Reportable:	~~NO~~ YES
Circulate to Judges:	~~NO~~ YES
Circulate to Magistrates:	NO ~~YES~~
Circulate to Regional Magistrates:	NO ~~YES~~

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 2847/17

In the matter between:

PARAGON LENDING SOLUTIONS (PTY) LIMITED Applicant

and

WEYBRIDGE PROPERTIES (PTY) LIMITED Respondent

JUDGMENT

<u>O'BRIEN AJ</u>

1. This is an application for the provisional winding-up of the respondent. The applicant alleges that the respondent is unable to pay its debts which are due and payable in the ordinary cause of its business as contemplated in s 344(f) read with s 345(1)(a)(i) and s 345(1)(c) of the Company's Act No 61 of 1973 as amended ("the 1973 Act") and Item 9 of Schedule 5 to the Company's Act No 71 of 2008 ("the 2008 Act").

2. The applicant claims that the respondent is indebted to it in the amount of R6 754 301.02 (plus interest) ("the debt"). The debt remains unpaid and to this end the applicant has attached a certificate of balance setting out the amount the respondent is allegedly indebted to the applicant. The respondent's indebtedness to the applicant arises as a result of a loan agreement concluded between the parties. The applicant holds security for its claim against the respondent by way of a mortgage bond registered over the respondent's immovable property situate at Erf 1013 Kimberley. But first, the facts.

Factual Background

3. On 3 July 2012, the parties concluded a written term loan agreement ("the agreement") in terms whereof the applicant undertook to lend monies to the respondent the sum of R3 287 050.00. It was a term of the agreement that the applicant would be entitled to charge interest on the amount owing under the agreement at the rate of 2.75% per month, calculated daily and capitalised monthly. As in most of these agreements, the interest rate would vary depending on the increase or decrease from time to time of the prime interest rate. If the respondent should fail to make a payment, penalty interest would be charged on the due date.

4. The agreement states that the respondent was to pay twelve consecutive monthly instalments of at least R90 393.88 each; a raising fee of R32 500.00

plus VAT thereon; and one residual instalment payable, in the amount of R3 250 000 by no later than the final maturity date 8 August 2013.

5. In the event of default, the respondent was given seven days to purge it. That was to be done in writing demanding that it be remedied. In the event of a default the respondent was deemed to be unable to pay its debts as they fell due for payment. Should that occur, the applicant could immediately declare that all or part of any amounts outstanding under the agreement be immediately due and payable and claim immediate payment of all or part of any amounts outstanding under the agreement.

6. A certificate signed by any director of the applicant setting out the amount of indebtedness shall serve as *prima facie* proof of its contents and of its correctness for all purposes and shall be a valid liquid document for any proceedings instituted by the applicant against the respondent.

The respondent's alleged indebtedness

7. The applicant contends since early December 2012 the respondent failed to comply with its obligations under the loan agreement. On a number of occasions, debit orders processed by the applicant, and authorised by the respondent, were returned.

8. On 07 May 2013, in an email addressed to the respondent to confirm whether payment has been made by sending proof thereof. The response on the same

day, the deponent to the respondent's answering affidavit ("Kimber") informed that he will make the payment from his personal account and that a debit order should not be processed. The inference is irresistible that the respondent was not in a position to pay.

9. On 29 June 2013, Kimber was advised via email that the agreement was expiring on the 8th of August which was a month away and as the deal are 12 monthly transactions the facility needs to be settled in full. It was stated that the respondent's payment history over the past 10 months were intermittent with many missed instalments. Kimber was further advised that he made promises which have not been met. The deponent to the founding affidavit of the applicant, Gary Palmer ("Palmer"), requested Kimber to transfer the arrear instalments as he promised; ensure there is enough money in the account of the respondent for the debit order dated 07 July 2013 and ensure the respondent has the capital available to settle the facility in full on 18 August 2013.

10. Kimber responded on 01 July 2013, requesting an updated statement of the account reflecting all debits and credits; a re-conciliation of the respondent's deposit account including the allocation of those funds to the main agreement and with whom the respondent needs to engage in respect of bond cancellations.

11. On 03 July 2013 Kimber was advised that the respondent was in arrears in the amount of R389 000.00 and provided him with a summary of the loan and the latest account statement and reconciliation.

12. On 9 July 2013 an email was sent by the applicant that as at 8 July 2013 the total balance owing (capital plus interest in arrears) is R3 883 342.99. Reference was made to an attached reconciliation in support of that figure. Kimber was invited to apply for further information if the need arises.

13. On 9 July 2013 Kimber responded that the computation provided by the applicant would be reviewed and commented on by him.

14. On 10 July 2013 the applicant advised Kimber that it is available to assist him with understanding the statement.

15. On 9 August 2013, the applicant processed a debit order from the respondent which was returned by the bank. Palmer then advised Kimber of the return of the debit order as well as the fact that the loan had expired and the full debt was now due, owing and payable to the applicant.

16. In answer, Kimber indicated his willingness to transfer funds to the applicant. Furthermore, a settlement figure computed by the respondent would be available on 12 August 2013. Upon receipt of this computation, Kimber advised that he would contact Palmer to discuss the settlement of the account.

17. As things would have it, Kimber did not make good on his promises. The applicant contends that this type of conduct was not unusual because Kimber would in the past often advise that he will discuss repayment and then fail to do so.

18. On 15 August 2013, a letter of demand was addressed to the respondent in regard to the debt being due and payable. The respondent failed to pay the applicant in accordance with the terms of the demand. Because of the respondent's failure to make good payment in terms of the loan agreement – and after making numerous promises which the respondent failed to fulfil – interest has accrued to the outstanding debt.

19. On 24 April 2017, Kimber requested from the respondent a full detailed statement of account since inception of the facility. This was given on the same day.

20. The applicant points out that Kimber attempted to raise disputes concerning the computation of the debt but has failed to provide the applicant with a *bona fide* reason why it was not fully repaid.

21. The facts set out above are not in dispute or seriously challenged by the respondent.

22. On 24 July 2017 the applicant's attorneys caused a written letter of demand in terms of s 345(1)(a) of the 1973 Act read with the 2008 Act to the respondent.

In this demand, the applicant points out that the respondent is indebted to it in the amount of R6 754 301.02 together with interest at the rate of 41% per annum calculated daily and compounded monthly from 1 July 2017 to date of payment. It accordingly demanded from the respondent to make payment immediately. The respondent was advised that should it fail to make payment within a period of 3 weeks of receipt of the demand letter or should the respondent fail to secure or compound for such amount within the aforementioned 3-week period, to the reasonable satisfaction of the applicant, the respondent shall be deemed to be unable to pay its debts in terms of s 345(1)(a) of the 1973 Act, as read with the 2008 Act. Furthermore, the respondent was advised that should it be unable to pay its debts the applicant will proceed with an application for its liquidation. This demand was served on 3 August 2017 by the Sheriff at the respondent's registered address.

23. On 4 August 2017, the respondent's attorneys advised the applicant's attorneys that their instructions are not to respond to the letter of demand until such time as negotiations have either succeeded or failed. The applicant contends that negotiations between the parties have failed, and no further correspondence was received from the respondent's attorneys – the 3-week period referred to in the statutory demand has lapsed – the applicant was of the view that the respondent is in fact deemed to be insolvent.

24. On 3 May 2018, the respondent made an application to this court for an order staying the winding-up proceedings pending the outcome of arbitration proceedings. In this application, Kimber refers to a summons which was

issued out of the South Gauteng High Court, Johannesburg by the applicant against him in his personal capacity as surety for payment of the debt in terms of the loan agreement. He filed an affidavit resisting summary judgment a copy of which was attached to this application wherein he disputed the quantum of the applicant's claim, and raised various other defences.

25. On 3 May 2018, the respondent filed a counter-application seeking orders declaring the applicant's claim prescribed alternatively; declaring the applicant's claim as being settled in full; an order in terms of which it is declared that payment to the applicant is not yet due and payable and condoning the late filing of the respondent's affidavit. On 4 May 2018, Olivier J struck the application to stay the winding-up proceedings from the roll.

26. I shall refer to the parties as they are described in the main application.

The issues

27. Although the respondent is seeking declaratory relief in its counter-application, Mr Smith acting for the respondent confined his arguments mainly to the following: First, clause 4.3 of the term loan agreement is in the nature of a suspensive condition governing the whole contract. Because the onus is on the applicant to proof fulfilment of the condition precedent and in the absence of such evidence the court cannot grant a provisional winding-up order. Second, an amount of R2 299 000.00 was paid to an entity Rodel Financial Services (Pty) Ltd ("Rodel"), and not to the respondent. Thus, it was not in

accordance with the terms of the agreement constituting a breach. Furthermore, the aforestated amount was not paid to any of the designated accounts prescribed in paragraph 8 of the agreement. The submission is that the certificate of balance cannot in these circumstances serve as *prima facie* proof of any indebtedness on the part of the respondent.

28. It will be immediately apparent that the relief the respondent seeks in its counter-application as alluded to in paragraph 25 is in conflict with the arguments advanced by counsel in paragraph 27 of this judgment.

Discussion

29. In its founding affidavit in the counter-application the deponent states as follows:

> "*18. It is also important that I draw the court's attention to the fact that on the applicant's version, the anniversary date being the date when all amounts were due, the anniversary date of the loan would be a year after the date of the last payment meaning that any amounts that may have been due, would be repayable by no later than 11 August 2013. More than 3 years have lapsed since the 11 August 2013 and therefore any claim that the applicant may have had has prescribed.*"

30. In response to this, the applicant in its answering affidavit to the counter-application pointed out that the relevant loan was secured by way of a mortgage bond therefore the said claim had not prescribed.

31. In its reply in the counter-application the respondent made a *volta face* alleging that the applicant paid an amount of R2 299 000.00 to Rodel which was not in accordance with the agreement. Because the amount stated was not paid to the respondent but to Rodel, the mortgage bond cannot serve as security for monies advanced in terms of the said agreement. In these circumstances, so the argument goes, there is therefore no mortgage bond to extend the term of prescription in regard to the monies advanced to Rodel. The argument is without merit.

32. It is trite that in motion proceedings an applicant must set out the facts to justify the relief sought in the founding affidavit which would alert the respondent of the case it is required to meet (**National Council of Societies for the Prevention of Cruelty to Animals v Open Shaw 2008 (5) SA 339 (SCA)**). Although the rule is not absolute, there are instances where our courts have allowed an applicant to introduce additional facts or grounds for relief in his replying affidavit. As was pointed out by Ogilvie Thompson JA in **James Brown & Hamer (Pty) Ltd (Previously Named Gilbert Hamer & CO Ltd) v Simmons, N.O. 1963 (4) SA 656 (AD) at 660 E-F**:

"*… must always be rigidly applied: some flexibility, control by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.*"

33. In my judgment, the respondent is precluded from relying on this new defence which was made out in reply in the counterapplication for the following reasons:

33.1 The facts were known to the respondent at all material times;

33.2 No explanation is given why the defence is raised at this stage;

33.3 The defence raised in the founding affidavit of the counter-application and the new defence raised in reply are at odds. The monies paid to Rodel cannot at the same time be a valid payment in terms of the loan agreement as stipulated in the respondent's founding affidavit to the counter-application and an invalid payment as contended by the respondent in reply;

33.4 In any event, Mr Smith acting for the respondent conceded that the latter renounced the legal exceptions *non causa debiti* and *non numeratae pecuniae*.

33.5 Moreover, the loan is secured by a covering mortgage bond which means that the prescriptive period is 30 years.

34. In my view, the new defence raised by the respondent cannot be sustained and falls to be rejected.

35. Counsel for the respondent complained that according to the loan summary which is attached to the agreement, designated accounts are created into which the monies were supposed to be paid. He submits that an amount of R182 390.03 was paid to Nedbank. This amount reflects an outstanding payment to Nedbank Ltd. Accordingly, payment was not made to the respondent. But the respondent ignores the purpose for which the amount of R182 390.03 was paid. It was done in order to have the Nedbank mortgage bond in respect of the respondent's property cancelled and a first covering bond to be registered in the applicant's favour.

36. Allied to the above, so the respondent submits, is the fact that the amount of R2 299 000.00 was not paid to the respondent but to Rodel. That being the case, the payment was not in accordance with the agreement. Rodel is a company that provides bridging finance. In this instance, it provided bridging finance to the respondent pending the registration of the mortgage bond in favour of the applicant. It is common ground that the respondent enjoyed the use of these funds. These funds were utilised by the respondent to set up its operations. For the respondent to now cry foul – after utilising the funds – that it was not paid in accordance with the agreement is of no moment. The argument is overly technical and detracts from the whole purpose of the agreement that is to advance money to the respondent.

37. The respondent further submits that the agreement was subject to the fulfilment of a number of conditions precedent. It points out that clause 4.3 of the agreement is in the nature of a suspensive condition governing the whole contract. Clause 4.3 reads as follows:

> "*The Conditions Precedent are for the benefit of the lender who may (in its sole discretion) waive or extent any such Conditions Precedent (whether in whole or in part), by written notice to the Borrower. Any waiver or extension may be subject to such conditions as the lender may determine in its sole discretion.*"

38. The difficulty with this submission, is that it was never canvassed in the affidavits. Furthermore, the respondent does not indicate which of those conditions precedent were not complied with. Lastly, the applicant indicated that these conditions were fulfilled, alternatively waived.

39. It was urged upon me in the absence of a defence not pleaded to do justice between the parties which is fair, just and reasonable. It was stated that it would be unfair, if not inappropriate, to ignore the terms of the contract on which the applicant relies for its cause of action in the liquidation application. As authority for that is cited **Courtis Rutherford & Sons CC & Others v Sasfin (Pty) Ltd [1999] 3 All SA 639 (C)**.

40. The **Courtis Rutherford** case dealt with the failure by a defendant to raise s 3 of the Conventional Penalties Act 15 of 1962. It was not covered in the

pleadings but was fully argued at the end of the case. On appeal, it was held that a Court's primary function was to ensure that justice was done on the basis of what was just, fair and reasonable in the circumstances. The Court held that these principles were inherent in the common law and particularly in the law of contract, where they went hand in hand with the concepts of good faith and good morals, or public policies. Therefore, it would be contrary to these principles to refuse to consider the application of the Conventional Penalties Act purely because of a failure to plead same.

41. In the matter under consideration, the Court is dealing with a defence – a condition precedent – which was never canvassed in the respondent's affidavits. It would be unfair and prejudicial to allow the respondent this defence which was not dealt with in its founding affidavit in the counter-application. The applicant did not have an opportunity to deal with these allegations, causing prejudice to it. Furthermore, this is not a case where it should be allowed, for the reasons stated in paragraph 33 above.

42. The respondent's counsel, although referring to the *in duplum* and a settlement agreement in its heads of argument did not pursue these issues in oral argument. However, the *in duplum* rule does not assist the respondent. All this rule means is that when a debt is owed it draws interest, the amount of such interest may not exceed the capital amount. It only relates to interest that has accrued but is unpaid (**Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd 2014 (4) SA 253 (SCA) at para 20**). The further question begs: if the respondent claims the debt is not due and payable or was paid, why did

he sign a settlement agreement. Also, if it relies on in duplum how is it possible to still make a computation of the debt owed.These questions the respondent could not answer.

Badenhorst Rule

43. During argument, counsel for the respondent fleetingly touched on the Badenhorst rule (**Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347- 348**.) It was compared in **Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 at 980 B-D**:

> "In regard to *locus standi* as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by the company. Consequently, where the respondent shows on a balanced of probability that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order. The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds."

44. For the reason set out hereunder in my opinion the grounds upon which the respondent disputes the debt are unreasonable and rejected. Ever since the conclusion of the agreement the respondent continuously attempted to avoid re-payment.

45. The respondent signed a settlement agreement notwithstanding the fact that it claimed that the debt to the applicant had already been repaid in full. This it failed to do. Furthermore, the respondent undertook to review the applicant's

computation of the amounts owing. This never happened. The applicant advised the respondent that it would assist it by processing the statements line by line with the respondent. The respondent has failed to take up this invitation. The respondent also indicated that it intended to engage an accounting expert to recalculate the amounts owed to the applicant. The applicant still waits. From the above, it is evident that although claiming not to be in debt or that the debt is not due and payable, the respondent's conduct clearly indicates to the contrary.

Conclusion

46. In my view, the respondent is unable to pay its debt of more than R100 owed to the applicant.

47. I make the following order:

47.1 The respondent is placed under provisional liquidation;

47.2 A *rule nisi* is issued calling upon all persons interested to show cause, if any, to the court on a date to be fix by the court as to:

47.2.1 Why the respondent should not be placed under final liquidation; and

47.2.2 Why the cost of this application should not be cost in the liquidation.

47.3 That service of this order be affected:

47.3.1 By one publication in each of the Diamond Fields Advertiser and the Volksblad newspapers;

47.3.2 By service on the South African Revenue Services at Oranje Toyota Building, corner of De Villiers and Bean Streets, Kimberley;

47.3.3 By service on the respondent at its registered address at 42 Carington Road, Kimberley;

47.3.4 By service on the employees of the respondent, if any; and

47.3.5 By service on all registered trade unions of the employees, if any.

47.4 That the costs of this application be paid as cost of administration in the winding-up of the respondent;

47.5 The counter-application is dismissed with costs.

S C O'BRIEN AJ

Date heard:	6 August 2018
Date delivered:	21 September 2018
Obo Applicant:	Adv L Lever SC
Instructed by:	Duncan & Rothman Inc.
Obo Respondent:	Adv J Smit
Instructed by:	Hugo Mathewson & Oosthuizen Attorneys