R E P O R T A B L E

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: 20159/2015

In the matter between:

EUGENE BRYAN WALLACE,

GARY DONOVAN WALLACE

MOGAMAD RAHIN JOSEPH N.N.O APPLICANTS

And

WCP HOTEL PROPERTY (PTY) LTD RESPONDENT

JUDGMENT: 8 MARCH 2016

MEER J.

Introduction

[1] The Applicants in their capacity as the joint liquidators of Western City Properties (Pty) Ltd, ("West City"), in liquidation, seek the provisional winding up of the Respondent. They do so on the basis that the Respondent is indebted to West City in the sum of at least R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand), as alleged by them. It is common cause that the Respondent is no longer trading, has disposed of all of its assets and is unable to pay the debt claimed by the Applicants.

[2] The Respondent disputes its indebtedness, firstly on the basis that the debt has been

fully paid with the result that West City is not a creditor, and secondly on the basis that the claim has prescribed. The Respondent contends that the debt is *bona fide* disputed on reasonable grounds and that this application is an abuse of the court process. The Applicants, it contends, persisted with this winding up application after it became clear that the debt was disputed. They ought instead to have proceeded by way of an action seeking the determination of its indebtedness to West City.

[3] This application would appear to be the third insolvency proceeding in this Court involving West City, the Respondent and its common director one, Mr Gormley ("Gormley"), an Irish property developer. The genesis of these applications is a project for the development of the Cape Town central business district, with the injection, *inter alia,* of foreign funds, and the transactions flowing from such development. The development spanned several years and although it culminated in the construction of the Taj Hotel and the Mandela Rhodes Building, in the Cape Town city centre, the project ended in insolvency proceedings. West City was placed under final liquidation in May 2012 and the Applicants were appointed as its liquidators in June 2012. The estate of Gormley, the previous sole director of the Respondent, was placed into sequestration in May 2013.

[4] There are common dramatis personae and transactions that feature in this application, which spans some 500 pages. The founding and replying affidavits on behalf of the Applicant are attested to by Eugene Bryan Wallace ("Wallace") one of the liquidators of West City. There is also the contested expert affidavit filed on behalf of the Applicants by chartered accountant, Mr Gregory Charles Johnson ("Johnson"). The major affidavits on behalf of the Respondent are attested to by Martin Edward Luyt ("Luyt"), a chartered

accountant and director of LPH Chartered Accountants Inc ("LPH"). It is common cause that LPH have throughout been the auditors of both West City and the Respondent and that Gormely was, until his sequestration in 2013, a director of West City and the sole director of Respondent.

Application to Strike Out

[5] The Respondent applied to strike out various paragraphs in the two replying affidavits filed by Wallace. It is convenient to deal with these applications briefly, at the outset. Firstly, they applied to strike averments from each of Wallace's two replying affidavits for being scandalous and vexatious. I am of the view that the paragraphs and averments sought to be struck are either relevantly made on behalf of the Applicants in countering the *bona fides* with which the debt is disputed, or contain relevant contextual background information. Whilst they cast aspersions, they are not in my view scandalous, vexatious or prejudicial, views in context. The striking of those paragraphs and averments is accordingly refused. Given that the refusal is in respect of all the paragraphs and averments sought to be struck, I do not refer to them by number.

[6] Secondly, and on the basis that they contained new matter, the Respondent applied to strike out paragraphs 10.6, 10.8 and 10.13 to 10.18 of the replying affidavit of Wallace dated 4 December 2015, and paragraphs 5.2 to 5.6 and 6.7 of his further replying affidavit dated 4 February 2016. That application is granted on the basis that these paragraphs are not responsive, but constitute new matter, as alleged by the Respondent.

[7] The Respondent in addition applied to strike out the affidavit of Johnson, deposed to

as an expert for the Applicants, on the basis that it was filed out of time and raised new matter. That application is refused. The lateness of Johnson's affidavit is adequately explained in the affidavit of Wallace dated 4 February 2016. Johnson's affidavit does not raise new matter but deals with allegations in the answering papers to the effect that the Respondent is not indebted to the Applicants. In particular, it deals with the disputed assertion (elaborated upon later in this judgment), that the sum of R12million paid by the joint venture company was part of the purchase price for properties transferred from West City. The reasons why the affidavit contains the hearsay evidence with which the Respondent takes issue, are fully set out in the affidavit. The evidence concerned is, in my view, relevant and I am inclined to allow it. In the circumstances, the application to strike out the affidavit of Johnson is refused.

Background Facts

[8] During 2005, West City acquired various properties in the central business district of Cape Town for R20 500 000.00 (twenty million five hundred thousand rand) and Gormley, as a director of West City, initiated the Mandela Rhodes development as hotel and apartments and the construction of the Taj Hotel. The market value of the properties is alleged to have been R50 000 000.00 (fifty million rand). To enable the developments, on 3 April 2007, a joint venture agreement was concluded between West City, the Respondent, TAJ International Hotels South Africa (Pty) Ltd ("TISA") and Eurocape Investments Ltd, ("Eurocape"). The terms of the joint venture agreement were set out in a document called the "*Heads of Terms*".

[9] This was to the effect that further development of the properties owned by West City

would be undertaken through the medium of a new enterprise, a joint venture company to be owned jointly by the Respondent and TISA, each holding a fifty percent interest therein. The company used for the joint venture was Good Hope Palace Hotels (Pty) Ltd ("Good Hope Palace Hotels"). It was agreed that West City would transfer the properties it owned to the joint venture company. In return, the latter would pay "*pre-development costs*" in the agreed sum of R12 000 000.00 ("twelve million rand"), by settling a Nedbank loan secured by mortgage bond over the properties for this amount. It was also agreed that the joint venture company would, as payment for the properties, credit West City with a R50 000 000.00 (fifty million rand) loan account, ("the R50 million loan").

[10] It was further agreed that West City would assign the R50 million rand loan claim against the joint venture company to the Respondent so that the Respondent would be indebted to West City in the sum of R50 000 000.00 (fifty million rand) and the joint venture company would be indebted in that sum to the Respondent.

[11] Clauses 4.4 to 4.6 of the "*Heads of Terms*" in providing for the above arrangement stated as follows:

> *"4.4. As payment for the Property transfer West City Precinct shall be credited with a R50 million loan (subsequent to the JV agreement, West City is to assign the loan to WCP).*
>
> *4.5 The Pre- Development costs up to the signing of the JV agreement has been verified and agree to be R12m.*
>
> *4.6 The new JV Company will settle the R12m loan that West City Precinct has with Nedbank in settlement of the contractually agreed Pre -Development Costs".*

[12] Also on 3 April 2007, a "*Subscription and Shareholders*" agreement, in relation to the

joint venture, was entered into. The parties to that agreement were TISA the Respondent, Eurocape and West City. Clauses 4.4 to 4.6 of the "*Heads of Terms*" agreement are mirrored, as set out below, in the "*Subscription and Shareholders*" agreement. The joint venture company is referred to in that agreement as "the company".

> *"WCP Loan*
>
> *8.2.1 It is hereby recorded that, in terms of the sale agreement entered into (or to be entered into) between West City Precinct and the Company, an amount of R50 000 000.00 (fifty million rand) shall be credited in the books of account of the Company as a loan account in favour of West City Precinct which shall serve as the consideration payable by the Company for the Property as contemplated in the aforementioned sale agreement (the "WCP Loan"). Forthwith thereafter, EIL and West City Precinct shall procure that the WCP Loan is ceded and assigned by West City Precinct to WCP and EIL and West City Precinct hereby undertake to take all such steps that are necessary and/or required in order to do so. EIL and West City Precinct shall bear all the costs, taxes and/or duties of whatsoever nature in respect of the cession and assignment of the WCP Loan to WCP.*
>
> *8.2.2 The WCP Loan shall not bear interest.*
>
> *8.2.3 The WCP Loan shall be repaid as may agreed from time to time between TISA and WCP."*

> *"3. <u>SUSPENSIVE CONDITIONS</u>*
>
> *3.1.3. to the extent required, Nedbank Limited agreeing to the transfer of the Property from West City Precinct to JVCO (as contemplated in clause 3.1.4 below) and to the cession and assignment of the Nedbank Loan and the Nedbank Bond to JVCO and/or the cancellation of such loan and bond and/or registration of a new mortgage bond over the Property, in either case on terms and conditions acceptable to TISA in its sole and absolute discretion".*

[13] The shareholding in the joint venture company was stipulated in the following paragraphs:

> *"5.4 TISA shall, forthwith after the date of signature hereof, subscribe for 500 (five hundred) ordinary shares of R1.00 (one rand) each in the capital of the Company, constituting 50% (fifty per cent) of the entire issued share capital of the Company, at a subscription price equal to the par value per share;*
>
> *5.5 WCP shall, forthwith after the date of signature hereof, subscribe for 500 (five hundred) ordinary shares of R1.00 (one rand) each in the capital of the Company, constituting 50% (fifty per cent) of the entire issued share capital of the Company, at a subscription price*

equal to the par value per share."

[14] The property was transferred to Good Hope Palace Hotels on 8 November 2007 and the latter settled the Nedbank Loan of R12 000 000.00 (twelve million rand) on transfer of the property into its name. A new bond was registered in its name.

[15] In accordance with the agreements, West City was credited with a R50 000 000.00 (fifty million rand) loan by Good Hope Palace Hotels. West City thereafter assigned the loan to the Respondent with the Respondent then owing the said amount to West City and in turn being owed R50 000 000.00 (fifty million rand) by the joint venture company.

[16] According to the Applicants, from the above agreements there are self-evidently two separate undertakings by Good Hope Palace Hotels. There is a clear distinction between payment of agreed pre-development costs prior to the transfer of the properties and the loan of R50 000 000.00 (fifty million rand). In contrast, the Respondent contends that the payment of the R12 000 000.00 (twelve million rand) pre-development costs, was to be in part payment of the purchase price of R50 000 000.00 (fifty million rand). Upon payment thereof, the debt to West City was settled, and West City is in fact indebted to the Respondent in the sum of R2.5 000 000.00 (two and a half million rand). The Respondent contends that due to an accounting error, more of which appears below, this was not correctly reflected in West City's financial statements.

[17] After the conclusion of the agreements, the replying affidavit of Wallace, on behalf of the Applicants, states that in addition to the TISA loan of R50 000 000.00 (fifty million rand), a loan for the development was secured by mortgage bond over the property in the

sum of R317 939 661.00 (three hundred and seventeen million, nine thousand and thirty nine, six hundred and sixty one rand), from the Hong Kong and Shanghai Banking Corporation Limited ("HSBC").

[18] It is common cause that the loan of R50 000 000.00 (due by Good Hope Palace Hotels and ceded to the Respondent, receivable by West City for the transfer of the properties), was reduced initially to the sum of R9 606 241.00, due to shareholders claims against West City on loan account being transferred to the Respondent and a deduction of R14 750 000.00, (being 50% of the difference between what West City had originally paid for the property and R50 000 000.00).

[19] West City's audited financial statements for the 2009 financial year reflect a further reduction of the loan to R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand) as a result of a deduction in the sum of R 113 867.52 in respect of "*Christies Commission Adjustment*". A loan account certificate signed by Gormley, as director of the Respondent certified that the sum owing to West City by the Respondent as at 28 February 2009, was R 949 374.00 (nine hundred and forty nine thousand, three hundred and seventy four rand).

[20] The R50 million loan account assigned to the Respondent against Good Hope Palace Hotels (as provided for at Clause 4 of the "*Heads of Term*" agreement) was paid in full to the Respondent in September 2012. Pursuant to a "*Sale of Shares and Claims*" agreement the Respondent then disposed of its interest in Good Hope Palace Hotels for R500 to "IHMS" Hotels, which I understand to be the parent body of TISA. This agreement also provided

for the Respondent to sell 100% of all claims which it may have against Good Hope Palace Hotels to IHMS, but specifically excluded "*the designated WCP claim*" (a reference to the ceded loan account of R50 000 000.00 by Good Hope Palace Hotels to the Respondent arising from the transfer of West City's Properties), which was repaid by Good Hope Palace Hotels to the Respondent.

[21] The Applicants aver that they learnt of the repayment of the R50million loan to the Respondent by Good Hope Palace Hotels, from a third party, early in 2015, the Respondent not having disclosed this to them. The replying affidavit of Wallace states that attempts to establish what the Respondent had done with the R50 million loan repayment, were frustrated by the Respondent, Gormley and their accountant Luyt on the basis that the Appicants had no right to the information.

[22] West City, as aforementioned, was placed under final liquidation in May 2012 and the Applicants were appointed as liquidators in June 2012. The estate of Gormley, as also aforementioned, was placed into sequestration in May 2013. The replying affidavit of Wallace states that prior to his sequestration, Gormley disposed of numerous shareholdings and members' interests owned by him in South Africa to a Gormley family trust formed by Luyt. These dispositions, it is alleged included shares in the Respondent and payments from the loan of R50 million rand received from Good Hope Palace Hotels.

[23] Wallace further mentions in reply, that this application is one of several matters flowing from the financial affairs and dealings of Gormley. Another, is a pending action also in this Court relating to alleged collusive dispositions without value by Gormley to his

family trust, including a substantial shareholding in the Respondent and a loan account against the Respondent. Wallace contends that the sole reason for the Respondent's opposition to this application is to attempt to prevent the unravelling of the payment of the R50 million loan repayment to other parties in preference to the general body of creditors.

The Implementation of the Agreements and the Financial Statements of the Pparties to the Agreements.

Financial statements of Good Hope Palace Hotels

[24] After Good Hope Palace Hotels paid the sum of R12 000 000.00 (twelve million rand) to Nedbank on 8 November 2007 in accordance with the agreements, its audited annual financial statements reflected its continuing loan liability to West City, ceded to the Respondent in the sum of R50 000 00.00 (fifty million rand). A loan account in this sum is recorded in the audited financial statements at year end 31 March 2008, 31 March 2009, 31 March 2010 and until the loan was re-paid. The Respondent's annual financial statement for the year ended 28 February 2010 similarly record the loan account claim against Good Hope Palace Hotels as R50 000 000.00 (fifty million rand).

[25] Significantly, Note 11 to the financial statements of Good Hope Palace Hotels for the year ended 31 March 2010 states as follows in respect of the WCP loan account ceded by West City to the Respondent in the sum of R50 000 000.00 (fifty million rand) :

"11. Amounts owing to joint venture shareholders

	2010	*2009*
	R	*R*
IHMS Hotels (SA) (Proprietary) Limited	***50 000 000***	*50 000 000*
WCP Hotel property (Proprietary) Limited	***50 000 000***	*50 000 000*
	100 000 000	*100 000 000*

The above loans are unsecured, interest free and have no fixed terms of repayment. WCP Hotel Property (Proprietary) Limited's contribution was by way of land and buildings. These loans have been subordinated in favour of Hong Kong and Shanghai Banking Corporation Limited and cannot be repaid in full or in part until such time as the bank loan has been settled (refer to note 10)."

[26] Note 10 records that the HSBC loan has as its final date of repayment, 20 September 2015.

Financial Statements of West City

[27] The audited annual financial statements of West City for the year ended 29 February 2008 record the R12 000 000.00 (twelve million rand) payment in settlement of agreed pre-development costs, as a credit against "*costs of sales*" and not as having been made in reduction of the loan account liability. The loan of R50 000 000.00 (fifty million rand) arising from the transfer of properties by West City to Good Hope Palace Hotels and ceded to the Respondent, is reflected as having been reduced to R9 606 241.00 (nine million, six hundred and six thousand, two hundred and forty one rand). The audited financial statements of West City for the financial years ended 28 February 2009 and 2010 record the reduced debt as R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand), and still owing.

[28] The two then directors of West City, Messrs Gormley and Coleman acknowledged their responsibility for the content and integrity of the annual financial statements of 2009 and 2010, which they signed and approved on 22 December 2010. It is common cause that

no amount has been repaid by the Respondent to West City since the end of the financial year ending 28 February 2010.

Financial Statements of the Respondent

[29] The Respondent's audited financial statements for the 2008 financial year similarly reflect the loan of R50 000 000.00 (fifty million rand) having been reduced to the sum of R9 606 241.00 (nine million, six hundred and six thousand, two hundred and forty one rand) and that of 2009 reflect the further reduction to R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand). A loan account certificate by Gormley, in his capacity as director of the Respondent, certified that the sum owing to West City by the Respondent as at 28 February 2009 was this sum.

[30] The Respondent's annual financial statements for the year ended 28 February 2010 record the ceded loan account claim against Good Hope Palace Hotels arising from the transfer of West City's properties, as R50 000 000.00 (fifty million). A note thereto at record page 126, is essentially identical to the recordal at note 11 to the annual financial statements of Good Hope Palace Hotels, quoted above at paragraph 25. It too refers to the ceded loan as unsecured, interest free and having no fixed terms of repayment and only repayable once the loan to HSBC, owed by Good Hope Palace Hotels, is paid back in its entirety, the repayment date of which loan, being 20 September 2015.

[31] Against this backdrop I turn to consider the legal context and whether the debt is *bona fide* disputed by the Respondent on reasonable grounds.

Is the debt *bona fide* disputed on reasonable grounds or is the application an abuse of process?

[32] It is well established that where in a provisional winding up application, the issue in dispute is the indebtedness of a Respondent, the onus is on the Respondent to show that the debt is *bona fide* disputed on reasonable grounds. In *Hülse-Reutter and Another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening)* 1998 (2) SA 208 (C), a case similar to the present, where the party challenging the application for the winding-up of a company contended it was an abuse of the process of the court, Thring J, at 218 E – F, succinctly set out what constituted a *bona fide* defence in the context of a provisional winding-up application:

> *"The legal position in this regard is conveniently set out as follows in Henochsberg on The Companies Act 5th ed vol 1 at 693 – 4:*
>
> *'Abuse of the process of the Court*
>
> *In addition to its statutory discretion, the Court has an inherent jurisdiction to prevent abuse of its process and, therefore, even where a good ground for winding-up is established, the Court will not grant the order where the sole or predominant motive or purpose of the applicant is something other than the bona fide bringing about of the company's liquidation for its own sake, eg the attempt to enforce payment of a debt bona fide disputed. . . .*
>
> *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 (Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347 – 8 and authorities there cited; Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd 1971 (1) SA 524 (T) at 529-30; Walter McNaughton (Pty) Ltd v Impala Caravans (Pty) Ltd 1976 (1) SA 189 (W) at 191; Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd 1979 (1) SA 265 (W) at 269; and see Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 980; and see eg Re a company (No 0012209 of 1991) [1992] 2 All ER 797 Ch)). Where prima facie the indebtedness exists the onus is on the company to show that it is bona fide disputed on reasonable grounds (Meyer NO v Bree Holdings (Pty) Ltd) 1972 (3) SA 353 (T) at 354-5; Commonwealth Shippers Ltd V Mayland*

Properties (Pty) Ltd 1978 (1) SA 70 (D) at 72; Machanick case supra at 269).”

[33] In like vein, in *Orestisolve (Pty) Ltd* t/a Essa Investments *v NDFT Holdings (Pty) Ltd and another* 2015 (4) SA 449 (WCC), Rogers J at paragraph 7-8 stated:

> *“In an opposed application for provisional liquidation the applicant must establish its entitlement to an order on a prima facie basis, meaning that the applicant must show that the balance of probabilities on the affidavit is in its favour. (Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943 (A) at 975 J – 979 F). This would include the existence of the applicant's claim where such is disputed.*
>
> *Even if the applicant establishes its claim on a prima facie basis, a Court will refuse the application if the claim is bona fide disputed on reasonable grounds. The rule that winding-up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the Court's process should not be abused. In the context of liquidation proceedings the rule is generally known as the Badenhorst rule from the leading eponymous case on the subject, Badenhorst v Northern Construction Enterpirses (Pty) Ltd 1956 (2) SA 346 (T) at 347 H – 348 C, and is generally know treated as an independent rule, not dependant on proof of actual abuse of process (Blackman et al Commentary on the Companies Act vol 3 at 14-82 to 14-83)... At the provisional stage the other requirements must be satisfied on a balance of probabilities with reference to the affidavits. In relation to theapplicants claim, however, the court must consider not only where the balance of probabilities lies on the papers but also whether the claim in bona fide disputed on reasonable grounds. A Court may reach this conclusion even though on a balance of probabilities (based on the papers) the applicants claim has been made out (Payslip Investments Holdings CC v Y2K Tec Ltd 2001 (4) SA 781 (C) at 783G-I). However, where the applicant at the provisional stage shows the debt prima facie exists, the onus is on the company to show that it is bona fide disputed on reasonable grounds (Hülse- Reutter and Another v HEG Consulting Enterprises (Pty Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 218D- 219C).”*

[34] Thring J in *Hülse-Reutter supra* considered what it is that Respondents have to establish in order to resist a winding up application at the provisional stage, with success. He stated at 219 F – 220 B as follows:

> *“Apart from the fact that they dispute the applicants' claims, and do so bona fide... what they must establish is no more and no less than that the grounds on which they do so are reasonable. They do not have to establish, even on the probabilities, that the company, under their direction, will, as a matter of fact, succeed in any action which might be brought against it by the applicants to enforce*

their disputed claims. They do not, in this matter, have to prove the company's defence in any such proceedings. All that they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable. To do that, I do not think that it is necessary for them to adduce on affidavit or otherwise, the actual evidence on which they would rely at such a trial. This is not an application for summary judgment in which, in terms of Supreme Court rule 32 (3) a defendant who resists such an application by delivering an affidavit or affidavits must not only satisfy the Court that he has a bona fide defence to the action, but in terms of the Rules must also disclose fully in his affidavit or affidavits 'the material facts relied upon therefor'. (cf Standard Merchant Bank Ltd v Rowe and Others 1982 (4) SA 671 (W) at 676H-677A and Chairperson, Independent Electoral Commission v Die Krans Ontspanningsoord (Edms) Bpk 1997 (1) SA 244 (T) at 247F-250F).

It seems to me to be sufficient for the trustees in the present application, as long as they do so bona fide, and I emphasise again that their bona fides are not here disputed, to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company."

I would respectfully qualify the latter statement by adding, that the facts to be alleged must be reasonable facts, capable of sustaining a defence.

Discussion on grounds upon which the debt is disputed by the Respondent

The Respondent, as aforementioned, disputes the debt on two grounds which it alleges are reasonable, firstly, that the debt has been paid and secondly, that it has prescribed.

The defence that the debt has been paid

[35] In asserting that the debt has been paid, the Respondent's stance is that the payment of the sum of R12 000 000.00 (twelve million rand) of agreed pre-development costs by Good Hope Palace Hotels on 8 November 2007, was made in part payment of a total consideration of R50 000 000.00 (fifty million rand) with the effect that the amount of the loan was only R38 000 000.00 (thirty eight million rand).

[36] The Respondent claims that all the prior recordals and admissions since 2007 of its

liability to West City of the R50 000 000.00 (fifty million) debt, reduced to at least R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand) in annual financial statements and written explanations under oath in affidavits under other application proceedings, were in consequence of a bookkeeping misallocation in the records of West City. The debt, it says, has been paid.

[37] The answering affidavit of Luyt, states as follows in this regard:

> *"35. In part payment of the purchase price of R50 million the joint venture company was to settle the Nedbank loan on behalf of West City. The "pre-development costs" referred to in the heads of terms is actually a reference to the Nedbank loan which partially financed the acquisition of the properties.*
>
> *38.3. When the Nedbank loan was settled by Good Hope Palace, the correct amount was debited and it was reflected in the financial statements of West City that the Nedbank loan had been settled in full. However, in West City's financial records, Eurocape erroneously credited costs of sales instead of "Amounts receivable from related parties".*
>
> *38.4. Consequently, due to a bona fide posting error, the bookkeeping staff of Eurocape failed to take proper account of the payment of the sum of approximately R12 million by Good Hope Palace and that mistake was perpetuated in the financial statements.*
>
> *39. LPH was not aware of the allocation error and audited the financial statements, based on figures provided by Eurocape.*
>
> *41. In these circumstances the debt to West City has been paid and, in fact, it appears that West City is indebted to the Respondent in the sum of approximately R2.5 million resulting from the Respondent taking over more loan accounts than it should have.*
>
> *"Role of Eurocape bookkeeping staff and LPH*
>
> *23 Eurocape's bookkeeping staff (including Smith) and the representatives of LPH (including me) were not involved in the transaction relating to the sale of West City's properties and we were not fully versed in the facts of the matter (as alleged in paragraphs 8.45 and 8.47 of the replying affidavit)."*

Finding on whether the debt has been paid

[38] The agreements and the implementation thereof, in my view, do not bear out Luyt's averments. It is, as the Applicants contend, self-evident from the "*Heads of Terms*" and the "*Subscription and Shareholders*" agreement that there were two separate undertakings by Good Hope Palace Hotels. There is a clear distinction between the payment of agreed pre-development costs prior to transfer of the properties on the one hand and a loan by West City on the other of R50 000 000.00 (fifty million rand) as payment for the properties.

[39] The agreements make abundantly clear that West City was lending R50 000 000.00 (fifty million rand) and in addition thereto, Good Hope Palace Hotels would pay R12 000 000.00 (twelve million rand) pre-development costs. If West City was only lending R38 000 000.00 (thirty eight million rand) to Good Hope Palace Hotels, the agreements would have stated that West City would have to cede a loan claim of R38 000 000.00 (thirty eight million rand) to the Respondent and not the R50 000 000.00 (fifty million rand) loan claim against Good Hope Palace Hotels, as provided for in the agreements.

[40] The Respondent's contention that the sum of R12 000 000.00 (twelve million rand) was included in the purchase price of R50 000 000.00 (fifty million rand) is simply not borne out by the written agreements which clearly provide for two obligations, a payment of R12 000 000.00 (twelve million rand) for pre-development costs and a loan of R50 000 000.00 (fifty million rand) *in lieu* of the transfer of the properties by West City. The literal meaning of the two agreements and a consideration of the agreements in the light of all relevant and admissible context, including the circumstances in which the documents

came into being favour this conclusion. See *Bothma – Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at 499 per Wallace JA.

The subsequent conduct of the parties and in the implementation of the terms of the agreement as separate obligations, also favours this conclusion.

[41] Whilst the Respondent avers that the crediting of the R12 000 000.00 (twelve million rand) payment by Good Hope Palace Hotels in West City's financial records to costs of sale was an error and that the sum ought to have been credited to "*amounts receivable from related parties*" they do not explain, as is contended by the Applicants, why this error was only discovered some 7 years after the agreements were implemented. Nor, as is also aptly contended by the Applicants, is it explained why the same indebtedness is reflected in both the annual financial statements of the Respondent and the annual financial statements of Good Hope Palace Hotels, whose records are independently kept, and whose annual financial statements are audited by KPMG auditors and not the common auditors of Respondent and West City. It is also strange, that if as is asserted by Respondent, it is West City who is in fact indebted to it for some R2,500 000.00 (two and a half million rand), why there is no hint of a claim to recover this amount.

[42] I agree further that it is unsustainable for the Respondent to claim that Good Hope Palace Hotels was only indebted in the loan sum of some R38 000 000.00 (thirty eight million rand) after payment of the agreed pre development costs, when the annual financial statements of Good Hope Palace Hotels record its indebtedness after the R12 000 000.00 (twelve million rand) payment and throughout all subsequent years in the sum of R50 000 000.00 (fifty million rand), and the Respondent was subsequently paid the full sum

of R50 000 000.00 (fifty million rand) in settlement of the loan account by Good Hope Palace Hotels, and not R38 000 000.00 (thirty eight million rand). The Applicants' categorisation of Respondent's reliance on a bookkeeping error as a recent fabrication and its insistence that the loan amount was R38 000 000.00 (thirty eight million rand), as egregious, is, in the circumstances, understandable.

[43] In view of the abundantly clear provisions of the agreements which reflect the R50 000 000.00(fifty million rand) loan and the R12 000 000.00 (twelve million rand) payment as separate obligations, the clear recordal of the debt in the annual financial statements and the implementation of the agreements by the parties referred to above, the Respondent, in my view. has not shown that the debt is disputed on *bona fide* reasonable grounds.

The dispute of the debt on the grounds of Prescription

[44] In disputing the debt on the grounds of prescription, Mr Van Rooyen on behalf of the Respondent contends for two scenarios as to when the debt prescribed. The first of these has the prescription date as 1 March 2014, being 3 years after the last acknowledgment of indebtedness on 2 March 2011. The second scenario, asserts the Respondent, comes into operation if it is found that the debt became due when the order for the winding-up of West City was granted. In that case, says the Respondent, the debt prescribed in August 2015, three years after the Applicants were appointed as West City's liquidators in August 2012. On either scenario, contends the Respondent, the debt has prescribed.

[45] The Respondent refutes the Applicants' assertion that the ceded R50 million loan had

been subordinated and could not be repaid until 20 September 2015, as is stated in note 11 to the annual financial statements of Good Hope Palace Hotels for the year ended 31 March 2010, and in the note to the financial statements of the Respondent for that year,(as quoted respectively at paragraphs 25 and 30 above). The Respondent's contention as articulated by Luyt is that the subordinated loans of R50 000 000.00 (fifty million rand) which were due in September 2015, were the two loans owed by Good Hope Palace Hotels to its two shareholders, one of which was owed to the Respondent, and had nothing to do with the Respondent's loan to West City. That the latter loan was in fact a cession of a loan owed by Good Hope Palace Hotels to West City, was not, according to the Respondent, a consideration.

Finding on Prescription

[46] Central to the Respondent’s argument on prescription is the premise that there was no conjunction between the debt that Good Hope Palace Hotels owed to the Respondent and the debt that the Respondent owed to West City. I do not agree with this premise. Both debts or loans had their origins in one transaction, namely, the transfer of property by West City to Good Hope Palace Hotels for a consideration of R50 000 000.00 (fifty million rand), and one loan account of R50 million flowing therefrom. It was that loan account and no other, that was thereafter assigned to the Respondent in favour of West City. Under these circumstances, there was clearly a conjunction between the debt that Good Hope Palace Hotels owed to the Respondent and the debt that the Respondent owed to West City.

[47] Those involved in the transactions, for their own reasons, elected to structure the repayment of the debt, so that it would be repaid through two loans. The fact that the

financial statements referred to each loan as a separate and discreet transaction, does not detract from the fact that the two loans had their origin in the transfer of the properties from West City and a single ceded loan.

[48] It is common cause, as is reflected in Good Hope Palace Hotels financial statements, that the ceded loan of Good Hope Palace Hotels to the Respondent, was subordinated in favour of HSBC and could not be repaid until that bank loan had been settled in September 2015. The financial statements reflect the loan as an agreed profit share.

[49] The replying affidavit of Wallace states it is common cause that the joint venture was a new enterprise and that Good Hope Palace Hotels would for a number of years during the hotel construction phase incur debt without any income and would thereafter, for a period, be obliged to apply its income firstly to the reduction of the HSBC loan secured over its immovable property and repayable by 20 September 2015. Respondent similarly would have no liquidity and no assets to pay its loan liability of R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand) to West City, the Respondent being merely a vehicle to hold the 50% shareholding and the loan account against Good Hope Palace Hotels. I note that whilst this assertion was sought unsuccessfully to be struck, it was not gainsaid.

[50] As is aptly stated by Wallace, Luyt's attempt to suggest a disjuncture between the due date of Respondent's obligation to West City for the debt of R9 492 374.00 (nine million, four hundred and ninety two thousand, three hundred and seventy four rand), and the due date of its claim against Good Hope Palace Hotels for payment of the claim ceded by West

City to the Respondent, ignores the fact that the Respondent had no funds of its own to pay West City and that its ability to pay West City was linked to payment by Good Hope Palace Hotels to it.

[51] In this regard, Mr Mitchell for the Applicants drew, my attention to paragraph 176 of Gormley's answering affidavit in the application for the sequestration of his estate, in which he said the following:

> *"WCP Hotel Property (Pty) Ltd was a brand-new start-up company whose only asset was shares in a company which was entirely funded by debt. Moreover, the first two years of trading of the latter company incurred over R60 million in trading losses. Any value is very long term and its assets are fully pledged to creditors and banks."*

[52] He also referenced paragraph 72 of the answering affidavit of Marc Smith ("Smith"), (the financial manager of Eurocape), in the application to liquidate West City. There, Smith referred to the debt owed to West City as a deferred profit share and explained the repayment thereof as follows:

> *"A high value was put on the properties but on the basis that the surplus over costs would not be paid until the new operation was trading profitably and had the funds to make payment. As a result of this "gain", the respondent's records reflect a loan owed by Good Hope Palace Hotels (Pty) Ltd which did not involve any advance of money but is in fact a deferred profit share from the transaction ... and stated that West City "made an excellent profit though deferred, on the disposal."*

[53] The debt is similarly referred to as an agreed profit share in the Respondent's annual financial statements for the year ending 28 February 2010. With neither Good Hope Palace Hotels nor Respondent having any funds with which to repay the loan for a number of years, the statement refers to the indebtedness to West City as a "*non-current liability*".

> *"The agreed profit share payable by Good Hope Palace Hotels (Pty) Ltd is unsecured, interest free and has no fixed terms of repayment. This agreed profit share payable will only*

be repaid once the loan to HSBC owed by Good Hope Palace Hotels (Pty) Ltd is paid back in its entirety, the repayment date of this HSBC loan being 20 September 2015."

Given my finding that the two loans are conjoined, I do not accept the Respondent's stance that the profit sharing was that payable by Good Hope Palace Hotels to its shareholders and had nothing to do with West City.

[54] As the debts were conjoined and the Respondent had no funds of its own, it follows, in my view, that the debt payable by the Respondent to West City could not have been paid until such time as the debt owed by Good Hope Palace Hotels to the Respondent was due in September 2015. Accordingly, payment of the debt by the Respondent to West City was also only due in September 2015.

[55] As the Applicants contend, both Gormley and Luyt would have had intimate and complete knowledge of the affairs of West City, the Respondent and the transactions in respect of Good Hope Palace Hotels. Mr Mitchell submitted that Gormley, as sole director of the Respondent, would have been aware that the loan due to the Respondent from Good Hope Palace Hotels was subordinated and due by 2015. Gormley as a director also of West City, would have carried that information over to West City. Mr Mitchell argued that in the circumstances, it would have been a tacit term of the loan agreement that West City could not call up the loan against the Respondent until 2015, when the latter would come into funds to pay. Had it done so sooner, it would have run the risk of bankrupting the Respondent. I am inclined to agree.

[56] In the premises and in the light of all of the above, I come to the view that the Respondent has failed to advance reasonable grounds for its claim that the debt has prescribed. It has therefore failed to establish that the debt is *bona fide* disputed on

reasonable grounds on the basis of prescription.

Abuse of Process

[57] It follows from my finding of there being no *bona fide* dispute of the debt on reasonable grounds, that this application has not been an abuse of the Court process. It remains briefly to say a few words about the Respondent's contention that there was an abuse of process because the Applicants persisted with the winding up application after it became clear that the debt was disputed. This submission is without merit. The grounds relied upon in this application by the Respondent for disputing the debt were not conveyed to the Applicants before the commencement of the application. The defences that the debt was not owed due to a bookkeeping error and because the payment of R12 000 000.00 (twelve million rand) was made in part payment of the R50 000 000.00 (fifty million rand) purchase price, was first mentioned in the Respondent's answering affidavit, as was the defence that the claim had prescribed. The correspondence referred to by the Respondent in support of its averment that the application was an abuse, whilst contending that the debt had been paid and that West City was owed some R2 500 000.00 (two and a half million rand), did not mention the defences relied upon by the Respondent in this application.

Costs

Given that the Respondent has not succeeded in its dispute of the debt, the Applicant is entitled to a cost award in its favour for the two days of the hearing being 22 and 23 February 2016. I am satisfied that such should include the costs of two Counsel. The hearing scheduled for 9 February 2016 was postponed by agreement, as, I am informed, was an earlier hearing scheduled for October 2015. I make no order as to costs in respect of those

two postponed hearings.

[58] I grant the following order:

1. The Respondent is placed under provisional liquidation.

2. A Rule *Nisi* is issued calling on the Respondent or any other interested party to show cause on Monday 4 April 2016, why the Respondent should not be placed into final liquidation and the costs of this application not be ordered to be costs in the winding-up.

3. Service of this order shall be effected on:

3.1 The Respondent;

3.2 The South African Revenue Service;

3.3 The Master of the High Court, Cape Town;

3.4 By publication in one edition of The Cape Times and Die Burger newspapers.

4. The Respondent shall pay the costs of the opposed application for provisional liquidation, such costs to be on a party and party scale and to include the costs of two Counsel.

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Y S MEER

Judge of the High Court