Republic of South Africa

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

Appeal Case no: A378/2012

In the matter between:

NEDBANK LIMITED Appellant

v

ZONNEKUS MANSION (PTY) LTD Respondent

Court: Mr Justice Yekiso, Mr Justice Binns-Ward and Mrs Acting Justice Cloete

Heard: 21 January 2013

Delivered: 7 February 2013

JUDGMENT

CLOETE AJ:

INTRODUCTION

[1] This is an appeal with the leave of the court *a quo* against the dismissal of an application for a provisional winding-up order of the respondent company. For sake of convenience I shall refer in this judgment to the appellant, Nedbank Limited, as *'the applicant'*.

[2] The grounds of appeal may be crystallised as follows. First, the court *a quo* conflated the respondent's defences of lack of *locus standi* and disputed indebtedness. Second, it wrongly found that the indebtedness was disputed on *bona fide* and reasonable grounds.

[3] No findings were made in relation to the respondent's ability to pay its debts (it would seem in light of the other findings made). The court *a quo* further concluded that it would not be just and equitable to exercise its discretion in favour of the applicant and to grant a provisional winding-up order, although it is not apparent on what basis it considered that it was called upon to exercise such a discretion.

BACKGROUND

[4] During April 1999 the Cape of Good Hope Bank Limited (*'Good Hope Bank'*) concluded a written agreement with the respondent granting it an access loan facility of R4 million. The respondent is a non-trading property owning company.

According to the respondent it is the registered owner of five immovable properties with a total value of some R80 million, including an immovable property with a value of R40 million, being Erf 13898 Milnerton, (*'the property'*), which serves as security for the aforementioned loan as well as the later loan referred to hereunder.

[5] Thereafter, and during February 2001, Good Hope Bank concluded a further written agreement for an additional access loan facility of R800 000 with the respondent (*'the consolidated agreement'*). It is common cause that monies were lent and advanced by Good Hope Bank to the respondent in terms of both agreements. The respondent furthermore admits the terms of both agreements as well as the terms of the two mortgage bonds registered over the property during April 1999 and February 2001, respectively, as security for its indebtedness to Good Hope Bank.

[6] In terms of the consolidated agreement:

6.1 The respondent acknowledged its indebtedness to Good Hope Bank as at 15 December 2000 in the sum of R4 017 730.33;

6.2 the additional access loan facility of R800 000 would be consolidated with the respondent's then existing liability thereby providing a total access loan facility of R4.8 million;

6.3 the respondent agreed that its consolidated liability would be repaid and regulated in accordance with the provisions of the consolidated agreement;

6.4 the respondent would repay the capital sum (including interest) monthly in arrear by way of 240 consecutive monthly instalments on the last day of each month;

6.5 the monthly instalments payable would be R57 770 subject to variation as a result of the fluctuating interest rate applicable from time to time;

6.6 the respondent would be entitled to effect repayments of the capital sum over and above the monthly instalments payable in which event the respondent would be entitled to obtain a re-advance of the additional amounts paid subject to certain terms and conditions;

6.7 in the event of the respondent failing to pay any amount owing on due date Good Hope Bank would be entitled to cancel the agreement and to claim immediate payment of the capital sum and any other amounts outstanding or, at its option, to continue to enforce the agreement for so long as it deemed fit and then to exercise its right of cancellation and claim immediate payment;

6.8 the respondent would be liable for any fees and costs relating to insurance of the property;

6.9 all amounts payable would be paid without deduction or set-off;

6.10 a certificate signed by a manager of Good Hope Bank reflecting the amount of the respondent's indebtedness or any other fact relating to the respondent's indebtedness would constitute *prima facie* proof of the contents thereof;

6.11 Any extension, relaxation or indulgence granted to the respondent by Good Hope Bank would not affect the latter's rights in terms of the agreement and would not be construed as a waiver thereof or constitute a novation; and

6.12 the agreement constituted the whole agreement between Good Hope Bank and the respondent and no variations would be of any force or effect unless reduced to writing and signed by both parties.

[7] The applicant alleges that it is the successor-in-title of all of the assets and liabilities of Good Hope Bank including the agreements and mortgage bonds referred to above. It avers that it acquired these assets and liabilities with effect from 1 January 2003 *'by virtue of endorsement BC3/2003 in terms of section 54 of the Banks Act, No 94 of 1990 as amended'*. This is denied by the respondent and will be dealt with later in this judgment since this issue is the cornerstone of the respondent's defence that the applicant lacks *locus standi*.

[8] It is common cause that the respondent failed to pay the monthly instalments due in terms of the consolidated agreement and that it last made a payment to the

applicant during October 2009.

[9] On 5 January 2010 Mr Gary van der Merwe, who at all material times represented the respondent before the commencement of the current litigation, approached the applicant to assist with a *'restructure'* of the access loan facility.

[10] On 6 January 2010 the applicant's Ms Anthea Small wrote to Mr van der Merwe in response. Her email reads as follows:-

> *'Subject: Nedbank bond over Erf 13898 ino Zonnekus Mansion (Pty) Ltd*
>
> *Dear Mr van der Merwe*
>
> *I refer to our telephonic conversation of yesterday and require the following in order to possibly assist with a restructure:*
>
> - *Latest financial statements on Zonnekus Mansion (Pty) Ltd*
> - *If above not available, please provide 6 months management accounts on company*
> - *Statement of Assets and Liabilities of all parties (individuals) related in the above company to the above company*
> - *Detailed Income & Expenses Statement of all parties (individuals) related in the above company*
> - *Confirmation of Income on the individual parties (ie salary slip or auditor's confirmation of income). If this is not readily available 6 (six) months bank statements is required to confirm income.*
>
> *If directors/shareholders as mentioned by yourself is a trust, we would require the following:*
>
> - *The financial statements on the Trust*
> - *The Personal Position statements of all trustees to be provided*
> - *Confirmation of Income on the trustees (ie salary slip or auditor's confirmation of income). If this is not readily available 6 (six) months bank*

statements is required to confirm income

Kindly provide the information by the latest 15 January 2010 in order to assess as the bond is currently in arrears by R226,420.'

[11] On 15 January 2010 Mr van der Merwe responded in writing as follows:-

'Hi Anthea

I am in the process of updating the financials for Zonnekus which are going to take some time, there are three years to do and the accountant has been requested to complete these ASAP, I will forward them with assets and liability statements as soon as same are in hand, in the interim as per my telephone conversation with you and your request that I communicate my concerns to you in righting (sic) *I hereby raise the following discrepancies and concerns*

- *The Zonnekus bond was originally held by Cape of Good Hope Bank*
- *The term was approved at 20 years with an access bond up to six million Rand*
- *The access bond was unilaterally stopped by Nedbank*
- *The term of payment appears to have been calculated at 15 years and not 20*
- *Insurance is being debited to our bond account at some R50/60 thousand per year without consent and we are being charged interest on this*
- *By the incorrect payment term being used and the access bond facility taken into account we are some R2 million in advance with payments and or available funds*

Zonnekus therefore respectfully requests the following

- *The unauthorized insurance that has been charged to the Zonnekus bond account be refunded form* (sic) *the inception and credited against the bond account.*

- *A recalculation of the payments be made on the basis of our agreed to bond and terms take place setting out the true position of the bond*
- *The R6 million access bond be reinstated with immediate effect*
- *I am not aware of or have any documentation in my possession signed with Nedbank for the bond, should there exist any please forward to me as a matter of urgency.*

Anthea I hope this sets out some of our concerns, we are not complaining and are sure that these errors are due to an oversight and due to this being an old COGHB bond, we would like to have this rectified and are open to proposals regarding any form of restructuring, we also hope to extend the bond to some R10 million in order to facilitate the renovation of the property for World Cup rental purposes.

Please do not hesitate to call me should you which (sic) *to have further information or which* (sic) *to discuss any issues.'*

[emphasis supplied]

[12] There is no indication in the record of any response by the applicant to this communication. However, during May 2010, the applicant issued summons against the respondent as first defendant, as well as seven sureties, for payment of the full capital sum then due of R4 613 796.84 plus interest together with an order declaring the property executable.

[13] Apart from the usual allegations relating to its cause of action the applicant alleged in its particulars of claim in the action that it was *'the successor-in-title of certain of the assets and liabilities'* of Good Hope Bank.

[14] The respondent delivered a notice of intention to defend and the applicant

proceeded to apply for summary judgment. The respondent delivered an opposing affidavit deposed to by Mr van der Merwe.

[15] As to the applicant's *locus standi* he alleged that:-

> *'9. I am aware that not all Cape of Good Hope Bank Limited's ("Good Hope Bank") assets were acquired by plaintiff. The fact is acknowledged in paragraph (iii) at the top of page 4 of the summons, where plaintiff avers only that it is the successor-in-title to certain assets of Good Hope Bank.*
>
> *10. I point out that plaintiff nowhere avers that the loan agreements concluded between first defendant and Good Hope Bank were part of the assets so acquired by it. Instead, it contents itself with a general statement to the effect that it is the successor-in-title to certain of the assets of Good Hope Bank, without specifying that these loan agreements constitute part of those assets.*
>
> *11. I am advised that plaintiff's failure in this regard renders the summons excipiable, in that no cause of action has been made out against first defendant. I am advised further that plaintiff is not entitled to summary judgment on the basis of a pleading which does not disclose a cause of action.'*

[16] As to the merits of the applicant's claim Mr van der Merwe alleged merely that:-

> *'12. The loan agreements concluded by first defendant were concluded not with plaintiff, but with Good Hope Bank.*
>
> *13. I deny in the circumstances that those loan agreements constitute part of the assets transferred by Good Hope Bank to plaintiff (referring once again to the plaintiff's failure to allege that they are), and put plaintiff to the proof*

thereof.'

[17] It will immediately be apparent that the respondent did not dispute its indebtedness *per se*. Its defence was simply that it had contracted with Good Hope Bank and that the applicant's allegations pertaining to its *locus standi* were insufficient to found a cause of action.

[18] The applicant subsequently withdrew its action against the respondent in order to pursue instead the winding-up application which is the subject of this appeal.

[19] The ground of insolvency relied upon by the applicant is that contained in s 344(f) as read with s 345(1)(c) of the Companies Act No 61 of 1973 ('*the Companies Act*'), namely that the respondent is commercially insolvent.

[20] In support of the ground so advanced the applicant annexed to its papers the financial history of the respondent's account for the period 4 April 2005 to 6 September 2010 from which the following is evident:-

20.1 the respondent regularly failed to pay the monthly instalments on due date;

20.2 the respondent made various irregular payments;

20.3 the last payment made by the respondent was on 19 October 2009 in the sum of R28 500.

[21] The applicant also annexed a certificate of balance signed by one of its managers reflecting that as at 1 January 2011 the respondent was in arrears in the sum of R1 132 650.76. The applicant submitted that the respondent's payment history was *'cogent proof'* of its inability to pay its debts and that it was suffering serious financial difficulties. Furthermore the respondent is not a trading entity with a steady revenue stream and as such has no readily available resources (i.e. liquid assets) in order to pay the applicant or to trade itself out of its financial difficulties.

[22] The respondent's grounds of opposition (as set out in its answering affidavit deposed to by Mr van der Merwe's mother, Ms Fern Cameron) are essentially that:

22.1 the applicant has failed to establish its *locus standi* in the sense that it has not proven its acquisition of the assets and liabilities of Good Hope Bank and in particular the agreements and mortgage bonds between Good Hope Bank and the respondent;

22.2 the respondent's *modus operandi* at all times has been to utilise the access loan facility *'as and when needed and to pay in lump sum cash amounts from time to time'* and that it is operating well within the limit of that facility;

22.3 the applicant, while purporting to act as transferee of the relevant agreements from Good Hope Bank, unilaterally reduced the period of the loan from 20 years to 15 years. It also *'unilaterally imposed insurance costs of over R50 000 per annum and charged interest on this amount'*;

22.4 the respondent is neither factually nor commercially insolvent; and

22.5 even if the applicant proves its claim in due course it will be able to realise the full extent of its security and on that basis alone the court should exercise its discretion in the respondent's favour and refuse a provisional winding-up order.

APPLICABLE LEGAL PRINCIPLES

[23] It is trite that in order to succeed in an application for a provisional winding-up order an applicant must show: (a) that it has *locus standi* (*in casu*, that it is a creditor of the respondent); and (b) the existence of one or more of the grounds set out in s 344 of the Companies Act No 61 of 1973 for the winding up of the respondent.

[24] The approach to be taken in considering whether a provisional winding-up order should be granted (albeit in the context of distinguishing a provisional order from a final order) was restated by Binns-Ward J in *Absa Bank Limited v Erf 1252 Marine Drive (Pty) Ltd and Another* [2012] ZAWCHC 43 (15 May 2012) at para [4] as follows:-

> *At the provisional stage the applicant had to make out only a* prima facie *case – in the peculiar sense of that term explained in* Kalil v Decotex (Pty) Ltd and another *1988 (1) SA 943 at 976D – 978F. In order to succeed in obtaining a final order the applicant has to prove its case on the evidence as it falls to be assessed in the usual manner in proceedings on motion for final relief. The practical distinction between the two requirements thus arises out of the application of the* Plascon-Evans *evidentiary rule in opposed proceedings for a final order; cf.* Export Harness

> Supplies (Pty) Limited v Pasdec Automative Technologies (Pty) Limited *2005 JDR 0304 (SCA), at para. 4. The effect has been described in terms which suggest that a higher 'degree of proof...on a balance of probabilities' is required for a final order than for a provisional order (*Paarwater v South Sahara Investments (Pty) Ltd *[2005] 4 All SA 185 (SCA), at para. 3). While the basis for that description is understandable, I would suggest respectfully that the position might more accurately be described as being that while the applicant must establish its case on the probabilities to obtain either a provisional or a final order, in an opposed application, a different, and more stringent approach to the evidence, consistent with the* Plascons-Evans *rule, must be adopted by a court in deciding whether the applicant has made a case for a final order. This is in contradistinction to the approach to an opposed application for a provisional order, when the case is decided on the probabilities as they appear from the papers.'*

[25] As regards bald denials or bald allegations of fact in a respondent's answering affidavit Binns-Ward J had the following to say at para [16]:-

> *There is authority to the effect that the rule about bald denials by a respondent not giving rise to a genuine dispute of fact also holds true in respect of bald allegations of fact in the answering affidavits; see* Dausa v Middleton NO and others *[2005] 2 All SA 83 (C) at 93 in fin -94 (approved in* Wightman t/a JW Construction v Headfour (Pty) Ltd and another *2008 (3) SA 371 (SCA), [2008] 2 All SA 512, at para. 12). Compare also* National Scrap Metal v Murray & Roberts *[2012] ZASCA 47 (29 March 2012), at para. 19, which exemplifies the effect of a party's failure to put up such substantiating evidence as it might have been expected to, as a factor to which regard may be had in determining the existence or not of a real or genuine dispute of fact on a point in issue.'*

[26] I now turn to consider the issues in dispute in light of these principles.

LOCUS STANDI

[27] As previously indicated the applicant bases its *locus standi* on its claim to be the successor-in-title of all of the assets and liabilities of Good Hope Bank which it alleges were acquired with effect from 1 January 2003 as evidenced by an endorsement effected by the Registrar of Deeds in terms of s 54 of the Banks Act 94 of 1990 (*'the Banks Act'*). The endorsement is appended to a circular issued by the Chief Registrar of Deeds dated 11 December 2002 which was annexed to the applicant's founding papers and which reads as follows:-

'CHIEF REGISTRAR'S CIRCULAR NO. 3/2003

TRANSFER OF ASSETS OF CAPE OF GOOD HOPE BANK LIMITED TO NEDBANK LIMITED

1. *All the assets of CAPE OF GOOD HOPE BANK LIMITED (No. 1958/000018/06) have been transferred to NEDBANK LIMITED (No. 1951/000009/06) in terms of section 54 of the Banks Act, 1990 (Act No. 94 of 1990), with effect from 1 January 2003.*

   The Minister of Finance has, in terms of section 54(8A) of the Banks Act, 1990 consented to the waiver of duties, fees or charges that may be payable in respect of the above-mentioned transfer of assets.

   The enclosed documentation of this transfer must be filed under BC No. 3/2003 in all offices.

2. *Due to the number of deeds that have to be endorsed regarding the transfer permission is hereby granted to endorse deeds as and when they are lodged for an act of registration.*

3. *Powers of attorney, consents and applications signed, and deeds registered after 1 January 2003 must reflect the new situation, whilst those signed prior to the said date must be accepted unaltered.*

4. *When relevant bonds are lodged for cancellation, it will not be necessary to endorse them in this regard, provided that the consent to cancellation refers to the new situation.*
5. *All offices will be supplied with rubber-stamps.'*

[28] The applicant's allegations as to *locus standi* as well as the aforementioned circular are met with a bald denial by the respondent on the basis of the stance adopted earlier in its affidavit in which it is contended that both the applicant's allegations and the circular are:-

'23. ...far from sufficient in regard to this aspect. For example:

23.1 Applicant has failed to deal at all with the various requirements of the Banks Act 94 of 1990 (including section 54 thereof).

23.2 Applicant has failed to deal at all with the transaction itself in terms of which the alleged transfer of assets occurred.'

[29] In reply, and in further substantiation of its allegations, the applicant annexed a letter dated 5 December 2002 from the Deputy Registrar of Banks confirming that the then Minister of Finance had granted consent to the transaction between Good Hope Bank and the applicant in terms of s 54(1) of the Banks Act, together with the Minister's written consent. Specific reference is made therein to the Minister's consent to the transfer of all of the assets and liabilities of Good Hope Bank to the

applicant with effect from 1 January 2003.

[30] Section 54(1) of the Banks Act provides that, save in respect of a duly approved securitisation scheme (not applicable in the present matter), the Minister must consent in writing conveyed through the office of the Registrar of Banks to a transfer of more than 25% of the assets and liabilities of one bank to another; and that no such transaction *'shall have legal force unless the consent of the Registrar to the transaction has been obtained beforehand'.*

[31] Section 54(3) of the Banks Act stipulates that once a transfer as contemplated in s 54(1) comes into effect all assets and liabilities so transferred *'shall vest in and become binding upon'* the transferee; that all agreements entered into by the transferor shall remain of full force and effect *'and shall be construed for all purposes as if they had been entered into'* by the transferee; as will any securities, such as mortgage bonds, held by the transferor.

[32] Section 54(8) of the Banks Act provides that *inter alia* the Registrar of Deeds shall, if satisfied that consent has been given in terms of s 54(1) and that such transfer has been duly effected, record the transfer by way of an endorsement.

[33] The respondent contends that the abovementioned documents annexed to the applicant's papers are not sufficient to prove the underlying transaction to which they relate. It was submitted that whenever a party is sued by another as cessionary, the latter bears the onus to prove the cession of the claim to it and the

party sued is entitled to challenge the right of the cessionary to sue in terms of the ceded debt. Since any ordinary litigant would be required to establish the transaction itself in the usual manner – by proof of the agreement in terms of which the right was allegedly ceded – a transfer of assets and liabilities in terms of s 54 of the Banks Act must be pleaded and proved or admitted. Despite the respondent having directly challenged the applicant on this point in its answering affidavit the applicant has failed to provide any evidence as to the actual transaction. The documentation annexed to the applicant's papers relates to permission for or approval of the transfer of assets. It has nothing to do with the transaction itself. The respondent contends that the applicant has failed to grasp this fundamental distinction and therefore to deal with it. There is nothing before the court as to whether the transfer actually took place.

[34] In my view in advancing its argument the respondent has lost sight of the approach to be taken by a court in an application for a provisional winding-up order as set out in *Absa Bank Limited v Erf 1252 Marine Drive (Pty) Ltd and Another* (*supra*) following *Kalil v Decotex*. At this stage of the proceedings the case must be decided on the probabilities as they appear from the papers and for the reasons that follow I am satisfied that the probabilities favour the applicant.

[35] First, the consent contained in the letter from the Deputy Registrar of Banks refers in terms to an application for approval under s 54(1) of the Banks Act to the transfer of all of the assets and liabilities of Good Hope Bank to the applicant. It confirms that such approval had been granted by the Minister at a date subsequent to the

conclusion of the admitted agreements and mortgage bonds between Good Hope Bank and the respondent.

[36] Second, the circular from the Registrar of Deeds (again issued after the conclusion of the admitted agreements and mortgage bonds) certifies that all of the assets and liabilities of Good Hope Bank have been transferred to the applicant in terms of s 54 of the Banks Act with effect from 1 January 2003; and that *'the enclosed documentation of this transfer'* had to be filed under BC 3/2003, being the reference to the endorsement effected by the Registrar of Deeds.

[37] Third, s 54(8) of the Banks Act renders it obligatory for the Registrar of Deeds to satisfy himself or herself that such a transfer *'has been duly effected'* before making any endorsement or effecting any alteration to any relevant document placed before him or her. It is highly unlikely that this senior official would, as a matter of course, fail to apply his or her mind and fail to scrutinise the underlying transaction which is the very document to which he or she would have to have regard in order to be satisfied that a transfer had been effected; and there is no suggestion by the respondent that the Registrar of Deeds failed to do so in this case. It is the duty of the Registrar of Deeds to examine all documents submitted for execution or registration and to reject documents, the execution of which is not permitted by law. This is a considerable and onerous duty. The Registrar has the duty to ensure that legal requirements are met prior to any endorsement being authorised: see Heyl: Grondregistrasie in Suid-Afrika at p 20-21.

[38] Fourth, if the respondent had any genuine doubts about the transaction between the applicant and Good Hope Bank in relation to the admitted agreements and mortgage bonds it could have availed itself of the provisions of rule 35(12) of the Uniform Rules of Court, or applied for discovery in terms of rule 35(13) before delivering its answering affidavit. Rule 35(12) provides that *'Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof...'* In *Protea Assurance Co and Another v Waverley Agencies CC and Others* 1994 (3) SA 247 (CPD) Marais J (as he then was) considered the purpose of rule 35(12). At 249A-E he said:

> *'Applicant's desire that second respondent should first have to file his affidavit in response to the allegations made by Roberts as to what second respondent said to him during the telephone conversations which were recorded on the tape before being allowed to listen to the tape is understandable as a forensic strategy, but to gratify it would be to defeat the object of Rule 35(12). That Rule plainly entitles a litigant to see the whole of a document or tape recording and not just the portion of it upon which his adversary in the litigation has chosen to rely. That entitlement, unlike the entitlement to general discovery for which Rule 35(1) provides, does not arise only after the close of pleadings in a trial action, or after both answering and replying affidavits have been filed in motion proceedings: it arises as soon as reference is made in the pleading or affidavit to a document or tape recording. It is inherent in that that a litigant cannot ordinarily be told to draft and file his own pleadings or affidavits before he will be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his adversary's pleading or affidavits.'*

[emphasis supplied]

[39] Finally, on close scrutiny the respondent's denial of the applicant's *locus standi* is even less than a bald denial, since the denial itself is premised solely upon the applicant proving or failing to prove the existence of the underlying transaction between itself and Good Hope Bank.

[40] The court *a quo* appeared to accept that the applicant had established its *locus standi* but for a different reason, namely that Mr van der Merwe's written communication to the applicant of 15 January 2010 constituted evidence of an admission by the respondent that the transfer from Good Hope Bank to the applicant had been effected. During argument before us respondent's counsel was candid that at the date of that communication Mr van der Merwe had indeed believed that the transfer had taken place; but he described the subsequent allegation in the applicant's summons that only *'certain'* of the assets and liabilities had been transferred to the applicant as *'a bombshell'* to the respondent. If that were in fact the case one would have expected the respondent to have availed itself of the provisions of rule 35(12) before delivering its answering affidavit so that it could put up the substantiating evidence that might reasonably have been expected in order to assist the court in determining whether or not there was a genuine dispute of fact on this issue. That the respondent elected not to do so raises the question of whether this was not part of a forensic strategy to fend off the relief sought by the applicant.

[41] In these circumstances I am satisfied that the applicant has established its *locus standi* on the probabilities as they appear from the papers.

[42] Mr Kantor for the respondent contended that the mere placing in issue of the alleged cession resulted in a dispute which in terms of the Badenhorst rule (after the judgment in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T), especially at 347-8) cut across the approach described in *Kalil v Decotex* and *Erf 1252 Marine Drive*. Counsel argued that in the circumstances the respondent had a low threshold to cross to successfully see off liquidation proceedings as an inappropriate remedy in the circumstances. In this respect he emphasised the oft-cited dicta of Thring J in *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219F-220B. In my view the contention was misplaced. The Badenhorst rule applies when the indebtedness on which the application for winding-up is founded is *bona fide* disputed. That much is confirmed if one has regard to what Thring J, quoting from *Henochsberg on the Companies Act*, said at 218F-G in *Hülse-Reutter*: '*Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds; the procedure for winding up is not designed for the resolution of disputes as to the existence or non-existence of a debt...*' (underlining supplied for emphasis). In all of the South African cases cited in support of the proposition set forth in the passage from *Henochsberg* quoted by Thring J the debt in issue was disputed. In the current matter the debt is not disputed. It is common cause that the respondent had not effected monthly payments in terms of the consolidated loan agreement since 2009. It is evident from the terms of the agreement, which are also not in dispute, that the failure to make these payments rendered the loan immediately repayable in full. In my view

the nature of the dispute is therefore not one which falls within the purview of the Badenhorst rule.

[43] The dispute about *locus standi* goes rather as to whether or not there was cession of the debt from Cape of Good Hope Bank to the applicant, not as to the existence of the debt. As stated in *Erf 1252 Marine Drive* supra, at para. 25, it is probably inaccurate to define the Badenhorst rule as going to standing in the narrow sense. Binns-Ward J (drawing on the observations of Corbett JA in *Kalil v Decotex* supra, at 980) illustrated the proposition thus: '*After all ... it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent company in winding-up proceedings, while the respondent at the same time was able to establish that the claim was disputed on bona fide and reasonable grounds. The applicant in such a case would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it, that the remedy sought by the applicant should not be granted. The Badenhorst rule would thus seem to constitute a self-standing (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is bona fide disputed.*' (footnote reference omitted). The Badenhorst rule does not operate in the circumstances of the current case to exclude the determination of the existence or not of the cession on the probabilities as they appear from the papers. Even were the aforegoing analysis of the applicability of the Badenhorst rule to be wrong, it is nevertheless clear from the observations of Corbett JA in *Kalil v Decotex* at 982D-H that the rule falls to be applied flexibly. Therefore assuming *ex hypothesi* against the correctness of my

aforegoing analysis, I would in any event hold that there is no reason in the circumstances of the current case not to exclude the application of the Badenhorst rule to the contested factual issue of whether or not there had been a cession. As Corbett JA justified a similar departure from the application of the rule in *Kalil* (in the context of a dispute about the effect of a cession) '*This is hardly a case of a creditor seeking to enforce a disputed debt by winding-up proceedings and thereby abusing the Court process*'.

MODUS OPERANDI ADOPTED, UNILATERAL IMPOSITION OF INSURANCE COSTS AND UNILATERAL REDUCTION OF LOAN PERIOD

[44] The second defence raised by the respondent is that its *modus operandi* at all times has been to utilise the access loan facility *'as and when needed and to pay in lump sum cash amounts from time to time'* and that it is operating well within the limit of that facility.

[45] Apart from the probabilities this defence must fail on the respondent's own version. First, it does not allege that this *modus operandi* was adopted by both itself and the applicant which would of course have had to have been a party to such an arrangement. Second, the respondent admits all of the terms of the relevant agreements and mortgage bonds (in particular the terms of the consolidated agreement) and thus admits: (a) its obligation to repay the capital sum (including interest) monthly in arrear; (b) that re-advances would only apply to payments made on account of the capital sum over and above the monthly instalments payable;

(c) that its failure to pay any amount owing on due date would entitle the applicant to cancel the agreement at any stage and to claim immediate payment of the capital sum and any other amounts outstanding; (d) that no indulgences granted by the applicant would affect its rights and would not be construed as a waiver thereof or a novation; and (e) that no variations to the agreement would be of any force or effect unless reduced to writing and signed by both parties. Third, it is common cause that the respondent failed to pay the monthly instalments due in terms of the consolidated agreement and that its last payment made to the applicant was the sum of R28 500 on 19 October 2009.

[46] The respondent is thus clearly in breach of the consolidated agreement and the applicant was entitled to cancel and to institute proceedings for recovery of the sums due to it.

[47] As to the probabilities it should not be overlooked that the respondent's only defence raised on the merits in opposition to the summary judgment application was that it had contracted not with the applicant but with Good Hope Bank. No mention was made of any defences regarding its indebtedness despite the contents of Mr van der Merwe's earlier communication of 15 January 2010 to the applicant.

[48] The same considerations apply in respect of the insurance costs allegedly unilaterally imposed by the applicant. Clause 11 of the consolidated agreement provides as follows:

'11. PROPERTY INSURANCE

11.1. With effect from the commencement date and for the duration of this agreement the Borrower and the Mortgagor shall ensure that all improvements on any properties which are bonded to the Bank as security for this loan are insured through an insurance company and for an amount approved of by the Bank in its sole discretion, such cover to be effected against risk of loss or damage from fire and such other risks which the Bank may at any time direct in writing and the Borrower or the Mortgagor shall cede such insurance policy to the Bank as collateral security for its indebtedness to the Bank from time to time.

11.2 The Bank will be entitled but not obliged to arrange such insurance and/or pay the premiums on behalf of the Borrower against payment of an administration fee as determined by the Bank in its sole discretion, and any money so disbursed and administration fee so charged shall be debited to and form part of the capital sum and shall be payable by the Borrower to the Bank on demand.'

[emphasis supplied]

[49] This particular defence thus requires no further comment.

[50] As regards the alleged unilateral reduction of the period of the loan from 20 years to 15 years, the respondent contented itself with the bald allegation that *'while purporting to act as transferee of the relevant agreements from Good Hope Bank, purported to unilaterally amend the period of the loan to 15 years from 20 years'*. It failed to provide any basis or explanation for this allegation and simply referred to the same complaint which had been made in equally vague and broad terms by

Mr van der Merwe in his written communication to the applicant of 15 January 2010. Furthermore, this allegation had not even been raised in the respondent's affidavit filed in opposition to the summary judgment application.

[51] In addition the respondent did not take issue with the contents of the financial history printout of its access loan facility for the period 4 April 2005 to 6 September 2010 which was annexed to the applicant's founding papers. A perusal of that document reveals that none of the monthly instalments debited (adjacent to entry code 59) exceeded the amount of the instalments initially stipulated as being payable in terms of the consolidated agreement of R57 770 per month. If the applicant had indeed unilaterally reduced the period of the loan from 20 years to 15 years (when, how and in what manner was not even alleged by the respondent) one would have expected that the monthly instalments would have increased from the initial amount stipulated in the consolidated agreement.

[52] Again the respondent failed to put up any substantiating evidence in support of its allegation. It was of course also open to the respondent to avail itself of the provisions of rule 35(12) but again it failed to do so.

[53] In these circumstances the probabilities as they appear from the papers must favour the applicant and I am in respectful disagreement with the court *a quo* which found that:-

> *'...I am of the view that the concerns raised, of unauthorised amendments of periods and terms of repayments of the bond as well as the allegations of unauthorised*

charging of insurance into the respondent's account (made by Van der Merwe in the email), are genuine. The applicant has not indicated how those concerns were addressed. In my view, these concerns would, if proved at a trial, constitute a good defence to the claims made against the respondent.'

[54] It follows that these defences must also fail.

COMMERCIAL INSOLVENCY

[55] As previously indicated the applicant relies on s 344(f) as read with s 345(1)(c) of the Companies Act in support of its contention that the respondent is unable to pay its debts. These provisions read together constitute one of the grounds commonly referred to as commercial insolvency.

[56] In *Absa Bank Limited v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (CPD) at 440F-H Berman J set out the test for 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 exceed 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.'

[57] The respondent raises two defences to this leg of the dispute. First, it has not paid, not because it is unable to pay, but because it believes that it is under no obligation to do so. As I hope to have demonstrated above there is no merit in this defence. Second, the applicant has not established on the probabilities that the respondent is unable to pay.

[58] Although the court in *Absa Bank Limited v Rhebokskloof (Pty) Ltd and Others* (*supra*) referred to a *'company carrying on business'* and the respondent is not a trading entity *per se*, it is apparent from the latter's answering affidavit that its assets (in the form of immovable properties) *'...were used as security to raise finance for commercial purposes from time to time... As is common and standard in the conduct of business affairs, further financing was subsequently required'*. The business of the respondent is thus to make available its assets as security for loans for commercial purposes and these loans have to be serviced by the respondent as part of its business activities.

[59] In response to the applicant's averments relating to the respondent's inability to pay as set out above – albeit in respect of alleged factual insolvency upon which the applicant did not rely – Ms Cameron (the deponent to the answering affidavit) had the following to say:-

> ***'RESPONDENT'S FACTUAL SOLVENCY***
>
> 27. *Respondent's latest annual audited financial statements are for the financial year ending 28 February 2011 (the 2010 and 2011 accounts have been*

audited and are in the process of being signed off by the auditors). I do not propose annexing them to these papers as the information contained therein is confidential, but I will permit Applicant's legal representatives (not Applicant) to inspect same in order to verify what is set out hereunder. The salient features thereof for the purposes of this application are as follows:

27.1 R 80 million in immovable property.

27.2 Various movable assets which are readily realisable in an amount way in excess of Applicant's claim.

27.3 R 12 million long term liabilities (which include R 5 million which Respondent disputes), all of which are secured by first mortgage bonds over immovable properties owned by Respondent.

28. I will ensure that Respondent's legal representatives make available at the hearing of this matter copies of the said annual financial statements, should same be required to be inspected by the Court.

29. I accordingly respectfully submit that Respondent is factually solvent.'

[60] The respondent furthermore claimed that it is commercially solvent on the basis of the bare allegation that it *'...has an income and numerous assets (both movable and immovable) from which it is able to pay any debts as and when they fall due'.*

[61] Commercial insolvency pertains to illiquidity and comprises two elements, namely available income and readily realisable assets. The respondent made no mention of its income when dealing with the allegations relating to its factual solvency. Further, as to the allegations of commercial insolvency, the respondent contented itself with the bald allegation that it *'has an income'*. Whether or not the respondent in fact has an income and the details of that income should have been disclosed in its affidavit. It ill-behoves the respondent to require this court to consider the issue of any

income that it might have by permitting it to produce extraneous financial documentation during argument which is consistent with a 'cloak and dagger' approach. The respondent should have realised that this information might have been expected of it in order to assist the court to determine on the probabilities, as they appear from the papers, whether there was a genuine dispute of fact on this issue.

[62] In respect of its assets a similar complaint can be levelled against the respondent. What is however noteworthy is that on the respondent's own version it furnished an exclusive mandate to an estate agent on 20 June 2011 to market and sell the property for the sum of R39 million. If the respondent was as liquid as it blandly seeks to suggest the question that arises is why it was necessary for it to attempt to dispose of its largest asset. Again the respondent failed to take the court into its confidence in the sense required as set out in *Absa Bank Ltd v Erf 1252 Marine Drive (Pty) Ltd and Another* (*supra*).

[63] In the circumstances it is my view that the applicant has established on the probabilities as they appear from the papers that the respondent is commercially insolvent.

DISCRETION

[64] Notwithstanding my finding that the respondent is commercially insolvent, the court nonetheless has a discretion to refuse a winding-up order. However as was said by

Berman J in *Absa Bank Ltd v Rhebokskloof (Pty) Ltd and Others* (*supra*) at 440J-441B:-

> *'...but* [the discretion] *is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled,* ex debito justitiae, *to a winding-up order (see* Henochsberg on the Companies Act *4th ed vol 2 at 586;* Sammel and Others v President Brand Gold Mining Co Ltd *1969 (3) SA 629 (A) at 662F).'*

[65] *Henochsberg on the Companies Act* (Vol 1 Issue 26) explains this principle at p 699 as follows:

> *'Where a creditor seeks the winding-up and his application is not opposed by other creditors, the Court's discretion is very narrow; for an unpaid creditor who cannot obtain payment and who brings his claim within the Act is, as against the company, entitled* ex debito justitiae *to a winding-up order; he is not bound to give the company time (*Coughlan v Ward & Son (Pty) Ltd *1931 NPD 153 at 154; Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd 1962 (3) SA 424 (T) at 428;* Rosenbach *case* supra *at 597;* Sammel v President Brand Gold Mining Co Ltd *1969 (3) SA 629 (A) at 662;* E Sacks Futeran and Co (Pty) Ltd v Linorama (Pty) Ltd; Ex parte Linorama (Pty) Ltd *1985 (4) SA 686 (C) at 687;* Absa Bank Ltd v Rhebokskloof (Pty) Ltd *1993 (4) SA 436 (C) at 440-441*; Re Camburn Petroleum Products Ltd *[1979] 3 All ER 297 (Ch) at 303; but* cf JJC Smit *1981* SALJ *120).'*

[66] The provisional winding-up order sought by the applicant is not opposed by any other creditors of the respondent. Notwithstanding its admission that its last payment to the applicant was made during October 2009 the respondent contends that the court should exercise its discretion in favour of the respondent and refuse the order because the applicant is more than covered by abundant security in respect of its claim. Liquidation will simply result in the forced sale of assets which

far exceed any claim that the applicant has against the respondent.

[67] To my mind however this misses the point, which is that it is the applicant which is entitled to payment without further delay. It is not that the applicant should have to wait indefinitely for payment so that the respondent can realise its assets to its own greatest advantage in the normal course. The fact that the applicant holds security for its claim makes no difference since the security itself does not automatically translate into immediate payment.

[68] Having regard to these considerations it is my view that this court should not exercise its discretion in favour of the respondent.

CONCLUSION

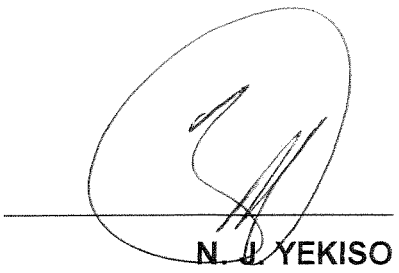
[69] In the result the following order is made:

1. **The appeal is upheld with costs.**
2. **The respondent is placed under provisional liquidation in accordance with the provisions of the draft order annexed hereto marked "X".**
3. **The costs of the appeal shall be costs in the liquidation.**

J. I. CLOETE

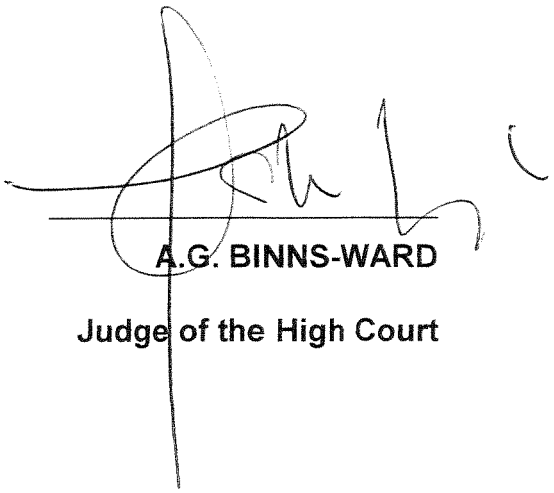
Acting Judge of the High Court

We concur:



N. J. YEKISO

Judge of the High Court



A.G. BINNS-WARD

Judge of the High Court

"X"

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Appeal Case No: A378/2012

Case Number: 21502/2012

Court: Mr Justice Yekiso, Mr Justice Binns-Ward and Mrs Acting Justice Cloete

On: 7 February 2013

In the matter between:

NEDBANK LIMITED Appellant

and

ZONNEKUS MANSION (PTY) LIMITED Respondent

ORDER

IT IS ORDERED THAT:

1. Respondent is placed under provisional liquidation.

/2...

2. A *Rule Nisi* is issued, calling upon all interested parties to show cause, if any, on 13 March 2013 at 10h00, or as soon thereafter as Counsel may be heard, why an order in the following terms should not be granted:

2.1 That Respondent be placed under final liquidation.

2.2 That the costs of this application be costs in the liquidation.

3. A copy of the provisional liquidation order be served:

3.1 on the South African Revenue Services in accordance with section 346A(1)(c) of the Act;

3.2 on Respondent at its registered office in accordance with section 346A(1)(d) of the Act;

3.3 on all known creditors, with claims in excess of R5 000,00 by way of prepaid registered post;

3.4 by publication in one edition of the **CAPE TIMES** and **DIE BURGER** newspapers.

BY ORDER OF COURT

.....

COURT REGISTRAR