it alleges that interest was incorrectly calculated, certain of the capital amounts advanced have not been proven and that in fact it has overpaid the applicant.

[8] Where a provisional order has been granted the applicant must satisfy the court on a balance of probabilities that a final order is to be granted. In *Paarwater v South*

Sahara Investments (Pty) Ltd 2005 (4) All SA 185 (SCA) at 186G-H it was stated as follows:

> *"At the outset it is important to point out that the onus rested upon the appellant in seeking a final order to satisfy the court, on a balance of probabilities, that it was indeed 'just and equitable' finally to liquidate the respondent. Furthermore, the degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order. In the former case a mere prima facie case need be established whereas the court, before it will grant a final order, must be satisfied on a balance of probabilities that such a case has been made out by the applicant seeking confirmation of the provisional order."*

[9] There was some debate before me as to the test to be applied in deciding whether the applicant is entitled to a final winding up order. I am satisfied that this court is obliged to apply the rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C:

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … moreover, there*

may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers ..."

[10] Where an application for a final order is opposed on the basis of a dispute as to the existence of a debt upon which the applicant relies, what is in issue is whether the debt is genuinely disputed on reasonable grounds. The court will not allow a genuine dispute raised on reasonable grounds to be resolved by way of winding up proceedings. The applicant bears a full onus to establish the claim upon which it relies. A party that seeks to show that the claim is bona fide disputed on reasonable grounds need only show that it is not being unreasonable in its opposition; it need not adduce evidence on affidavit upon which it would rely at a trial in due course. It need only make allegations of fact which, if proved at trial, would disclose a defence to any claim made against it:

See *Helderberg Laboratories CC v Solar Technologies* 2008 (2) SA 627 (C) at 633G-H

[11] The dispute between Mr David Muller of the applicant and Mr Thomas Notnagel of the respondent is a classic case of a business relationship turned sour, and neither party can be complimented on keeping detailed and accurate records of its dealings with the other. The lack of these records has inevitably given rise to a whole host of disputes of fact, and it is thus important to focus on whether the debt is genuinely disputed on reasonable grounds. With the above in mind, the following emerges from the papers:

[11.1.] In its founding affidavit, applicant relies on an indebtedness by respondent of R276 199.06 together with interest thereon at the rate of 36% per annum as from 19 January 2009 until date of final payment.

[11.2.] By way of background, applicant alleges that it provided bridging finance to the respondent in a total sum of R490 000 together with interest at a rate of 0.15% per day. It then alleges that the respondent repaid the applicant R446 110.59 on 19 June 2008, at which date the outstanding balance due by respondent (inclusive of interest) was R256 233.87. It further alleges that the parties thereafter decided to consolidate the respondent's debt, as the applicant required security for the amount still owing to it. (The founding affidavit does not allege when the decision to consolidate was taken, where it was taken or by which natural persons the juristic entities were represented). In this regard the applicant relies on a power of attorney to register a mortgage bond over the respondent's property, which it avers was signed by Notnagel on 10 June 2008. The draft mortgage bond reflects an indebtedness to the applicant of R450 000 plus interest thereon at the rate of 36% per annum as from 13 June 2008 until date of payment. It is common cause that this mortgage bond was never registered.

[11.3.] In answer the respondent disputes the advance of the sums as alleged (but not vouched) by the applicant. Respondent alleges that its payment of R446 110.59 on 19 June 2008 would have extinguished its entire indebtedness at that date, and that indeed there has been an overpayment by it of R6 906.26. Respondent further denies the applicant's claim for interest, which it alleges falls foul of the regulations promulgated under the National Credit Act, 34 of 2005. Alternatively and in any event, the applicant's

claim for interest falls foul of the *in duplum* rule, which prevents a creditor from charging interest in excess of the capital sum due. On respondent's version the interest charged (and claimed) would have exceeded 100% of the capital sums allegedly advanced by, the latest, mid 2010.

[11.4.] The applicant's difficulties are compounded by the allegation in its replying affidavit that as at 19 June 2008 the balance due by the respondent was R318 918.76 (as opposed to R276 199.06 in the founding affidavit). Respondent requested a debatement of account but the applicant chose instead to persist in its application for the winding up of the respondent, with the assistance of the intervening creditors. .

[12] Furthermore, it appears that the interest charged by the applicant has been calculated at impermissible rates, and thus the claims so calculated are void. In *Schierhout v Minister of Justice* 1926 AD 99 at 109 it was stated as follows:

> *"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect … so that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act."*

[13] To my mind, the applicant cannot succeed in this application. It is clear, in light of the allegations emerging from the papers, that the respondent is not being unreasonable in its opposition to the applicant's claim, as envisaged in *Helderberg Laboratories CC v Solar Technologies* supra

[14] The applicant has not discharged the onus resting upon it as is set out in *Paarwater v South Sahara Investments (Pty) Ltd* as read with the test in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (supra). I have thus concluded that the provisional order obtained by the applicant against the respondent should be discharged.

THE APPLICATION OF GADD

[15] In order for Gadd to succeed in its application for the winding up of the respondent it must, *prima facie*, establish that:

[15.1.] It is a creditor of the respondent; and

[15.2.] The respondent is unable to pay its debts.

See *s 346(1)(b) and s 344(f) read together with s 345(1)(c) of the Companies Act, 61 of 1973 ("the Act")*

[16] The following is clear from the papers:

[16.1.] Gadd brought a previous application for the winding up of the respondent on 11 June 2009 which was opposed;

[16.2.] On 14 October 2009 and by agreement between the parties, an order was granted by this court in terms of which Gadd withdrew its application for the provisional

liquidation of the respondent and the respondent agreed to pay Gadd the sum of R456 000 by not later than 14 December 2009;

[16.3.] Respondent failed to make any payment by 14 December 2009;

[16.4.] Over the period December 2009 to June 2010 respondent made various proposals and gave undertakings to settle its indebtedness to Gadd, which respondent has failed to honour;

[16.5.] Due to the respondent's failure to pay, Gadd proceeded to execute against its immovable properties;

[16.6.] Notwithstanding the execution steps, respondent still failed to make any payment to Gadd who was then prevented from proceeding with the sale in execution as a result of the provisional winding up order obtained against respondent at the instance of the applicant.

[17] In its notice of motion, Gadd incorrectly applied, in the alternative, for an order of final liquidation against respondent. To my mind, nothing turns on this, inasmuch as I am satisfied that, notwithstanding this error, Gadd has complied with all of the necessary procedural requirements for the grant of a provisional winding up order, by effecting service as required in terms of ss 346(4) and 346(4A) of the Act, furnishing the requisite security and producing the necessary certificate from the Master.

[18] Respondent's counsel sought to persuade me that Gadd's application was "contradictory" in that if the provisional order against the respondent was discharged, the agreed (payment) process could run its course in order to enable Gadd to obtain

payment. To my mind, there is no merit in this submission. Gadd was clearly entitled to proceed to levy execution against the immovable property of the respondent in circumstances in which the latter had failed to pay the amount due to it within the deadline stipulated in the settlement agreement.

[19] Respondent's counsel further submitted that the fact that immovable property of the respondent had been attached would confer a preferent claim on Gadd in the event of a final winding up order being granted. Respondent's counsel thus argued that *"because he is going to get paid anyway, how can his claim be taken into account in determining whether the respondent is commercially insolvent?"*. Again, it is my view that this submission is without merit. In Henochsberg on the Companies Act at Vol 1 p760 it is stated that:

> *"A sale in execution of property attached prior to the commencement of the winding up is suspended in terms of s 359(1)(a) ... Indeed, after such commencement it cannot proceed at the instance of the execution creditor not even if he purports to give notice in terms of s 359(2)(a) of an intention to continue with the execution. The liquidator, in the light of the provisions of ss 342(1) and 391, is bound and entitled to claim the property from the execution officer who must deliver it to him... and if, despite the institution of the winding up, the execution creditor causes the sale to proceed, the proceeds of such sale must be released to the liquidator by the execution officer if held by him and must be repaid to the liquidator by the execution creditor if they were paid to him subject*

only to the preference enjoyed by the execution creditor for the costs of execution not exceeding R50 …"

[20] These two "defences" constitute the high water mark of respondent's attempt to fend off payment to Gadd. I agree with Gadd's counsel that the following dictum by Innes CJ in *De Waard v Andrew & Thienhaus Ltd* 1907 TS 727 at 733 summarises and puts into perspective the issues involved in this application:

"Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind, the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man does not pay what he owes."

[21] In *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd & Others* 1993 (4) SA 436 CPD at 440F-H the court dealt with the concept of "commercial insolvency" as follows:

"The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current

demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceeds its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act, 61 of 1973 and is accordingly liable to be wound up."

[22] In my view, the inescapable conclusion is that the respondent is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f), of the Act and that it is commercially insolvent.

[23] I am thus satisfied that Gadd has established a prima facie case for the grant of a provisional winding up order in accordance with the principle referred to at *Paarwater v South Sahara Investments (Pty) Ltd* supra.

THE APPLICATION OF LIEBENBERG

[24] Liebenberg's application sets out that she sold a smallholding in Brackenfell for development as residential erven. She alleges that she is a creditor of the respondent with a claim of R 2 657 430 being the balance of the purchase price due to her arising out of the aforementioned sale.

[25] Liebenberg avers that the deed of sale does not reflect her oral agreement with the respondent. She states that the respondent undertook to pay a portion of the purchase price to her on the grant of rezoning approval, and that she signed the deed of

sale with this understanding. In the alternative (and albeit in reply), Liebenberg relies upon an unwritten undertaking of the respondent that it would make payment to her upon approval of the rezoning.

[26] Respondent relies upon the terms of the deed of sale itself, the relevant clause (i.e. clause 4.1) providing that Liebenberg's claim only arises from the nett proceeds of sales to end buyers and that, inasmuch as the erven have not been sold to end buyers, Liebenberg's claim is not payable. On Liebenberg's alternative claim, respondent avers that she has not alleged that rezoning approval has been granted, nor does she attach any proof of such approval to her affidavits (such approval would of course be a matter of public record). Accordingly, even on her alternative claim, Liebenberg has failed to establish that her claim is payable. (Respondent also disputes that certain payments made by it were made on account of the purchase price, and sought to persuade this court that such payments were in fact loans to Liebenberg. However, even on the respondent's version, an amount is owing to Liebenberg, and the probabilities are overwhelming that this amount – whatever it may be – exceeds the sum of R100).

[27] In his heads of argument, counsel for respondent put it thus (at para 61):

> *"While Liebenberg may enjoy a prospective claim conferring upon her locus standi, and that can be taken into account in reckoning whether the respondent is actually insolvent, she does not enjoy a payable claim that can be taken into account in evaluating whether the respondent is commercially insolvent."*

[28] This submission is without merit. Section 345 of the Act makes provision for the instances in which a company is deemed unable to pay its debts. Section 345(2) specifically provides as follows:

> *"In determining for the purpose of sub section (1) whether a company is unable to pay its debts, the court shall also take into account the contingent and prospective liabilities of the company."*

[29] Henochsberg supra at p711 summarises the position as follows:

> *"A contingent liability is one which, by reason of an existing vinculum juris between the creditor and the company, may become an enforceable liability on the happening of some future event; a prospective liability is one which, by reason of an existing vinculum juris between the creditor and the company, will become an enforceable liability on a future date or on a date determinable by reference to future events ... In taking a contingent or prospective liability into account the court should not treat it as it were due and payable; it should treat it as it is and as one of the factors affecting its decision as to whether or not the company is unable to pay its debts (Barclays Bank CD & O v Riverside Dried Fruit Co (Pty) Ltd 1949 (1) SA 937 (C) at 949-950)."*

[30] Although Liebenberg's claim for a provisional winding up order has been rendered abortive in light of my conclusion that Gadd is entitled to such an order, it is nonetheless necessary for me to consider whether Liebenberg approached this court bona fide for the relief sought, as this is relevant to her costs. In light of my view that

Liebenberg has a claim against respondent as envisaged in s 345(1) as read with s 345(2) of the Act, I am satisfied that she indeed approached this court on bona fide grounds.

[31] Liebenberg sought an order that her costs be costs in the liquidation. In this regard however I must be guided by the decision in *Ex parte Aitchison* 1924 TPD 570 (quoted with approval in *Simms Service Station v Maharaj* 1960 (3) DCLD 465 at 466G and 467C-D) to the following effect:

> *'... The question whether the costs of an abortive application should be included in the costs of sequestration and so made preferent, should be determined, in the first instance, by the trustee after consultation with the creditors, and the court should not make an anticipatory order."*

ORDER

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

[32.1.] The provisional winding up order obtained at the instance of the applicant on 29 April 2010 is discharged with costs, such costs to include the costs of the postponement on 2 June 2010 but excluding the costs of the postponements on 19 August 2010 and 15 September 2010;

[32.2.] Respondent is placed under provisional liquidation at the instance of the first intervening creditor, Kevin Gadd Architects CC;

[32.3.] A rule *nisi* is issued calling upon the respondent and all persons concerned to appear and show cause to this Court at 10h00 on **TUESDAY, 11 JANUARY 2011** why:

[32.3.1.] A final order of liquidation should not be granted;

[32.3.2.] The costs of the first intervening creditor's application, including the costs incurred by it in respect of the postponements on 19 August 2010 and 15 September 2010, should not be costs in the liquidation

[32.4.] Service of this order is to be effected:

[32.4.1.] on the respondent at its registered office;

[32.4.2.] by one publication in the Cape Times and Die Burger newspapers;

[32.4.3.] on the respondent's employees by affixing a copy thereof to any notice board to which the employees have access inside the respondent's premises or by affixing a copy thereof to the front door of the premises from which the respondent conducts business;

[32.4.4.] on any registered trade union that represents any of the respondent's employees; and

[32.4.5.] on the South African Revenue Service.

[32.5.] Whether the costs of the third intervening party (including the costs incurred by her in respect of the postponements on 19 August 2010 and 15 September 2010) shall form part of the costs in the liquidation shall be determined by the liquidator in consultation with the respondent's creditors.

J I Cloete, AJ