



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

CASE NO: 40405/21

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|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: NO |

31 JANUARY 2023

DATE

SIGNATURE

In the matter between:

INNOVATIVE FUNDING SOLUTIONS (PTY) LTD

[REG NO: 2014/033644/07]

APPLICANT

and

XAFARI CAPITAL (PTY) LTD

[REG NO: 2014/002537/07]

RESPONDENT

JUDGMENT

A. INTRODUCTION

- [1] The Applicant, Innovative Funding Solutions (Pty) Ltd ("**IFS or Applicant or Lender**"), brought an application for the final winding-up of the Respondent, Xafari Capital (Pty) Ltd ("**Xaf Cap or Respondent or Borrower**"), as envisaged in section 344(f) read with section 345(1)(c), and section 344(h) of the Companies Act, 61 of 1973, alternatively for its provisional winding-up.
- [2] At the hearing of this application the Applicant moved for an order for the provisional winding-up of the Respondent.

B. RELEVANT BACKGROUND FACTS

- [3] On 28 June 2019, IFS (formally known as FBT IFS (Pty) Ltd) ("**the Lender**") concluded a written loan agreement ("**the loan agreement**")¹ with Xaf Cap (formally known as Van Zyl Game Farming (Pty) Ltd) ("**the Borrower**").
- [4] Xaf Cap ("**the Borrower**") borrowed, by way of an available facility, an amount of R10,000,000.00 (ten million rand) from IFS in terms of the aforesaid loan agreement ("**the loan amount**").²
- [5] It is not disputed that the loan amount was advanced to Xaf Cap on 28 June 2019³, and if disputed, it is not on reasonable grounds.

¹ Annexure "B" to the Applicant's Founding Affidavit

² Clause 4 of the Loan Agreement (Annexure "B")

³ Annexure "L" to the Founding Affidavit (Statement of IFS)

- [6] The parties agreed in terms of the loan agreement that Xaf Cap shall pay interest on the outstanding balance calculated at 3% per month, calculated daily, which interest shall be payable monthly in arrears or on repayment of the facility, whichever occurs first.⁴
- [7] It is common cause between the parties that as security for the obligations of Xaf Cap towards IFS, Mr JJ van Zyl (the director of Xaf Cap) signed surety for the due performance of Xaf Cap and, Xaf Cap assigned and ceded all its rights, title and interest in and to the R10, 000,000.00 (ten million rand) loan agreement between Van Zyl Game Farming (Pty) Ltd (Xaf Cap) and Shefa Coal (Pty) Ltd ("Shefa")⁵ (hereinafter referred to as the "Shefa loan") to IFS.⁶
- [8] It is further common cause between the parties that, as from 26 July 2019, an amount of R550,000.00 (five hundred and fifty thousand rand) would have been repayable by Shefa towards Xaf Cap and from October 2019, the monthly instalments should have increased to R2,000,000.00 (two million rand) per month.⁷
- [9] IFS granted the loan to Xaf Cap based on the security tendered in the Shefa loan.
- [10] Xaf Cap was unable to repay the amount to IFS and accordingly, the parties concluded an addendum to the loan agreement on 30 January 2020 ("the addendum").⁸
- [11] In terms of the addendum, the due date for the repayment of the loan amount was amended and ultimately, the total outstanding balance had to be repaid on the last day of June 2020.⁹

⁴ Clause 5 of the Loan Agreement (Annexure "B")

⁵ Clause 15 of the Loan Agreement (Annexure "B") & Annexure "C" to Founding Affidavit (Loan Agreement: Van Zyl Game Farming (Pty) Ltd and Shefa Coal (Pty) Ltd)

⁶ Paragraph 12 of the Founding Affidavit; paragraph 47 of the Answering Affidavit

⁷ Paragraph 15 of the Founding Affidavit; paragraph 49 of the Answering Affidavit

⁸ Annexure "D" to the Founding Affidavit

⁹ Paragraph 3 of Annexure "D" to the Founding Affidavit

- [12] Clause 4 of the addendum stated that *"All clauses, together with any Annexures, other than that referred to in this Addendum shall remain unchanged and in full force and effect."*
- [13] It is common cause that the loan agreement and the addendum were duly signed by representatives of IFS ("the Lender") (formally known as FBT IFS (Pty) Ltd) and Van Zyl Game Farming (Pty) Ltd ("the Borrower") (now known as Xaf Cap).
- [14] Xaf Cap failed to make payments of the outstanding amount on 30 June 2020 (as per the addendum). On 16 November 2020, IFS sent a demand to Xaf Cap, wherein payment for the outstanding amount of R3,844,298.00 (three million eight hundred and forty-four thousand two hundred and ninety-eight rand) was demanded.¹⁰
- [15] Pursuant to this letter, Mr van Zyl indicated that Xaf Cap secured a transaction in term of which payment would be made towards IFS by no later than February 2021.¹¹ The agreement/transaction referred to is the one concluded on 30 November 2020 between Xafari (Pty) Ltd ("Xafari") (another entity of Mr van Zyl) and Uitspan Colliery (Pty) Ltd ("the Uitspan loan").¹²
- [16] A further letter was sent by IFS on 23 March 2021, wherein the amount outstanding, at that stage, being R4,781,428.89 (four million seven hundred and eighty-one thousand four hundred and twenty-eight rand and eighty-nine cents) was demanded by no later than 26 March 2021. It was further stated that failure to respond and conclude will result in immediate legal action in calling on the securities and sureties.¹³
- [17] On 12 April 2021, IFS directed a letter to Xaf Cap, Mr van Zyl and Shefa. Shefa was provided with a default notice in terms of paragraph 10.1 of the Shefa loan, which was ceded to IFS.¹⁴

¹⁰ Annexure "E" to the Founding Affidavit

¹¹ Paragraph 20 of the Founding Affidavit

¹² Annexure "K" to the Founding Affidavit

¹³ Annexure "F" to the Founding Affidavit

¹⁴ Annexure "G" to the Founding Affidavit

It was submitted that at that stage IFS was not aware that the security provided by Xaf Cap (being the Shefa loan) was already diluted and shifted in terms of the Uitspan loan contrary to clause 15.2 of the loan agreement.

[18] On 18 May 2021, a further letter was directed to Shefa. In this letter, IFS indicated that it has been informed by Gracelands Group (Pty) Ltd that the original share certificates of Shefa Coal, which was also requested in the 12 April 2021 letter, have been transferred to “*preserve value*”. This was apparently done, since various companies and individuals (which included Shefa) failed to make payment to Gracelands Group (Pty) Ltd in terms of a separate debt.¹⁵

[19] It appears that the Shefa loan, which was ceded to IFS, was apparently restructured on 30 November 2020 by Mr van Zyl (the director of Xaf Cap) in a consolidation of various loans with another entity called Uitspan Colliery in terms of the Uitspan loan mentioned above. The total amount of the restructuring is R23,658,226.00 (twenty three million six hundred and fifty-eight thousand two hundred and twenty-six rand), which was borrowed by Xafari to Uitspan Colliery.¹⁶

[20] In terms of clause 3.13 of the Uitspan loan the amount “*will be solely used by the company (Uitspan) to advance a loan to Shefa Coal*” to, *inter alia*, settle various outstanding loan amounts to Xaf Cap, one of which is the R10,000,000.00 (ten million rand) in terms of the loan agreement, dated 28 June 2019 (i.e. the Shefa loan).

[21] From the above it appears, that Xafari “*borrow (lends)*” to Uitspan Colliery R23,658,226.00 (twenty three million six hundred and fifty-eight thousand two hundred and twenty-six rand) to allow Uitspan Colliery to pay Shefa to, in turn pay Xaf Cap. It was contended by the Applicant that there cannot be any rational explanation for structuring the transactions in this manner and it was contended that *prima facie* it appears that the Uitspan loan is an attempt

¹⁵ Annexure “H” to the Founding Affidavit

¹⁶ Annexure “K” to the Founding Affidavit

to launder money, since Xafari “borrows (lends)” money to Uitspan Colliery, Uitspan Colliery “borrows the same money to Shefa Coal”, Shefa then repays Xaf Cap.¹⁷

[22] It is the case of the Applicant that its liquidation application is premised on an outstanding balance amounting to R6,131,958.97 (six million one hundred and thirty-one thousand nine hundred and fifty-eight rand and ninety-seven cents) (as on 8 December 2021) due, owing and payable to IFS.¹⁸ As proof of the aforementioned outstanding balance the Applicant attached a Certificate of Indebtedness.¹⁹

[23] In opposing the Applicant’s application, Xaf Cap makes reference to a matter between Gracelands Group (Pty) Ltd / Xafari Capital (Pty) Ltd (case number: 13998/21) and a “*stay and joinder application*” between Xafari Capital (Pty) Ltd / Gracelands Groups (Pty) Ltd (case number: 35634/21). I was further referred to a sequestration application between Innovative Funding Solutions (Pty) Ltd / JJ van Zyl (case no: 58712/21).

[24] It is the case of the Applicant that on a reading of all the various application, it is evident that Mr van Zyl, who is the puppet master behind Xaf Cap and Xafari, has provided irreconcilable versions in the various affidavits.

[25] Xaf Cap admits the loan agreement concluded between IFS and Xaf Cap. It, however, alleged that there were “*reciprocal obligations between the entities, whereby the Applicant / Nicolor would effect payment to Greenleave Rehabilitation (Pty) Ltd, who in turn would effect payment to Xafari (Pty) Ltd, which funds would be utilised on the basis of a cession to settle the debts of Xafari Capital*”.²⁰ It is the case of the Respondent that “*the crisp legal defence to such conduct is referred to as the exception non-adimpleti contractus*”.²¹

¹⁷ Paragraph 45 of the Founding Affidavit

¹⁸ Paragraph 47.2 of the Founding Affidavit

¹⁹ Annexure “L” to the Founding Affidavit – Certificate of Indebtedness

²⁰ Paragraph 46.2 of the Answering Affidavit and paragraph 52.1 of the Answering Affidavit

²¹ Paragraphs 52.1 to 52.4 of the Answering Affidavit

- [26] It is the case of the Applicant that this argument does not hold water, if regard is had to the “*Shifren-clause*” (non-variation clause), ad clause 14.2 of the loan agreement.²² In support of its submission the Applicant referred the Court to *SA Sentrale Ko-op Graan maatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A)*; *Brisley v Drotsky 2002 (4) SA 1 (AD)* at para 24 to 26 and *Impala Distrubutors v Taunus Chemical Manufacturing Co (Pty) Ltd 1975 (3) SA 273 (T)* at 275G-H.
- [27] It was further submitted by the Applicant that in the loan agreement, there is no “*reciprocal obligation*” save that IFS had to loan Xaf Cap the amount agreed and Xaf Cap had to repay the amount on or before the last day of June 2020.
- [28] It was admitted in the Respondent’s answering affidavit that the Shefa loan (which served as security for the loan agreement) had been repaid to Xaf Cap, however Xaf Cap has failed to settle the outstanding amount to IFS.²³
- [29] The Respondent stated in its answering affidavit that “*the basis of the opposition is not directed at the dispute of indebtedness, but directed as to what the actual amount of indebtedness is and the implication of the failure of the various parties, which the Applicant is one, to have met its reciprocal obligations which would have had the effect that monies would have been paid and allowing for these monies to flow in settling the debt, as and when same was due.*”²⁴ In the answering affidavit Xaf Cap admitted (on its own version) that it owes IFS at least an amount of R2,289,814.00 (two million two hundred and eighty-nine thousand eight hundred and fourteen rand) on 2 May 2020²⁵ (alternatively on the date when the answering affidavit was commissioned on 22 October 2021).
- [30] Pursuant to the filing of the answering affidavit and on or about 2 September 2022 the Respondent brought an interlocutory application for leave to file a supplementary affidavit, which application was subsequently granted on 14 October 2022. The main reasons for the

²² Clause 14.2 of the Loan Agreement

²³ Paragraph 64.3 of the Answering Affidavit

²⁴ Paragraph 52.1 of the Answering Affidavit

²⁵ Paragraph 63.3 of the Answering Affidavit

filing of the supplementary affidavit were that on or about April 2022 the Respondent's erstwhile attorneys, Messrs VZLR Attorneys, withdrew and as a result thereof the Respondent was forced to obtain the services of a new legal team. This new legal team found that certain aspects had not been properly ventilated by the Respondent's erstwhile attorneys, which include *inter alia* that the written loan agreement contained a suspensive condition and that there was non-fulfilment of the condition precedent (suspensive condition), which renders the contract of no force and effect. It was further submitted that the Applicant ought to have made the necessary allegations regarding the compliance with the suspensive condition in its founding affidavit and that its failure to do so has the result that the application does not disclose a *cause of action* in respect of the alleged indebtedness pertaining to the written loan agreement.²⁶

[31] In the supplementary answering affidavit it was stated that the suspensive condition is to be found in clause 8 of the written loan agreement. It was submitted that the clause relates to the opening of a regulated account by the Applicant in the name of the Respondent at First National Bank ("FNB"). According to the Respondent the clause was to the benefit of both the Applicant and the Respondent. It was further stated that the condition was not waived by either the Applicant or the Respondent, nor could it.²⁷

[32] It was further stated in the Respondent's supplementary affidavit that pursuant to the conclusion of the written loan agreement, the Respondent to date of the interlocutory application has repaid in excess of R10,000,000.00 (ten million rand) to the Applicant in respect of the written loan agreement. The exact amount repaid by the Respondent to the Applicant is an amount of R10,356,374.20 (ten million three hundred and fifty-six thousand three hundred and seventy-four rand and twenty cents).²⁸ As proof thereof the Respondent referred the Court to a statement issued by the Applicant.²⁹

²⁶ Paragraphs 2.1 to 2.7 of Respondent's Interlocutory Application

²⁷ Paragraphs 2.5 to 2.7 of the Respondent's Supplementary Affidavit

²⁸ Paragraph 2.8 of the Respondent's Supplementary Affidavit

²⁹ Annexure "L" to the Founding Affidavit.

[33] It was further stated that due to non-fulfilment of the suspensive condition it would simply mean that no amount would be due and payable to the Applicant in terms of the written loan agreement.³⁰

[34] In the Respondent's supplementary affidavit it was stated that an action was instituted to seek a declaratory order that the written agreement is invalid as a result of non-fulfilment of the suspensive condition under case number 2020\020494.³¹

[35] The Applicant in its response to the above allegations submitted that the above is an attempt of the Respondent to escape liability under the agreement which was not in dispute since the date it was signed (on or about 28 June 2019) until date of the interlocutory application, four years later.³²

C. ISSUES FOR DETERMINATION

[36] Whether the loan agreement is void, alternatively of no force and effect, as a result of the non-fulfilment of a suspensive condition (as alleged by the Respondent in its supplementary answering affidavit). If there was a suspensive condition, whether the condition was waived; and

[37] Whether the Applicant has made out a *prima facie* case for the provisional winding-up of the Respondent in terms of section 344(f), read with section 345(1)(c), and section 344(h) of the Companies Act, 61 of 1973.

D. JUDGMENT

³⁰ Paragraph 2.14 of the Respondent's Supplementary Affidavit

³¹ Paragraph 2.11 of the Respondent's Supplementary Affidavit

³² Paragraph 21 of the Applicant's affidavit in response to the Respondent's Interlocutory Affidavit

[38] Suspensive Condition

[39] As stated above this application concerns *inter alia* the interpretation of clause 8 (more specifically clause 8.8) of the written loan agreement concluded between the parties and specifically whether it contains a suspensive condition.

[40] In order to interpret clause 8 it is necessary to quote it *verbatim*:

"8. Regulated Account

- 8.1 *The **Borrower** understands and acknowledges that it is a condition of this agreement that a separate Regulated account is opened for the purpose of receiving monies;*
- 8.2 *The **Borrower** hereby irrevocably authorises the Lender and its duly authorised representative to open a Banking account in the name of the Borrower at FNB bank;*
- 8.3 *The **Borrower** acknowledges that the **aforementioned banking account shall be the only banking account into which all funds received from projects shall be received;***
- 8.4 *The **Borrower undertakes to ensure that all third Party payments in lieu of the Projects are paid into the Regulated account and undertakes to sign all necessary instructions and authorities necessary and issues to the Third Parties in order to ensure that the Third Parties only process payments into the regulated account;***
- 8.5 *The **Borrower undertakes and agrees to sign all necessary documents required by FNB bank in order to open the Regulated Account;***
- 8.6 *The **Borrower also agrees and undertakes to sign all necessary powers of Attorney; mandates and authorities in order to give the Lender the***

necessary authority to jointly manage and control this bank account with the Borrower;

8.7 *The Lender similarly undertakes to ensure that the Borrower receive full disclosure of the funds received into the banking account and allocated by the Lender to the repayment of Capital, interest and fees, and that only the aforementioned transactions or transfers will be made to the Lender from the Regulated account;*

8.8 ***Should the Borrower fail and/or refuse and/or neglect to sign any and/or all documents in order to give effect to this clause the condition will be deemed not have been fulfilled and this entire agreement will be of no force and effect;***

8.9 *Any attempt by the Borrower to close the regulated account; amend the banking details or circumvent the payments into the Regulated account shall be deemed to be a material breach of this agreement."*

[Own emphasis to all quoted clauses]

[41] Counsel for the Applicant, Adv Vorster SC, submitted that in interpreting the loan agreement reference should be made to the fact that there are two different clauses in the loan agreement that regulates the repayment of the loan. They each contain different methods of repayment. The first is clause 6.3 and the second is clause 8.7. It was further submitted that clause 8 is a provision in favour of the applicant to allow any and all payments under a particular project made by a third party towards a debtor to be received in a separate and/or ringfenced account also referred to as a regulated account.

[42] The Court was further referred to clauses 8.3 and 8.4 of the loan agreement and it was submitted that for clause 8 to come into play, there must be a project. In this matter there was no project. It was pointed out that on the Respondent's own version the purpose for which the loan was made was for it to provide bridging finance to a business known as Greenleaf Rehabilitation (Pty) Ltd in respect of its operational expenses.³³

³³ Paragraphs 19 to 20 of the Answering Affidavit

- [43] Counsel for the Applicant further submitted that the relationship between the Applicant and the Respondent was (and is) simply a debtor-creditor relationship and nothing more.
- [44] It was submitted that a business-like interpretation of clause 8 illustrates that it was plainly not applicable to the relationship between the Applicant and the Respondent as they were not involved in a project. Repayment of the loan was regulated by clause 6, which provides for repayment in monthly instalments and that it is in line with how the parties implemented their agreement.
- [45] Counsel for the Applicant referred to *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani 2016 (2) SA 307 (SCA) at para 314C* regarding the principles to apply in contractual interpretation. It was submitted that the evidence shows that the parties fully implemented the loan agreement, the capital amount of R10 million was paid to the Respondent on the very same day that the loan agreement was concluded, the parties thereafter amended the repayment terms by concluding an addendum, which amended clause 6 (not clause 8), and thereafter the Respondent made certain payments into the account nominated by the Applicant (i.e., the repayment took place in terms of amended clause 6).
- [46] It was further submitted by the Applicant that a contract should be interpreted in a business-like manner and with the view of avoiding conflicts. A finding that the failure to open a regulated account amounts to the failure of the loan agreement will mean that clause 6 is rendered meaningless. The Court was further referred to *Trustees, Bus Industry Restructuring Fund v Breakthrough Investments CC 2008 (1) SA 67 (SCA) at 73E-F* in which it was held that a Court must avoid an interpretation of the loan agreement that will result in “*absurd practical and commercial consequences*”. It was submitted that the manner proposed by the Respondent will have “*absurd practical and commercial consequences*”. It was further submitted that clause 8 is not relevant for purposes of determining the Respondent’s liability.
- [47] In the Applicant’s heads of argument it was submitted that to the extent that the Court may find that clause 8 has to be considered, the Applicant submits that: (1) there is no time limit

specified for the fulfilment of the condition in clause 8.8; and (2) clause 8 clearly operates for the Applicant's benefit as it intends to create security for the repayment of a debt and could therefore be waived by the Applicant. It was further submitted that it is well established that the mere use of the word "condition" does not always translate into the condition in question being a suspensive condition. In support of this submission the Court was referred to *Passenger Rail Agency of South Africa v Sbahle Fire Service CC* [2020] ZASCA 90 at 28.

[48] Counsel for the Applicant referred the Court to *Kootbodien and Another v Mitchell's Plain Electrical Plumbing and Building CC and Others* 2011 (4) SA 624 (WCC) at 632G-633B in which the Court applied the principles relating to the test for waiver as provided by the Supreme Court of Appeal in *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at 49H. In applying these principles (test) Counsel submitted that the Applicant's conduct is clearly an "*outward manifestation*" (to borrow words from the Supreme Court of Appeal) of its intention not to enforce clause 8. It was submitted that compliance with clause 8 was clearly waived by conduct. It was further submitted that it does not behove the respondent to attempt to use clause 8 to escape liability when it knew that the loan agreement was fully implemented as long as 28 June 2019.

[49] The crux of the argument advanced by Council for the Respondent, Adv Maritz SC, was that the contract is conditional upon the fulfilment of a suspensive condition. In other words, its operation was suspended until the regulated account referred to in clause 8 of the written loan agreement was opened and if not opened there was non-fulfilment of the suspensive condition, which renders the loan agreement of no force and effect.

[50] Counsel for the Respondent submitted that it is trite that non-fulfilment of a condition precedent or suspensive condition renders the contract void. In support thereof the Court was referred to various cases in footnote 19 of its updated heads of argument. Although the Court agrees with the legal principles stated in these case, it is also trite that each case should be determined on its own facts.

- [51] The Counsel for the Respondent submitted that it did not sign the requisite documents in clause 8.8 to give effect to the clause simply because the Applicant never provided these documents to it. It was further submitted that given the fact that the agreement is of no force and effect, the Applicant is only entitled to the return of the money provided to the Respondent. In support thereof the Court was referred to *Barenblatt & Son v Dickson* 1917 CPD 319; *Schultz v Morton & Co* 1918 TBD at 343; *Hall v Cox* 1926 CPD at 228; *Cotton Tale Homes (Pty) Ltd v Palm 15 (Pty) Ltd* 1977 (1) SA 264 (W) and *Melamed v BP Southern Africa (Pty) Ltd* 2000 (2) SA 614 (W).
- [52] It was further submitted by the Respondent's Counsel that it has repaid more than what was advanced, the nett effect is that the Respondent is not indebted to the Applicant, in fact the Applicant is indebted to the Respondent.
- [53] In the Respondent's updated heads of argument it is stated that the fact that the agreement was implemented by the parties notwithstanding the non-fulfilment of the suspensive condition is irrelevant. In support thereof the Court was referred to *Letseng Diamonds Ltd v JCI Ltd & Others* 2009 (4) SA 58 (SCA).
- [54] In the Respondent's heads of argument the Court was referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) regarding the principles to be applied when a contract is interpreted.
- [55] The Respondent submitted that clause 8 simply entitles the applicant to pay itself from the regulated account in accordance with the payment schedule agreed to in clause 6 and therefore clause 8 is not an independent and self-standing payment clause (separate from clause 6).
- [56] The Respondent in its heads of argument submitted that the term "projects" has not been defined in the written loan agreement. Although the Court agrees with this submission it is worth mentioning that the Respondent did not endeavour to provide any information regarding the projects irrespective of the fact that it alleges that the loan agreement is subject

to a suspensive condition. It was submitted that this term will accordingly have to be interpreted having regard to the factual matrix at the time when the agreement was concluded. It was further submitted that the evidence demonstrates that the Respondent intended to provide the funds received from the Applicant for purpose of bridging finance that would be provided by the Respondent to another entity (Greenleaf).³⁴ It was further submitted that a day before the Applicant and Respondent concluded their agreement, the Respondent concluded a loan agreement with Shefa Coal.³⁵ It was submitted that there is no reason why these loan agreements cannot be the projects that were envisaged in the written loan agreements. Therefore, once the regulated account was opened there is no reason whatever why the repayments made by either Greenleaf or Shefa Coal could not have been made into the regulated account.

[57] Counsel for the Respondent referred the Court to *Wellworths Bazaars Ltd v Chandlers Ltd 1947 (2) SA 37 (A) 43* in support of its submission that the interpretation contended for by the Applicant ignores the "*presumption against tautology or superfluity*".

[58] Counsel for the Respondent took issue with the Applicant's reliance on the subsequent conduct of the parties as an interpretative tool. It was pointed out that the parties simply forgot about this clause.³⁶ It was further submitted that it cannot be in dispute as the Applicant has failed to deal with this allegation and as such, this allegation is deemed to be admitted.

[59] In respect of the waiver, the Respondent submitted that the Applicant has failed to deal with the suspensive condition and in doing so also failed to plead any facts in its founding affidavit regarding the alleged waiver thereof. The Court was in respect of the waiver referred to *Christie RH, The Law of Contract, 6th ed, pages 151 to 152*. The Court was further referred to clause 14.8 of the loan agreement – "*No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it...*"

³⁴ Paragraph 18-23 of the Answering Affidavit

³⁵ Annexure "C" to the Founding Affidavit

³⁶ Paragraph 2.6 of the Respondent's Supplementary Affidavit

[60] It was further submitted by Counsel for the Respondent that the regulated account is to the benefit of both parties. The Court was referred to clause 8.7 of the agreement in support thereof. It was submitted that in terms of clause 8.7 the Respondent does not only receive a full accounting from the Applicant, but in addition the Applicant can simply pay itself from the regulated account and that this prevents the Respondent from breaching the agreement. The Court was pointed to paragraph 2.5 of the Respondent's supplementary affidavit in which the Respondent alleges and demonstrates that clause 8 was to the benefit of both parties.

[61] The Respondent concluded that the Applicant has provided insufficient evidence regarding the alleged waiver. It was submitted that if this is disputed, *Plascon Evans* applies. It was submitted that the only allegation made was in paragraph 23.23 of the Applicant's supplementary affidavit where the following is alleged:

"...the action to advance the loan amount without the regulated account being opened...is a waiver of the purported condition by the Applicant."

[62] Against this background is the application before the Court.

[63] In order to determine whether the loan agreement was concluded subject to a suspensive condition it is necessary to have regard to the loan agreement in its entirety. On a plain reading of the loan agreement it appears that reference is made to two accounts. The first account appears in clause 6 and more specifically in clause 6.3 and the second account appears in clause 8 of the loan agreement. The heading to clause 6 clearly states the words **"Repayment"**. It is further stated in clause 6.3 that ***"All payments due to the Lender of both capital and interest shall be paid in rands by banker's order into such account and bank within the Republic of South Africa as the Lender may from time to time in writing notify."*** In other words all payments of both capital and interest shall be made into an account to be nominated by the Lender (IFS). Clause 6 as well as the addendum set out the payment amounts and the dates of repayment. The parties amended the repayment terms by concluding an addendum, which amended clause 6 (not clause 8), and thereafter the Respondent made certain payments into the account nominated by the Applicant (i.e.,

repayments took place in terms of amended clause 6). From the above it is evident that the “*main account*” into which repayments were made was the account referred to in clause 6. This is in line with how the parties implemented their agreement and repayments were made. There are no evidence to the contrary.

[64] The second account referred to in the loan agreement appears in clause 8. The heading of clause 8 is “**Regulated Account**”. From the outset I have observed that the heading does not read “**Conditions**”, which is normally used in agreements to indicate that the agreement is subject to conditions. The using of the words “*a separate Regulated account*” in clause 8.1 is telling that it was the intention of the parties that the regulated account will be a different/independent account from the account referred to in clause 6 above. Furthermore, clause 8.3 explicitly used the words that “**the aforementioned banking account shall be the only banking account into which all funds received from projects shall be received**”. Clause 8.4 states that the Borrower (Respondent) undertakes to ensure “**that all third party payments *in lieu* of the projects are paid into the regulated account and undertakes to sign all necessary instructions and authorities necessary and issues to the third parties to ensure that the third parties only process payments into the regulated account.**” “*Separate*” according to the Oxford Dictionary means “*forming a unit by itself, not joined to something else*” and that is what the regulated account was – a separate account, which formed a unit by itself under specific conditions e.g., to receive monies from third parties in respect of projects.

[65] Furthermore, clause 8.7 reads as follows: “***The Lender similarly undertakes to ensure that the Borrower receive full disclosure of the funds received into the banking account and allocated by the Lender to the repayment of Capital, interest and fees, and that only the aforementioned transactions or transfers will be made to the Lender from the Regulated account.***”

[66] It appears from the above, that the borrower (i.e., the Respondent) can repay the loan in one of the two prescribed manners. Each contain different methods of repayment. These clauses are clause 6 and clause 8. Clause 8 deals with a regulated account in the name of the borrower (clause 8.2), over which the lender (i.e., the Applicant) will exercise control. Clause

8 is a provision in favour of the Applicant to allow any and all payments under a particular project made by a third party towards the debtor to be received in a separate and/or ringfenced account also referred to as a regulated account. It is clear that for clause 8 to come into play, there must be a project. In this matter there is no evidence of a project. In fact, the Respondent explains the purpose for which the loan was made was for it to provide bridging finance to a business known as Greenleaf Rehabilitation (Pty) Ltd.³⁷ The money therefore presumably flowed from the Applicant, to the Respondent, then to a related entity called Xafari (Pty) Ltd, and then to Greenleaf Rehabilitation (Pty) Ltd. Even on the Respondent's own version it did not engage in any project, it simply lent the money loaned from the Applicant to another entity.

[67] The regulated account is not only a different/separate account; having regard to the wording of clause 8, from the account referred to in clause 6.3 of the loan agreement, but it had a total different purpose, namely to receive monies from third parties in respect of projects and if there are projects and monies are so received the regulated account should be opened and the Lender (IFS) could be paid from this regulated account. It logically follows that in order for clause 8 to come into play, there must be a project. In this matter there was no evidence of any project(s). The submission made by the Respondent in its heads of argument that Shefa Coal and Greenleaf may/can be regarded as possible projects is purely a speculative conjecture and without substance. Clause 8.7 merely creates a facility of which the Lender could avail itself if a project(s) are to be engaged in by the Respondent. There is no evidence of any projects and therefore there was no need to open the regulated account. As stated above, on the Respondent's own version, the purpose for which the loan was made was for it to provide bridging finance to a business known as Greenleaf Rehabilitation (Pty) Ltd.³⁸

[68] The Respondent's contention that clause 8 simply entitles the Applicant to pay itself from the regulated account in accordance with the payment schedule agreed to in clause 6 and for that reason clause 8 is not an independent and self-standing payment clause (separate from clause 6) is without merit. Even if the regulated account was opened and the Applicant could have made payments from it in accordance with the payment schedule in clause 6, two accounts would still have existed, which is independent from one another – the account in clause 6

³⁸ Paragraphs 19 to 20 of the Answering Affidavit

refers to a nominated account (by the Lender) in which repayment of the loan amount must be made and the account in clause 8 refers to an account into which payments must be received from third parties in respect of projects. The regulated account could at best only served as an additional method for the repayment of the loan as a form of security, a safety mechanism for the Applicant to ensure that the monies lent to the Applicant is repaid. Any other interpretation would render clause 6 meaningless/purposeless.

- [69] Whether a condition is precedent or resolute is a matter of construction, the words “subject to” being the normal way of indicating a suspensive condition. In a suspensive condition there is normally a time limit fixed for the fulfilment of the condition. In this matter, the words “subject to” does not appear in clause 8 neither is any time limit fixed for performance of the alleged condition. Therefore, purely from the construction of clause 8.8 it is evident that it is not a suspensive condition.
- [70] Clause 8.8 does not contain a suspensive condition as will be illustrated hereinafter. Even if it is a suspensive condition, a contract containing such condition is not *per se* unenforceable but may be inchoate. “Inchoate” does not mean either party can withdraw from the contract with impunity.
- [71] In *Frumer v Maitland* 1954 3 SA 840 (A) at 850 Van den Heever JA referred to the golden canon of interpretation where the language is plain with reference to *Worman v Hughes and Others* 1948 (3) SA 495 at par505 (A) in which it was stated that on an action on a contract the rule of interpretation is to ascertain not what the parties’ intention was, but what the language used in the contract means i.e., what their intention was as expressed in the contract. It follows that if the language of the contract is not sufficiently clear, then the court must look at the surrounding circumstances and any other admissible evidence in order to ascertain the true common intention of the parties.³⁹

³⁹ *Spies v Standard Industries Ltd* 1922 NPD 343

- [72] In addition to the above, the principles applicable to the interpretation of contracts as stated in *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) at para 314A-C are as follows:

"The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and whether or not there is a possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded...All that needs to be added is that it can be accepted that the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term,... "this is because the parties' subsequent conduct may be probative of their common intention at the time they made the contract."

- [73] To apply the above principles to clause 8.8 of the loan agreement it is necessary to quote clause 8.8 verbatim : ***"Should the Borrower fail and/or refuse and/or neglect to sign any and/or all documents in order to give effect to this clause the condition will be deemed not have been fulfilled and this entire agreement will be of no force and effect"***.

- [74] From the wording of this clause it is clear that firstly, the Respondent had to act and/or to refrain from acting in a certain way, which was not done, secondly, only in the event of the Borrower **failing and/or refusing and/or neglecting to sign the documents when requested to do so** the sanction will come into effect, which on the Respondent's own version it was never required to sign any documents. It follows logically that the reason therefore was that no need existed to open the regulated account due to the fact that there were no projects in respect of which monies was received from third parties and thirdly no time limit was fixed for the fulfilment and therefore it could still be fulfilled in future if and when the relevant conditions arise. In other words in order for the entire agreement to be of no force and effect the Respondent should have refused and/or neglected and/or failed to sign any and/or all documents when requested to do so. It was never requested to do so.

[75] From a plain reading of clause 8 in its entirety it is clear that the "*condition*" referred to in clause 8.8 had a further qualification in order for it to kick in, namely that in order to open the regulated account and to present the documents to the Respondent for signature there needed to be projects in terms whereof monies are to be received from third parties. There is no substantial evidence before this court of any projects and/or any monies received from third parties and in the absence of such evidence the Court accepts that there were no projects and therefore no need to open the regulated account and to require from the Respondent to sign any documents.

[76] For reasons stated above, the "*condition*" never became relevant and it has no bearing on the enforceability of the loan agreement.

[77] If one consider how the parties to the loan agreement implemented their agreement in order to ascertain their common intention at the time they concluded the contract the following appears from the evidence: firstly, it shows that the parties fully implemented the loan agreement, secondly, the capital amount of R10 million was paid to the Respondent on the very same day that the loan agreement was concluded, thirdly, the parties thereafter amended the repayment terms by concluding an addendum, which amended clause 6 (not clause 8), fourthly, there were further negotiations between the parties in terms of which the Respondent undertook to repay the loan by no later than February 2021, and fifthly the Respondent made certain payments into the account nominated by the Applicant (i.e., the repayment took place in terms of amended clause 6). The evidence shows that the regulated account never became relevant.

[78] For reasons stated above, the loan agreement came into existence on the day the agreement was signed and the Applicant advanced the R10 million to the Respondent on its request. It follows that the loan agreement became fully enforceable. The agreement was not suspended pending the signing of the documents in order to open the regulated account as referred to in clause 8 of the loan agreement, which is evident from how the parties implemented the agreement.

- [79] For reasons stated above, the Court finds that the condition referred to in clause 8.8 is not a suspensive condition, but a resolutive condition as stated below.
- [80] A resolutive condition terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event.⁴⁰ It is trite that pending the fulfilment of a resolutive condition, the contract is fully operative, and both parties must perform their obligations.
- [81] The occurrence of the "*future uncertain event*" referred to in clause 8.8 is the signing of all documents by the Respondent when requested to do so in order to open the regulated account in the event that a project exists. As already explained above the "*the future uncertain event*" only occurs once there are projects in respect of which monies is received and the need arises to open the regulated account. There is no evidence of any projects and therefore no need to open the regulated account and/or to request the Respondent to sign any documents in order to give effect thereto. Only when such a request is made and the Respondent fails and/or neglects and/or refuses to sign the necessary documents the agreement is of no force and effect (terminates). The only reason for the non-fulfilment of the resolutive condition is that it never became relevant. In other words, if there are projects a regulated account must be opened and the Respondent will then be requested to sign all documents in order to give effect thereto. If it fails and/or refuses and/or neglects to do so the contract will terminate. There is no time limit for the fulfilment of this condition because the condition is qualified (conditional) in that projects must exist for the condition to become relevant. There is no substantial evidence of any projects and therefore no need for the opening of the regulated account and/or the signing of any documents by the Respondent upon request. The condition therefore never came into effect. The condition referred to in clause 8.8 is therefore a resolutive condition and not a suspensive condition.

⁴⁰ Christie RH, *The Law of Contract in South Africa*, 5th Ed., page 139
Design and Planning Service v Kruger 1974 1 SA 689 (T) at 695C; De Villiers v Van Zyl [2002] 4 All 262 (NC) at 279

- [82] In addition to the above, in *Florida Rand Shopping Centre (Pty) Ltd v Caine 1968 (4) SA 587 (N)* the Court held that where a contract is made subject to certain conditions, which gave the one party the right to cancel if they were not fulfilled and no time limit for their fulfilment was fixed, the seller had no right to cancel if the conditions were not fulfilled, but the right, if the conditions were not fulfilled within a reasonable time, to call upon the purchaser “to say whether it intended to exercise its right to cancel or not and if (the purchaser) then failed to exercise the right it would lose it.”
- [83] It is trite that a party cannot take advantage of his own default to the loss or injury of another. It appears that this is purely an attempt of the Respondent to escape liability under the agreement which was not in dispute since the date it was signed (on or about 28 June 2019) until date of the interlocutory application, four years later.⁴¹
- [84] Even if it is not a resolute condition, then at best it is a modal clause which does not affect the validity of the agreement and should be treated as a term of the contract, the breach of which the ordinary consequences of breach of contract follow. Although the word “condition” is used in clause 8 it does not refer to true conditions. A term of a contract imposes a contractual obligation on a party to act, or to refrain from acting in a particular manner. A contractual obligation flowing from a term of a contract can be enforced, but no action will lie to compel the performance of a condition. From a plain reading of clause 8 it appears that contractual obligations were imposed on the Respondent to act, or to refrain from acting in a particular manner. If the Respondent unreasonably refuses and/or neglects and/or fails to sign the relevant documentation the Applicant will have a remedy to compel performance. Therefore, if clause 8.8 does not contain a resolute condition then it is at best a modal clause, but it is not a suspensive condition.
- [85] Even if it is a suspensive condition (which has already been found not to be) then it is trite that non-fulfilment of a condition, whether suspensive or resolute, that is exclusively for the

⁴¹ Paragraph 21 of the Applicant’s affidavit in response to the Respondent’s Interlocutory Affidavit and Supplementary Answering Affidavit

benefit of one party may be waived by that party and cannot be relied on by the other party provided it must be exclusively for the benefit of the one party.

[86] On a plain reading of clause 8 and with reference to the words and language used in clause 8 it is clear that contractual obligations are imposed on the Respondent and that the clause is to the exclusive benefit of the Lender (IFS). The submission of the Respondent that clause 8 is to the joint benefit of both parties is without merit and not in accordance with the wording of the clause. The fact that the Borrower should receive a full accounting of funds received into the banking account and allocated by the Lender to the repayment of Capital, interest and fees (clause 8.7) and the fact that the Borrower gives the Lender the necessary authority to jointly manage and control the bank account with the Borrower, does not indicate any joint benefit, but rather confirms that it was created for the exclusive benefit of the Lender. The obligation placed on the Lender to provide a full accounting of the funds received into the banking account to the Borrower is purely administrative in nature.

[87] The Respondent contended that the Applicant has provided insufficient evidence regarding the alleged waiver. It was submitted that the only allegation made was in paragraph 23.23 of the Applicant's supplementary affidavit where the following is alleged:

"...the action to advance the loan amount without the regulated account being opened...is a waiver of the purported condition by the Applicant."

[88] Counsel for the Respondent further referred the Court to clause 14.8 of the loan agreement – *"No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it..."* In light of this it was contended that the *"condition"* could not be waived by the Applicant.

[89] It is not fatal to the Applicant's case that waiver was not expressly pleaded. As was held in *Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A)* [See also: *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another 1965 (4) SA 373 (A) at 381B-D*], that because of the fact that all the relevant material had been produced and placed before the Court, it would be *"idle for it not to determine the real issue which emerged during*

the course of the trial". During the hearing of this matter it became evident that there was firstly, no projects secondly, therefore no need to open the regulated account and thirdly, that both parties implemented the agreement from 2019 to 2022 without fulfilment of the alleged condition. On the facts which are common cause as well as the fact that the Respondent, while knowing that the provisions of clause 8 was not fulfilled, proceeded with the loan agreement and made repayments in terms thereof, negotiated amended repayment terms, concluded an addendum to the loan agreement, and thereafter took part in extensive negotiations regarding payment, the Court finds that both parties tacitly waived the fulfilment of the alleged condition by conduct, irrespective of the contractual term referred to above. The Applicant's conduct is clearly an "*outward manifestation*" of its intention not to enforce clause 8. [See: *Kootbodien and Another v Mitchell's Plain Electrical Plumbing and Building CC and Others 2011 (4) SA 624 (WCC) at 632G-633B*].

[90] For reasons stated above, I find that the loan agreement is valid, binding and enforceable and is/was not subject to the fulfilment of a suspensive condition.

[91] Application for provisional liquidation

[92] As stated above, the Applicant brought an application for the final winding-up of the Respondent as envisaged in section 344(f) read with section 345(1)(c), and section 344(h) of the Companies Act, 61 of 1973, alternatively for its provisional winding-up. At the hearing of this application the Applicant moved for an order for the provisional winding-up of the Respondent.

Respondent's alleged indebtedness and inability to pay its debts as envisaged in section 344(f) read with section 345(1)(c) of the Companies Act, 61 of 1973.

[93] The Applicant's case is based on the fact that the Respondent is unable to pay its debts when due. Furthermore, that it would be just and equitable that the Respondent be wound up. Based on these grounds, the Applicant's liquidation application is premised on an outstanding balance amounting to R6,131,958.97 (six million one hundred and thirty-one thousand nine

hundred and fifty-eight rand and ninety-seven cents) (as on 8 December 2021) due, owing and payable to it⁴² in terms of the written loan agreement concluded between the parties. As proof of the aforementioned outstanding balance the Applicant attached a Certificate of Indebtedness (statement). The Applicant submitted that the Respondent is commercially and factually insolvent.

[94] The crux of the Respondent's defence regarding its alleged indebtedness is that it is not indebted to the Applicant, either in the amounts alleged or at all. It is the case of the Respondent that the written loan agreement is/was subject to a suspensive condition, which was not fulfilled and therefore it renders the contract void. Given the fact that the agreement is void, alternatively of no force and effect the Applicant is only entitled to the return of the money provided to the Respondent and not entitled to charge interest for the period the money has been in the Respondent's hands. Furthermore, that the Applicant advanced an amount of R10,000,000.00 (ten million rand) to the Respondent and that the Respondent repaid an amount of R10,356,374.20 (ten million three hundred and fifty-six thousand three hundred and seventy four rand and twenty cents), which is more than what was advanced, the nett effect is therefore that the Respondent is not indebted to the Applicant at all and in fact the Applicant is indebted to the Respondent in the amount of R356,374.20 (three hundred and fifty-six thousand three hundred and seventy-four rand and twenty cents).

[95] The Respondent further submitted in its heads of argument that 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 Respondent on reasonable grounds and that it follows that where a company discharges the onus that a debt is *bona fide* disputed on reasonable grounds, the application should fail even if it appears that the company is nevertheless unable to pay its debts. It was submitted that the process of court is abused by an Applicant who brings, or persists with, an application after it has become clear that the debt is so disputed.

⁴² Paragraph 47.2 of the Founding Affidavit

- [96] The Respondent further submitted that there were inter-related reciprocal obligations between various parties, which includes the Applicant, and if the Applicant and these parties adhered to their obligations in making payment timeously, the money owing to the Applicant would have been paid. It was submitted that the "*crispy legal defence*" is the *exception non adimpleti contractus*⁴³.
- [97] In considering these defences the Court finds that these inter-related reciprocal obligations are not evident from the written loan agreement and as a result thereof this defence is without merit and unsubstantiated. In the loan agreement, there is no "*reciprocal obligation*" save that the Applicant had to loan the Respondent the amount agreed and Respondent had to repay the amount on or before the last day of June 2020. The relationship between the Applicant and the Respondent is purely a debtor-creditor relationship, nothing more. If regard is had to the "*Shifren-clause*" (non-variation clause), ad clause 14.2 of the loan agreement⁴⁴ the argument does not hold water (See: *SA Sentrale Ko-op Graan maatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A); *Brisley v Drotsky* 2002 (4) SA 1 (AD) at para 24 to 26 and *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 275G-H). Furthermore, even if clause 8 of the loan agreement constitutes a suspensive condition (which was found not to exist), the clause is for the sole benefit of the Applicant and the action to advance the loan amount without the regulated account being opened (which was not opened for reasons stated above) in my view amounts to a waiver of the purported condition by the Applicant. It is trite law that a non-variation clause will not prevent one party from waiving a provision of the contract that is entirely for its benefit.
- [98] It is trite that at the stage of provisional winding-up only a *prima facie* case has to be made out. A company's inability to pay its debts may be proven in any manner. Evidence that a company has failed on demand to pay a debt payment of which is due, is cogent *prima facie* proof of its inability to pay its debts: "*for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources*" (See: *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597). It is trite that commercial insolvency would suffice for the granting of a provisional winding-up order. As stated by Carey J in *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* referred to above: "*The proper*

⁴³ Paragraphs 52.1 to 52.4 of the Answering Affidavit

⁴⁴ Clause 14.2 of the Loan Agreement

approach in deciding the question whether a company should be wound up on this ground appears to me...to be that, if it is established that a company is unable to meet current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency."

- [99] The loan agreement is not subject to a suspensive condition and is enforceable and valid. It follows that the Respondent's submission that it is not indebted to the Applicant, as alleged or at all, due to the fact that the suspensive condition was not fulfilled and therefore it renders the contract void and as a result thereof the Applicant is only entitled to the return of the money provided to the Respondent and not entitled to charge interest for the period the money has been in the Respondent's hands and that it has repaid in excess of R10 million, is without merit.
- [100] It is trite that where a contract is subject to a resolutive condition, which is fulfilled (or non-fulfilled) and the contract therefore terminates a party is entitled to be refunded for its capital with interest. Therefore, it follows that the Applicant is contractually entitled to charge interest on the outstanding amount that is due and payable. On a closer inspection of the Applicant's statement (certificate of balance)⁴⁵ it appears that the Respondent's repayment consists of both outstanding capital and outstanding interest. The last payment made by the Respondent was on 5 February 2020 in the amount of R 500,000.00 (five hundred thousand rand). No further payments were made subsequent thereto. The total outstanding amount at that stage was R2,753,608.92 (two million seven hundred and fifty three thousand six hundred and eight rand and ninety two cents). The Applicant charged interest thereafter on the outstanding amount as it was contractually entitled to, which resulted in the outstanding amount being R6,131,958.97 (six million one hundred and thirty one thousand nine hundred and fifty eight rand and ninety seven cents).

⁴⁵ Annexure "L" to the Founding Affidavit

[101] Furthermore, due to the fact that the Respondent was unable to repay the amount to the Applicant the parties concluded an addendum to the loan agreement on 30 January 2020 ("the addendum").⁴⁶

[102] In terms of the addendum, the due date for the repayment of the loan amount was amended and ultimately, the total outstanding balance had to be repaid on the last day of June 2020.⁴⁷ There is no evidence that the Respondent repaid the full outstanding amount on the last day of June 2020.

[103] Furthermore, at paragraph 52.1 of the answering affidavit the Respondent admitted under oath its liability to the Applicant. Since the date of the signing of the loan agreement (on or about 28 June 2019) until date of the interlocutory application, four years later, the loan agreement and the indebtedness of the Respondent was not in dispute. At paragraph 63.2 of the answering affidavit the Respondent on its own version admitted that it owes the Applicant at least an amount of R2,289,814.00 (two million two hundred and eighty-nine thousand eight hundred and fourteen rand) on 2 May 2020"⁴⁸ (alternatively on the date when the answering affidavit was commissioned on 22 October 2021). This equates to a maximum *in duplum* amount of R4,579,628.00 (four million five hundred and seventy nine thousand six hundred and twenty eight rand). As no merit was found by this Court regarding the alleged suspensive condition and that the Applicant is entitled to interest as contractually agreed, this Court is satisfied that the Respondent is indebted to the Applicant in an amount not less than R100 as envisaged in section 345 of the Companies act, which amount is due and payable.

[104] The Respondent failed to make payment of the outstanding amount on 30 June 2020 (as per the addendum). On 16 November 2020, the Applicant sent a demand to the Respondent , wherein payment for the outstanding amount of R3,844,298.00 (three million eight hundred and forty-four thousand two hundred and ninety-eight rand) was demanded.⁴⁹

⁴⁶ Annexure "D" to the Founding Affidavit

⁴⁷ Paragraph 3 of Annexure "D" to the Founding Affidavit

⁴⁸ Paragraph 63.3 of the Answering Affidavit

⁴⁹ Annexure "E" to the Founding Affidavit

- [105] Pursuant to this letter, Mr van Zyl indicated that the Respondent secured a transaction in term of which payment would be made towards the Applicant by no later than February 2021.
- [106] On 12 April 2021, the Applicant directed a letter to the Respondent, Mr van Zyl and Shefa. Shefa was provided with a default notice in terms of paragraph 10.1 of the Shefa loan, which was ceded to the Applicant.⁵⁰
- [107] Despite these notices of demand, the Respondent did not make payment of the outstanding amount. As stated above evidence that a company has failed on demand to pay a debt payment which is due is cogent *prima facie* proof of inability to pay its debts: "*for a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources*" (See: *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597).
- [108] It is trite that where it was established that the Applicant is an unpaid creditor, as *in casu*, the Court has a narrow discretion and should grant the winding-up application (See: *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* [2017] ZASCA 24 at par 12).
- [109] The Court further considered the fact whether the Respondent has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the Respondent will be in a position to carry normal trading. In other words whether the Respondent can meet the demands on it and remain buoyant. Even if the Court considers the submission made by the Respondent that it has an immovable property "*which is sufficient to cover the loan advanced*" by the Applicant it finds that it is not a liquid asset and no evidence in respect of the alleged liquid asset has been provided to this Court to show that it can pay its creditors as and when payment falls due.
- [110] In determining commercial insolvency the Court is required to examine the financial position of the company, at present and in the future. The Respondent has failed to provide any

⁵⁰ Annexure "G" to the Founding Affidavit

financial statements, cashflow statements or any other similar documents, which evidence the fact that it is commercially solvent. From the evidence before this Court it is *prima facie* evident that Mr van Zyl shifts money around between his various entities to create the impression of cashflow and uses the same assets interchangeably. The evidence before this Court shows that the Respondent is commercially insolvent.

[111] The Respondent's defence that the Applicant's application amounts to an abuse of the Court process as the Applicant persisted with the liquidation application while knowing that factual disputes were raised based on *bona fide* and reasonable grounds and that the winding-up proceedings were instituted for the enforcement of a debt, is without merit.

[112] The crux of the Respondent's alleged factual disputes pertain to the alleged suspensive condition, the alleged abuse of the Court process, the alleged existence of reciprocal obligations and the *condictio non adimpleti contractus*. Apart from averments made in the Respondent's answering affidavit to reciprocal obligations between unrelated entities (not referred to in the loan agreement), whereby the Applicant/Nicolor would effect payment to Greenleaf, who in turn would effect payment to Xafari (Pty) Ltd, which funds would be utilised on the basis of a cession to settle the debts of the Respondent and which would have had the effect of settling the Respondent's indebtedness to the Applicant, there is no other proof of such inter-related obligations as well as how it directly relates to the Respondent's liability to repay the loan in terms of the loan agreement between the parties. These reciprocal obligations relate to other unrelated entities which have nothing to do with the loan agreement. The loan agreement does not state that performance of the Respondent was conditional upon performance of the Applicant to first make payments in respect of the above entities and only thereafter the Respondent would be obliged to repay the loan. Furthermore, if regard is had to the "*Shifren-clause*" (non-variation clause), ad clause 14.2 of the loan agreement, no amendments or variation to the loan agreement is valid unless in writing and signed by both parties. There is no evidence of any written amendments, other than addendum referred to above.

[113] In *Afgi Operations Limited v Hamba Fleet (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017) the Supreme Court held at par [6] as follows:

"It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds. Where, however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds." (See: *Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 980C.*

[114] It follows that the Respondent's case should be met in an adequate and reasonably convincing manner in order that the dispute can be said to be *bona fide* and predicted on reasonable grounds. The Respondent did not provide adequate and reasonably convincing evidence regarding its alleged factual disputes and therefore the Court finds that the Respondent's alleged factual disputes are not based on reasonable grounds. It follows that in the absence of a *bona fide* dispute based on reasonable grounds there is no bar to the institution of winding-up proceedings even for the enforcement of a debt. The institution of the winding-up proceedings are therefore not an abuse of the court process.

[115] Furthermore, it is trite that an unpaid creditor (as in this case) has a right, *ex debito justitiae*, to a winding-up order against the Respondent company that has not discharged that debt.

[116] For reasons stated above this Court is satisfied that the Applicant has proven to the satisfaction of the Court that the Respondent is indebted to it as claimed, that the Respondent is unable to pay its debts when due and that a provisional winding-up order is justified.

Section 344(h) – Just and Equitable Ground for winding-up

[117] The Court is satisfied that a provisional winding-up application is justified therefore there is no need to extensively deal with this ground.

- [118] It is trite that if a company is insolvent (meaning commercially insolvent) it may be wound-up in terms of Chapter 14 of the Companies Act, 61 of 1973, as read with item 9 of Schedule 5 of the 2008 Act. Factual solvency is not, in itself, a bar to an application to wind-up a company in terms of the 1973 Act on the ground of commercial insolvency (See: *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd 2014 (2) SA 518 (SCA) at para 23 and 24*). This Court is satisfied that the Respondent can be provisionally wound-up in terms of section 344 of the Companies Act, 61 of 1973.
- [119] In this matter there are serious allegations of money laundering, simulated transactions as well as restructuring and shifting of money amongst the various entities of Mr van Zyl. This is *prima facie* proof of the Respondent's efforts to prejudice creditors. Although the Respondent had ample opportunities to rebut these allegations i.e. in its answering affidavit as well as in its supplementary affidavit it has failed to address it adequately.
- [120] Furthermore, clause 15.1 states that as security for the obligations of the Borrower herein the duly authorised representatives of the Borrower will sign surety in terms of which they will bind themselves as sureties and co-principal debtors for the due performance by the Borrower of its obligations herein. Clause 15.2 states that the Borrower hereby cedes and assigns to FBT IFS (now IFS) all its rights, title and interest in and to the R10 million loan agreement between the Van Zyl Game Farming (now Xaf Cap) and Shefa Coal (Pty) Ltd.
- [121] Irrespective of the above contractually agreed cession tendered as security for the repayment of the loan, the Respondent admitted on 6 December 2021 in a letter (annexure "R" to the Founding Affidavit) addressed to the Applicant's attorney of record, that "*there is currently no outstanding debt due to our client by Shefa under the Xafcap/Shefa loan. The Xafcap/Shefa loan balance was settled by way of the Uitspan loan agreement and the corresponding intercompany loan agreements.*" Notwithstanding, the cession tendered in the loan agreement and the acknowledgment that payment was made in full by Shefa to Xafcap no payment was made towards the outstanding balance due in terms of the loan agreement. This is *prima facie* proof that the tendered security was diluted, if not, totally eroded.

[122] Although, Mr van Zyl signed surety and bound himself as surety and co-principal debtor for the due performance by the Borrower (Respondent) of its obligations in terms of the loan agreement there is no evidence before this Court regarding Mr van Zyl's financial position.

[123] For reasons stated above, the Court is satisfied that it will be just and equitable to provisionally wind-up the Respondent.

[124] A provisional winding-up order does no lasting injustice to the Respondent for it will on the return date generally be given the opportunity, in a proper case and where it asks for an order to that effect, to present oral evidence on alleged disputed issues.⁵¹

[125] Under the prevailing circumstances it would be appropriate to grant a provisional winding-up order. This will give the Respondent an opportunity to show cause on the return date (by disclosing its financial position) why a final winding-up order should not be granted. The Applicant has on the evidence contained in the affidavits established a *prima facie* case on a balance of probabilities for the granting of the provisional winding-up order.

E. ORDER

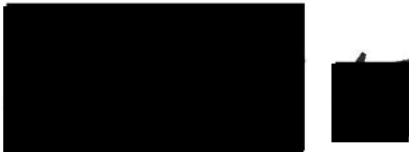
It is ordered that:

1. The Respondent be and is hereby placed under provisional winding-up.
2. All persons who have a legitimate interest are called upon to put forward their reasons why this Court should not grant the final winding-up of the Respondent company on **31 March 2023** at 10h00 or as soon thereafter as the parties could be heard.

⁵¹ *Kalil v Decorex (Pty) Ltd 1988 (1) SA 943 (AD) at 979; Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 81*

3. A copy of this order be forthwith served on the Respondent at its registered office and be published in the *Government Gazette* and a local newspaper.
4. A copy of this order be forthwith forwarded to each known creditor of the Respondent.
5. Costs of this application are costs in the liquidation.

SIGNED ON THIS 31ST DAY OF JANUARY 2023.



BY ORDER

SM MARITZ AJ

APPEARANCE ON BEHALF OF THE PARTIES:

Counsel for Applicant:

Adv J Vorster SC
Tel: 082 904 0997
jaco@vorsters.co.za

Adv HP Wessels
Tel: 060 528 6860
hpwessels@group33advocates.com

Applicant's Instructing Attorneys:

Van der Merwe & Associates
Tel: 087 654 0209
legal5@vdmass.co.za

Counsel for Respondent:

Adv SG Maritz SC
stefan@clubadvocates.co.za

Respondent's Instructing Attorneys:

Tiaan Smuts Attorneys
Tel: 012 342 0350
tiaan@tsa.co.za