IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓
DATE 14/6/13 SIGNATURE

CASE NO: 55059/2012

DATE: 14/6/2013

IN THE MATTER BETWEEN

SLIP KNOT INVESTMENTS 777 (PTY) LTD — APPLICANT

AND

MARTYCEL PROPERTIES CC — RESPONDENT

JUDGMENT

PRINSLOO, J

[1] Before me in the special motion court the applicant applied for the final winding-up of the respondent.

[2] Mr Stockwell SC assisted by Mr Pretorius appeared for the applicant and Mr Wagener SC appeared for the respondent.

The relief sought and the chronological procedural path followed by this application

[3] In the notice of motion, the applicant applies for the final winding-up of the respondent. Counsel for the applicant contended, in the alternative, that I may consider issuing a provisional winding-up order and, in the further alternative, referring certain factual disputes emerging from the papers to oral evidence.

[4] The application was launched in the normal course on 21 September 2012.

[5] With a lengthy answering affidavit, the respondent filed a "counter-application" in the form of a notice of motion asking for the matter to be heard as one of urgency.

[6] A replying affidavit was filed on 4 October 2012.

[7] The respondent then filed a "replying affidavit in the counter-application" dated 8 October 2012.

[8] On 10 October 2012, this court struck the application from the roll for lack of urgency and the respondent was ordered to pay the costs.

[9] On 25 October 2012 the applicant filed a "supplementary founding affidavit".

[10] The respondent then filed a "supplementary answering affidavit" dated 4 December 2012.

[11] In the founding affidavit, it is stated that the winding-up application is based on the following two grounds:

(1) the respondent is unable to pay its debts as intended by the provisions of section 344(f) read with section 345 of the Companies Act, no 61 of 1973 ("the old Act") and section 69 of the Close Corporations Act, no 69 of 1984 ("the Corporations Act"); and

(2) it is just and equitable that the respondent be wound-up as envisaged in section 344(h) of the old Act.

[12] In the opposing affidavit, it is argued by the respondent that it is solvent, if the test prescribed in section 4 of the Companies Act, no 71 of 2008 ("the new Act") is applied. It is submitted on behalf of the respondent that its assets, fairly valued, materially exceed its liabilities, fairly valued. Moreover, the respondent will be able to pay its debts as they become due in the ordinary course of business for a period of twelve months after the date on which the test is considered.

It is then argued by the respondent, that it being solvent, the provisions of *inter alia* section 344 of the old Act do not apply to the winding-up of the respondent as provided for in item 9(2) of schedule 5 of the new Act. These provisions also apply to the winding-up of a close corporation (such as the respondent) in terms of the provisions of section 66(1) of the Corporations Act.

[13] In the result, one of the defences offered on behalf of the respondent in the opposing affidavit is that the application is bad in law.

[14] Perhaps to counter this argument, or perhaps only to introduce an alternative attack for the winding-up of the respondent, the applicant, in the replying affidavit, argued that it would also rely on the provisions of section 81(1)(c)(ii) of the new Act which deals with the winding-up of solvent companies by a court on the application of a creditor. The particular subsection provides for the winding-up of a solvent company if "it is otherwise just and equitable for the company to be wound-up".

This move by the respondent inspired the respondent to argue, in one of the further affidavits which I have mentioned, that the applicant was not entitled to introduce a new cause of action in the replying affidavit and that I should not pay any regard thereto. During the course of my debate with counsel on this issue, I ruled that the argument would be entertained, because both parties had the opportunity to ventilate the issue in the further affidavits which I have listed.

[15] To make matters even more interesting, the following further legal point arose during the proceedings before me: item 9(2) of schedule 5 of the new Act reads as follows:

> "... sections 343, 344, 346 and 348 to 353 (of the old Act) do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of part G of chapter 2."

(Part G of chapter 2 deals with the winding-up of solvent companies and deregistering companies.) It was argued on behalf of the applicant that because section 345 of the old Act which deals with the circumstances when a company is deemed to be unable to pay its debts, is left intact by the provisions of item 9(2), a company can still be liquidated notwithstanding the promulgation of the new Act, on the grounds of its "commercial insolvency" or inability to pay its debts. This much was decided in this division by VAN DER BYL AJ in March 2012 in the case of *First Rand Bank Ltd v Lodhi 5 Properties Investment CC* case no 38326/2011 and two other respondents under different case numbers. Mr Wagener indicated that he was not going to argue against the correctness of this finding for present purposes. In the circumstances I am not inclined to deal with this issue any further, and will accept that the applicant is also entitled to apply for the winding-up of the respondent on the ground that it is unable to pay its debts or that it is "commercially insolvent".

Brief remarks about the background of the case

[16] All the facts are not common cause. Indeed, there are material factual disputes in existence. Nevertheless, I shall attempt to briefly sketch an overall picture.

[17] In March 2008, the respondent entered into a written agreement of purchase in terms of which it bought, as a going concern, a shopping centre or so-called community centre, situated on erven 316 and 317, Clarina extension in Akasia, Pretoria North ("the property"). The building is popularly named "Station Square". It covers some 40 000m^2 and houses shops and other businesses. Some of the tenants of the shops include the Department of Public Works, the Metro police, Sasol and Shoprite. There is also a Sasol petrol garage. There are staircases, balconies and passage ways. Photographs of the complex are included in the record. The purchase price was some R49,5 million.

The two parties got together and struck a deal. The details of the oral agreement which they entered into, are in dispute.

It is, however, common cause that the applicant provided the R49,5 million so that the respondent could buy the property and did so by advancing R14,5 million of its own funds and borrowing R35 million from Investec. As security for the Investec loan, a first mortgage bond was registered over the property in favour of Investec, and the respondent also bound itself as surety and co-principal debtor (with the applicant which borrowed the money) in favour of Investec.

It is common cause that the parties agreed that the property would be sold at a profit (preferably) and that the profit would be shared between the two parties on the basis of 60% for the applicant and 40% for the respondent.

[18] The property was transferred into the name of the respondent on 18 July 2008.

[19] The weight of the evidence suggests that both parties, initially, contemplated a quick and profitable sale so that the profits could be shared and the deal finally concluded.

In the event, however, the property was not sold right away and had still not been sold by the time this application was launched. According to the respondent, the delay was caused largely because the applicant wanted to effect certain improvements in order to enhance the prospects of a higher sale price. It is common cause that the applicant financed some improvements to the tune of more than R2 million and there is also strong evidence to the effect that the applicant insisted on VAT invoices in respect of these improvements being issued in its name.

[20] With the properties being an income generating going concern, which income, on the weight of the evidence, comes to more than R1 million per month net, the respondent, between April 2008 and August 2012 (the month before this application was launched) paid the applicant an amount of some R27,4 million.

According to the applicant, these payments were used to meet interest requirements flowing from the written loan agreement entered into between the applicant and Investec. According to the respondent, these payments were made to protect its interests as co-principal debtor of Investec and mortgagor of the property and also, in reduction of the capital sum advanced by the applicant on behalf of the respondent.

[21] The applicant paid off the loan of Investec in January 2012. By then, the liability came to some R29 million. When the respondent got wind of this, it instructed Investec to cancel the bond, which duly happened some time before October 2012 when the replying affidavit was signed. The respondent also stopped making payments to the applicant, arguing that there was no need to do so anymore because the principal debt had been extinguished. The stance adopted by the respondent was that the applicant had to wait for its 60% profit share once the property was sold. The respondent never disputed the fact that, in addition to the profit share, the outstanding balance on the advance made by the applicant on behalf of the respondent, would also have to be paid. This would come from the proceeds of the contemplated sale.

[22] The main dispute between the parties can perhaps be described as follows: the case of the applicant is that the parties entered into a loan agreement when the purchase price of R49,5 million was advanced by the applicant on behalf of the respondent. This loan is interest bearing. The interest is payable over and above

the 60% profit share which, according to the applicant, was agreed to be a minimum of R10 million. The case of the respondent is that there was no question of a loan agreement neither would there be any interest payable on the advance. It was simply a case of the applicant advancing the purchase sum and the respondent identifying and providing the property which was purchased. The anticipated quick profitable sale would generate enough to repay the amount advanced by the applicant and also provide a 60% profit share. According to the respondent, the outstanding balance on the initial advance is only some R27,9 million, with the respondent having made substantial payments between 2008 and 2012 as described.

[23] When the respondent stopped making the payments after the main debt was extinguished, as mentioned, the applicant adopted the attitude that the full outstanding balance became due and payable (that would be the capital advanced plus accrued interest less payments made).

[24] To enforce payment of this alleged debt, the applicant, before launching these liquidation proceedings, instituted action against the respondent, under case no 55004/12, for the following relief:

"1. A declaratory order declaring that the defendant is, upon the sale of the property, obliged to make payment to plaintiff of an amount equaling 60% of the gross profit generated by the sale of the property or the amount of R10 000 000,00 whichever amount may be the larger;

2. 2.1 payment of the amount of R48 681 610,03;

2.2 interest on the amount of R48 681 610,03 at 5% above the interest rate charged by Investec to be calculated from 1 June 2012 to date of payment."

[25] Pleadings in this action were already closed in November 2012 when the applicant filed a plea to a counter-claim instituted by the respondent. Details of the counter-claim do not appear from the papers which came before me.

I enquired from counsel whether a trial date had already been allocated but it appears that the applicant (as plaintiff) has not yet applied for a trial date. I am left with the impression that there was an undue delay on the part of the applicant to take this action forward. I will refer to this as "the main action".

[26] The applicant instituted yet further proceedings against the respondent: shortly before these liquidation proceedings were instituted, and on 6 September 2012, the applicant instituted an application for interim interdictory relief against the respondent (as first respondent), Investec Bank Ltd as second respondent and the Registrar of Deeds, Pretoria as third respondent. This was done under case no 51915/12 and will be referred to as "the interdict application". The other two

parties did not enter an appearance, and played no part in the interdict application which also came before me at the same time as the liquidation application.

The original notice of motion in the interdict application contained prayers for relief aimed at restraining the three respondents from cancelling the bond over the property. Once the applicant paid the full debt to Investec in January 2012, as I have mentioned, the respondent requested Investec to cancel the bond, which was done. Consequently, the original relief prayed for in the interdict application became moot. The applicant then amended the notice of motion so that the relief now sought in the interdict application reads as follows:

> "1. That the first respondent be interdicted and restrained from encumbering the properties described as erven 316 and 317, Clarina Extension 19, Registration Division J.R., province of Gauteng (hereinafter 'the properties') in any manner whatsoever pending the finalization of the action instituted under case no 55004/12;
>
> 2. directing the first and third respondents, in the event of the properties being sold, to cause an amount equal to the amount claimed under case no 55004/12, together with such interest as may have accrued on the transfer date, to be paid into an interest bearing trust account, and to further cause the money to be retained in such trust account pending the final determination of the proceedings instituted under case no 55004/12;

3. that the third respondent be directed to register a caveat against the properties to the effect that the properties may not:

    3.1 be encumbered in any manner whatsoever, pending the finalization of the action instituted by the applicant against the first respondent under case no 55004/12; and

    3.2 be transferred into the name of the purchaser, unless an amount equal to the amount claimed under case no 55004/12, together with such interest as may have accrued on the date of transfer is paid into an interest bearing trust account where the money shall be held pending the final determination of the proceedings instituted under case no 55004/12.

4. That the first respondent be directed to pay the costs of the application.

5. That the second and third respondents be ordered to pay the costs of this application, jointly and severally with the first respondent, only in the event of the second or third respondent opposing the relief sought herein."

[27] I turn briefly to the merits of the winding-up application and the grounds upon which it is based.

<u>The grounds for winding-up</u>

[28] The court's power to grant a winding-up order is a discretionary power, irrespective of the ground upon which the order is sought – see Meskin, *Henochsberg on the Companies Act* volume 1 p693 and the authorities there quoted.

[29] The *onus* is on the applicant for a final winding-up order to prove the grounds upon which it relies. In the present case the applicant relies, at least to some extent, on an oral agreement entered into in 2008. In my view, there are material disputes of fact emerging from the papers, the primary one being whether or not the parties entered into a loan agreement which would require the advance made by the applicant on behalf of the respondent to be repaid with interest or whether it was merely an investment arrangement which would entitle the applicant to 60% of the profits and, as already described, repayment of the original advance made. In such a case, the well-known test enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) at 634E-635C, is of application. In terms of this test, the final winding-up order will only be granted if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order – see *Budge v Midnight Storm Investments 256* 2012 2 SA 28 (GSJ) at 34G-I; *Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA) at 186g-187g.

[30] In the present case there is also the additional consideration that a winding-up application is not a legitimate means of seeking to enforce payment of a debt

where the indebtedness is disputed on *bona fide* and reasonable grounds – see *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 2 SA 346 (T) at 347H-348B (also known as "the Badenhorst rule"). In such a case, there is an *onus* on the respondent, not to show that it is not indebted to the applicant, but merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds – see *Kalil v Decotex (Pty) Ltd and another* 1988 1 SA 943 (AD) at 980B-D.

[31] I have already described the main dispute between the parties.

[32] The applicant heavily relies on a letter which its attorney wrote to the respondent dated 25 April 2008 which is annexure "FA2" to the founding affidavit ("FA2").

[33] In "FA2", the applicant's attorney informs the respondent that the applicant had agreed to arrange finance for the full purchase price of the properties in the amount of R49,5 million. For this financing, certain conditions are stipulated. These include that a loan agreement "shall be entered into" by the parties in terms of which the respondent borrows the money from the applicant at a certain interest rate which is specified in the letter. Repayment is to take place within 120 days from the date on which a guarantee is issued and the payment of interest will run from the date of transfer of the property. A bond will be registered in favour of Investec, the respondent will bind itself as a surety and co-principal debtor and there will be a deed of pledge/cession by the member of the respondent, Mr Smit,

of his membership in the respondent as security for due compliance with the foreshadowed loan agreement. The letter also stipulates that an option agreement "shall be entered into" between the parties in terms of which an option is granted to the applicant to purchase the properties for R49,5 million or certain higher amounts should certain future events take place.

"FA2" then concludes with the paragraph stipulating that this loan agreement and other agreements will be prepared by the applicant's attorney "as soon as reasonably possible" and the last sentence is couched in the following rather ominous terms:

> "In the event of Martycel Properties or Sarel Petrus Smit failing to sign these agreements when requested to do so, Slip Knot Investments shall be entitled to take such steps as may be necessary to have the guarantees issued by Investec Bank Ltd withdrawn."

Attached to "FA2" is then a page providing for the signatures of the parties under the line "the terms and conditions hereby accepted". The signatures of both parties were appended to this page on 29 April 2008.

[34] As I have already pointed out, the first covering bond was duly registered in favour of Investec and the respondent bound itself as surety and co-principal debtor. When the main debt was discharged, the bond was cancelled and Mr Smit was released from his obligations as surety.

[35] It is common cause that the loan agreement was never submitted to the respondent's representative ("Smit") for signature neither was the deed of pledge or the option agreement.

As I have already pointed out, the following happened: the guarantee was issued and the property was transferred into the name of the respondent on 18 July 2008. The parties carried on for another four years with the properties remaining unsold, and the respondent making regular payments, totaling some R27 million, towards servicing the Investec loan. According to the applicant, these payments represented interest due by the respondent to the applicant in respect of the advance made and according to the respondent, these payments were made to safeguard respondent's interests as a co-principal debtor towards Investec and also to serve as a reduction of the advance made by the applicant on behalf of the respondent as the outstanding balance of the advance has to be repaid to the applicant together with the 60% share of the profit once the properties are sold. This is another dispute of fact between the parties.

Moreover, soon after the deal was concluded, the properties were improved, according to the respondent at the instance of the applicant, which indicated that it was no longer keen to bring about an early sale, but would rather improve the properties to enhance the chances of a more favourable purchase price once the properties are sold. It is common cause that the applicant, as I have stated, financed the improvements to the tune of more than R2 million. There is also strong evidence that the applicant insisted on VAT invoices being issued in respect of these improvements in the name of the applicant.

[36] I now turn briefly to the actual grounds upon which the winding-up application is based:

(i) <u>It was firstly argued that the respondent is factually insolvent</u>

[37] This would mean that the liabilities of the respondent exceed its assets.

[38] In this regard, the respondent attached to its opposing affidavit a valuation of the property by one Mr Clive Frost of Frost & Frost Property Brokers (Pty) Ltd. The valuation was confirmed and supported by an affidavit deposed to by Mr Frost. The valuation is dated 27 September 2012. Mr Frost values the property at R107 387 308,46. There is also a budget income statement attached to the valuation showing a total monthly income of R1 242 758,90 consisting of rental income of more than R1 million, income from the parking bays totaling some R13 000,00 per month and the rest of the income consisting of "recoveries" which I understand to be electricity, water, refuse, sewerage and other monthly expenses paid by the respondent and then recovered from the tenants in terms of individual lease agreements. According to the income statement the gross annual income of the property is some R15,07 million consisting of rental income of R12,3 million, parking income of some R160 000,00 and recoveries of some R2,5 million. The

annual expenses only come to some R3,2 million consisting of operating expenses of some R3,1 million and company expenses of some R72 000,00. The annual net income is approximately R11,8 million.

[39] In addition, the respondent presented a valuation by one Mr Sebastiaan Kamstra, a professional valuer, also supported by an affidavit by Mr Kamstra. The latter, on 1 October 2012, valued the property at R109 600 000,00. He also postulates a potential annual income generated by the properties in the amount of some R17,2 million.

[40] In the opposing affidavit, the respondent alleges that it has cash on hand in the amount of some R2,5 million.

[41] It is common cause that the applicant is the respondent's only creditor. On the respondent's version the applicant is only a potential or future creditor to be paid when the properties are sold.

[42] There is no longer any bond over the property so that it is unencumbered.

[43] The applicant also presented a copy of an offer to purchase the property for some R92 million. The offer was dated 4 July 2012 and made by Arrow Head Properties Ltd.

[44] The applicant offered no meaningful evidence to rebut this evidence.

[45] The *onus* is on the applicant to show that the respondent is factually insolvent. Given the details set out above, and the test in *Plascon-Evans*, I am satisfied that this *onus* was not discharged.

(ii) <u>The respondent is commercially insolvent</u>

[46] This would mean that the respondent is unable to pay its debts.

[47] The answer to this question depends to some extent (but not entirely, given the favourable position of the respondent, owning an unencumbered property valued at approximately R100 million generating an income in excess of R1 million per month) on whether or not the parties entered into a loan agreement in March or April 2008 which is interest bearing and immediately payable. This debt, according to the particulars of claim in the main action, which I have quoted, came to some R48,6 million in June 2012.

[48] I have pointed out that the applicant relies mainly on "FA2" in support of its case that it was indeed a loan agreement that was entered into. "FA2" foreshadowed a loan agreement to be entered into in future. This never happened. The respondent argues that "FA2" is nothing more than a *pactum de contrahendo*, an agreement to make a contract in future. There may be something to be said for this argument – see the brief discussion in Christie, *The Law of Contract in South*

Africa, 6th edition p39 and the remark by HARMS ADP in *Van Zyl v Government of the Republic of South Africa* 2008 3 SA 294 (SCA) para [75] that "a promise to contract is not a contract". I consider it unnecessary to make a pronouncement on this point. I am also mindful of the fact that this dispute may well be tested in evidence before a trial court when the main action is enrolled for hearing and care must be taken not to usurp the functions of the trial court.

[49] Moreover, Smit said in the opposing affidavit that "FA2" came unexpectedly at a time when the guarantee had to be furnished to Dream World as a matter of urgency to avoid losing the opportunity of purchasing the property. He signed "FA2" in the belief that he would be able to renegotiate a favourable position if and when the foreshadowed "loan agreement" was submitted to him for signature. Smit also submitted that "FA2" did not reflect the true arrangement between the parties and was presented to him at a crucial time placing him under duress and forcing him in the circumstances to sign the document.

[50] Smit also presented evidence to the effect that he would not have agreed to pay interest and also part with a substantial portion of the profit (R10 million minimum according to the applicant, although Smit disputes this figure) as such an arrangement would not make commercial sense. Smit illustrated how he could have borrowed the purchase price of R49,5 million at an even higher interest rate (1,5% per week) over 120 days at a cost of some R10 million without having to incur an obligation to pay both interest and a substantial share of the profit. I add

that the applicant, in reply, offered certain arguments to the effect that the terms of the agreement as postulated by Smit (a pure investment agreement involving only a share of the profit and no interest) also made no commercial sense from the point of view of the applicant.

[51] In support of the case advanced by the respondent, there is also the fact that the loan agreement and the option agreement and the cession agreement foreshadowed in "FA2" were never submitted to Smit for signature.

[52] Moreover, when a demand was finally addressed to Smit in May 2012 by the applicant's attorney for payment of the alleged outstanding balance of the "loan", Smit's attorney, on 24 May 2012, wrote a letter to the applicant's attorney disputing this liability and describing the stance adopted by the respondent in some detail. It is a lengthy letter and I do not consider it necessary to quote the contents. This letter, annexure "SPS7", was never responded to.

[53] There were other arguments submitted by counsel in support of both versions. I do not consider it necessary to deal with those arguments.

[54] In terms of the test in *Plascon-Evans*, I must consider the version of the respondent in deciding whether or not the applicant discharged the *onus* of proving that the respondent is unable to pay its debts. In my view, this *onus* has not been discharged. Moreover, the version of the respondent is not "so far-

fetched or clearly untenable" that it can be rejected merely on the papers – see *Plascon-Evans* at 635B-D and the eloquent words of CAMERON JA in *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) where the learned Judge of Appeal revisits the test in *Plascon-Evans* as follows at 348B-C:

> "But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

In my view, this cannot be said of the version of the respondent. For the same reason, I am satisfied that the respondent discharged the *onus* of showing, as described in *Badenhorst* and *Kalil, supra*, that he is disputing the alleged indebtedness on *bona fide* and reasonable grounds.

[55] In the result, I have come to the conclusion that the winding-up application cannot succeed on the ground of so-called "commercial insolvency".

(iii) <u>It will be just and equitable to wind-up the respondent</u>

[56] I have referred to the provisions of section 81(1)(c)(ii) of the new Act in terms of which a solvent company may be wound-up if it is otherwise just and equitable to do so. This is the additional ground for winding-up introduced by the applicant in later affidavits, to which I have referred.

[57] In terms of the *Plascon-Evans* rule, this ground will also have to be adjudicated upon on the version of the respondent. I see nothing in the evidence of the respondent which can persuade me that it is just and equitable to wind it up: it appears to be a successful corporation. It has been doing this type of business of buying and selling developed properties as a going concern (with its tenants) for approximately 17 years, since 1996. It owns a valuable property, worth probably in the vicinity of R100 million, which is unencumbered. It generates an income in excess of R1 million net per month. It only has one creditor or, on its own version, a prospective or future creditor in the form of the applicant. It has, on oath on these papers, committed itself to refund the outstanding balance of the amount advanced by the applicant on its behalf and to pay the 60% profit share to the applicant, once a sale materializes. 0n respondent's version, and the available evidence with which I have dealt, the respondent will, on the probabilities, be able to meet this obligation without any difficulty.

[58] The argument advanced by the applicant, if I understood it correctly, is that it will be just and equitable to wind-up the respondent, firstly because the relationship between the parties has broken down in the sense that Smit and the director of the applicant, Mr Du Plessis, are no longer on speaking terms, and, secondly, because of the delay in getting the property sold, thereby, on the applicant's version, allowing interest on the outstanding balance on the advance made on behalf of the

respondent to accrue to the extent that it may ultimately eclipse the profit share which is due to the applicant.

[59] As far as the breaking down of the relationship is concerned, the applicant appears to rely on a so-called "deadlock" situation which has been recognized as a ground for winding-up a company on the basis that it is just and equitable to do so – see *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 2 SA 345 (W) at 349-350. As I have pointed out, on the respondent's version it is willing and able to meet its obligations to the applicant. I also do not consider this to be a classic "deadlock" situation which, if I understand the position correctly, is generally found between directors or members of a particular company or corporation. In this case, the applicant is not a member of the respondent. On the respondent's version, the applicant is an investor in the transaction structured and concluded by the respondent.

Moreover, on the respondent's version, the delay in proceeding with a sale of the property was due to the actions of the applicant, which insisted on renovations and improvements being effected to the property in order to enhance the selling price. In any event, on the respondent's version, there is no question of interest accruing on the outstanding balance of the advance made, for the reasons mentioned.

[60] Lastly, on my understanding of the "Badenhorst rule", which I have found to apply in this case, a winding-up order ought in any event not to be granted.

[61] In the result, I have concluded that the winding-up application cannot succeed on this ground either.

[62] The application must therefore fail.

[63] In the circumstances of this particular case, I also see no merit in a somewhat belated suggestion by the applicant that I should consider exercising my discretion in favour of granting a provisional order. The same applies to a late suggestion that the issue of the nature of the agreement between the parties should be referred to evidence. In the latter regard, the issues that have to be decided in this case may go wider than the limited question of whether or not there was a loan agreement. A trial action is pending and, but for what I consider to be undue delay on the part of the applicant, could probably have been enrolled already. It seems to me that that would be the proper forum to have all the issues ventilated.

The costs

[64] Generally, the costs should follow the result. I would have been prepared to make such an order. However, both counsel suggested that the appropriate order in this case should be to reserve the costs for decision by the trial court. The reasoning

appears to be that a favourable finding by the trial court (mainly to the effect that there was a loan agreement which is interest bearing) could render an adverse costs order against the applicant for winding-up at this stage to be seen to be unjust in hindsight.

[65] I will accede to the suggestion of counsel in this regard.

The order

[66] I make the following order:

1. The application is dismissed.

2. The costs of the application are reserved for decision by the trial court.

W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

55059-2012

HEARD ON: 21 and 22 MAY 2013
FOR THE APPLICANT: R STOCKWELL SC ASSISTED BY J F PRETORIUS
INSTRUCTED BY: SIM & BOTSI ATTORNEYS INC
FOR THE RESPONDENT: S D WAGENER SC
INSTRUCTED BY: COETZER & PARTNERS