REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024-061147

(1)	REPORTABLE: NO/~~YES~~
(2)	OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3)	REVISED: ~~NO~~/YES

[redacted]

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SIGNATURE **DATE** 28 February 2026

In the matter between:

THE NATIONAL HOUSING FINANCE CORPORATION SOC LIMITED Applicant
(Registration number: 1996/005577/06)

and

INDIGO KULANI PROPERTIES PROPRIETARY LIMITED Respondent
(Registration number: 2012/124870/07)

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

[1] This is an application in terms of s 344(f) of the Companies Act, 1973 ("1973 Act") as read with Item 9 of Schedule 5 to the Companies Act, 2008 to finally wind up the respondent for the reason that it is unable to pay a debt of R19,013,576.36 ("Debt"). The Debt arises from loans made by the applicant to the respondent. The parties' respective rights and obligations in respect of the loans and the Debt are contained in a suit of agreements comprised of a Facility Agreement, two addenda thereto, and a further agreement that was referred to as a Moratorium Agreement. The loans were intended for the respondent to develop and construct housing units on an immovable property ("Property").

[2] I pause to mention that additional loan funding had been advanced to the respondent by the Gauteng Partnership Trust trading as the Gauteng Partnership Fund ("GPF") in terms of a separate suit of agreements, and that the agreements concluded between the applicant and the respondent recognised the interests of the GPF. It is not necessary to say anything more about the involvement of the GPF.

[3] The respondent defends the application on three fronts. First, the applicant lacks standing as a creditor in terms of the Facility Agreement. This defence is based on the contention that the Facility Agreement is of no force and effect due to the fact that several suspensive conditions had not been fulfilled and the applicant failed to give the respondent written notice that any suspensive conditions had been waived ("waiver defence"). Second, the applicant is precluded from bringing the application because the Moratorium Agreement has not been terminated and remains extant ("moratorium defence"). Third, the respondent contends that it is able to pay its debts ("solvency defence"). I shall consider each in turn.

[4] Both the waiver defence and moratorium defence were raised for the first time in the answering affidavit. This despite the loans being advanced to the respondent years ago, subsequent negotiations and execution of the suit of agreements in an attempt to assist the respondent to complete the development. Mr Brewer, who appeared for the applicant, referred to the belated defences and questioned the respondent's *bona fides* and the

reasonableness of the defences. The respondent's explanation is that it did not appreciate these issues until it consulted and received advice on the application.

The waiver defence

[5] The issue turns on an interpretation of the Facility Agreement. It is trite law that this requires an application of the triad of text, context and purpose [*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)], which would, *in casu*, involve a consideration of the relationship between the words used, the concepts expressed, and the place of the contested provision within the contractual scheme as a whole to determine a coherent and salient interpretation [*Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA)].

[6] In terms of the Facility Agreement, which was concluded in 2013, the applicant advanced the sum of R12,460,635.00 to the respondent, repayable over twenty years (including a moratorium in respect of capital and interest for the first twelve months). In accordance with the terms of the Facility Agreement and as security for the respondent's obligations arising out of the Facility Agreement, the respondent registered a first covering mortgage bond over the Property in favour of the applicant equal to the capital sum of the loan (plus an additional amount of approximately R2½ million). The first Addendum to the Facility Agreement was concluded in 2015 and amended a suspensive condition to correct the terms of the payment in accordance with the moratorium that the GPF had granted the respondent. A second Addendum was concluded in 2016 and provided for a further loan of R2,949,392.00. Both addenda confirm that the capital sum had been advanced by the applicant to the respondent. Save for the specific amendments contained in the respective Addenda, the remainder of the Facility Agreement remained the same.

[7] The respondent fell into substantial arrears, resulting in the parties concluding the Moratorium Agreement in 2023, which recorded the respondent's admission of its indebtedness to the applicant. The purpose of the Moratorium Agreement

was to afford the respondent an opportunity to complete certain milestones in executing a 'Plan' to enable it to pay the loans in full. To this end, the applicant agreed to suspend any legal proceedings against the respondent until termination of the Moratorium Agreement. I shall deal with the Moratorium Agreement in more detail when I consider the moratorium defence.

[8] The Facility Agreement contains numerous suspensive conditions that were inserted for the applicant's benefit and could be waived by the applicant on written notice to the respondent [clause 7.3]. It further provided that if any of the suspensive conditions were not timeously fulfilled or waived, the Facility Agreement would be of no force and effect and neither party would have a claim against the other, save for a claim that may arise from a breach of clause 10 of Appendix 2 to the Facility Agreement [clause 7.4].

[9] The waiver defence involves two questions: did the Facility Agreement lapse due to the applicant's failure to give notice to the respondent that it had waived compliance with the suspensive conditions, and did the applicant retain a claim under clause 10 of Appendix 2?

<u>Absence of notice of waiver</u>

[10] Clause 7.3, in its terms, provides that the suspensive conditions were inserted for the applicant's benefit, and that they "*may accordingly be waived*" by giving notice to the respondent. I do not read the word "*may*" to mean "*must*". The term is couched in permissive language that grants the applicant a discretion to waive, but without placing on it a duty to do so by notice. This is in keeping with the context and purpose of the Facility Agreement to immediately advance money to the respondent to enable it to proceed with the development, and the applicant's right to waive compliance with any or all of the suspensive conditions that were inserted for its benefit. Elsewhere in the suit of agreements the terms and conditions reflect peremptory language that donates unequivocal and absolute contractual obligations on the part of the respondent.

[11] Importantly, the notice of waiver in terms of clause 7.3 is required to be given before the expiry of the notice period in clause 7.2, which in turn provides for

the respondent to remedy an unfulfilled condition, failing which the condition will be deemed to have been unfulfilled. On a simple and businesslike reading, the purpose of the waiver notice is intended to negate the deeming provision of clause 7.2. It is only in instances of a notice to remedy an unfulfilled suspensive condition that notice of waiver is required to prevent the threat of the suspensive condition being deemed unfulfilled.

[12] For the respondent's interpretation to have meaning, one would be required to ignore the words "*before the expiry of the time period referred to in 7.2 above*". But one may then legitimately ask why the parties inserted the reference to clause 7.2, because the requirement for a waiver notice in terms of clause 7.3 cannot sensibly be separated from the reference to clause 7.2.The respondent's reading of clause 7.3 leads to an unbusinesslike (if not absurd) result, in that waiver would always require both notices, and the applicant would be unable to waive compliance with a suspensive condition without having afforded the respondent the opportunity to remedy the unfulfilled suspensive condition.

[13] The unfulfilled suspensive conditions relied on by the respondent relate to obligations that were either borne by the respondent or by its appointees. It was well within its remit to ensure compliance with the relevant suspensive conditions, or to ascertain whether they had been complied with. This much is recognised by clause 7.5, which obliges the respondent to use its best endeavours to procure fulfilment of the suspensive conditions without delay. It does not behove the respondent to now seek to avoid the Facility Agreement because it was not informed of waiver by notice, despite knowing that the applicant had not insisted on compliance with these suspensive conditions or had by its conduct waived compliance. That would be placing form above substance.

[14] I find that the Facility Agreement did not lapse.

[15] I turn to consider the second question, whether (in the event the Facility Agreement did lapse) the applicant retained a claim in terms of clause 10 of Appendix 2 to the facility Agreement.

Clause 10 of Appendix 2

[16] Appendix 2 contains what are stated to be standard terms and conditions that are not subject to amendment by the respondent and which were inserted for the protection of the applicant's interests. Clause 10 thereof ("Clause 10") incorporates several events of default, any one of which would entitle the applicant to claim and recover all amounts owing under the Facility Agreement (including the balance of capital not repaid and interest).

[17] Mr Hollander, who appeared for the respondent, submitted that Appendix 2 did not survive the lapsing of the Facility Agreement. The argument ignores the stated purpose of Appendix 2. Its terms and conditions were inserted separately from the terms and conditions of the Facility Agreement, specifically to protect the applicant's interests *inter alia* in the event of the occurrence of any of the default events detailed in clause 10. It is apparent from clause 5 of the Facility Agreement that clause 10 shall survive termination of the Facility Agreement. Clause 10 was clearly introduced to ensure that the applicant retained a claim against the respondent in the event the Facility Agreement lapsed.

[18] Mr Hollander relied on two further arguments, both founded on the objection that the applicant cannot rely on new matter raised in its replying affidavit. The first new matter is the applicant's reliance on clause 10 and the second is the introduction of a potential enrichment claim to found *locus standi.* I was not persuaded by the arguments. It was the respondent who introduced its defences to the contractual claim for the first time in its answering affidavit. Until then, and despite several written admissions of the facts underpinning the Debt (as contained in the suit of agreements), there was no dispute between the parties that the applicant is a creditor of the respondent. The replying affidavit contains the response to the belated defences. There is no reason why the applicant should be precluded from referring to Clause 10 in response to the waiver defence. As for the potential enrichment claim, it arises from facts that were either admitted or not disputed, and this only became apparent upon a perusal of the answering affidavit. The respondent did not seek to strike out the references to clause 10 or the reference to a potential enrichment claim, nor did

it attempt to file a rejoinder to deal with these issues. Mr Hollander did not suggest that an enrichment claim would be bad in law or in fact; understandably so, because it would have been a tough row to hoe.

[19] As Mr Brewer correctly submitted, my task is not to adjudicate on a particular cause of action (a submission with which I understood Mr Hollander to agree) but to determine whether the applicant is a creditor (including a contingent or prospective creditor) [s 346(1)(b) of the 1973 Act]. This I find to be established based on an interpretation of the relevant contractual terms, taken together with the admitted facts.

The moratorium defence

[20] The applicant is a creditor also in terms of the Moratorium Agreement, which records the respondent's indebtedness for the loans of R12,460,635.00 and R2,949,392.00 advanced under the Facility Agreement [clauses 2.1 and 2.5], as well as the respondent's obligation to comply with the terms and conditions of the Facility Agreement [clause 2.6].

[21] The issue turns on an interpretation of the Moratorium Agreement. Essentially, the moratorium defence asserts that the applicant was precluded from instituting this application because the Moratorium Agreement was not terminated. Clause 2.7 of the Moratorium Agreement records that the applicant agreed to suspend any legal proceedings against the respondent, subject to the respondent timeously completing certain milestones for the respondent to execute the 'Plan' to sectionalise the Property into units and to sell the units in order to pay the loan in full. It was common cause before me that this application would be covered by the prohibition against legal proceedings, unless the applicant terminated the Moratorium Agreement. The respondent contends that the Moratorium Agreement has not been terminated.

[22] The applicant has a right to terminate the Moratorium Agreement (clause 5) if a trigger event occurs. A trigger event arises if the respondent fails to achieve a milestone timeously or at all, and in the event of a breach of the Moratorium Agreement [clauses 5.1 and 5.7]. The Moratorium Agreement included a *lex*

commissoria that entitled the applicant to terminate the Moratorium Agreement only after written notice to the respondent of the default constituting the trigger event and calling on it to remedy such default within ten days of receiving the applicant's notice of its intention to terminate the Agreement [clause 5.3]. The right to terminate shall be exercised at the applicant's election and in its discretion [clause 5.4], and a failure to exercise the election immediately shall not constitute a waiver of the right to invoke the election at a later stage [clause 5.4]. Upon termination, the respondent became obliged to do all things necessary to place itself into voluntary business rescue [clause 2.9.2] and the applicant shall be entitled to exercise all legal remedies available to it under the Facility Agreement [clause 5.8].

[23] The applicant claims that it did terminate the Moratorium Agreement and relies in this regard on two letters.

[24] The first letter, dated 6 March 2024, is captioned to be a 'notice of intention to terminate'. The content informed the respondent, in accordance with clause 5.3, that the notice served as a notice *"of intention to terminate"* the Moratorium Agreement. It proceeded to identify the trigger event and called on the respondent to remedy its breaches within ten days by making payment or placing itself in business rescue, failing which the applicant "*shall institute the appropriate legal proceedings*" against the respondent. In its terms, this was a notice to remedy in accordance with the terms of the *lex commissoria* that incorporated the express threat that termination and legal proceedings would follow a failure to remedy.

[25] The second letter, dated 8 April 2024, reminded of the relevant content of the earlier letter, including the warning that a failure to make payment or commencing voluntary business rescue would result in the applicant instituting the appropriate legal proceedings against the respondent. The letter further informed the respondent that the applicant will institute appropriate legal proceedings against the respondent and, for the purposes of engaging in the sale of housing units by private treaty, that the respondent hand over any agreements for the sale of housing units in its possession. I agree with

Mr Brewer that the Moratorium Agreement was terminated by the letter, despite it not saying so expressly. But I do not believe that it is necessary to affix a particular label to the letter or to the action it conveyed. The terms of the Moratorium Agreement are clear – the applicant could not litigate against the respondent unless it terminated the Moratorium Agreement. The letter of 6 March 2024 said as much. It was, in its terms, a notice of an intention to terminate, and if the breaches were not remedied, it would be followed by the institution of legal proceedings. Termination and litigation are inextricably linked; the latter could not take place unless the former had occurred. The implication was clear: if the applicant litigated (as it has), it had terminated the Moratorium Agreement. To the respondent's knowledge, when it received this application, it knew that the Moratorium Agreement had been terminated.

[26] Clause 5.3 of the Moratorium Agreement does not require two separate notices. It requires only a notice of intention to terminate unless the default is remedied. *In casu*, the first letter contained both a notice to remedy, and a notice of an intention to terminate if the remedy did not occur. The law, as opposed to the contract, requires that the decision to terminate (*i.e.*, the exercise of the right to terminate) must be conveyed to the other party [*Swart v Vosloo* 1965 (1) SA 100 (A) at 105G] and this is what occurred when the respondent was informed that the applicant "*will*" institute legal proceedings against it, followed by the application.

[27] There is a less complicated answer to the issue of termination. Acting *ex abundante cautela*, the applicant terminated the Moratorium Agreement in its replying affidavit. Mr Hollander repeated the objection he raised in regard to the waiver defence, that a new case should not be permitted in reply. However, the respondent failed to respond to the letter of 8 April 2024 and the applicant was not aware of the moratorium defence until it was raised in the answering affidavit. It is not suggested that there is any basis for a material objection to the (belated) termination of the Moratorium Agreement. The justification for the moratorium defence is based on the alleged non-termination and if that falls away, litigation is not suspended and the application is good.

Solvency defence

[28] Mr Hollander was hard-pressed to find facts to support this defence.

[29] The respondent has provided no relevant financial statements to establish its solvency. The Property was last valued in 2020 at R33½ million, but the respondent has provided no information of any other assets or of its liabilities. It did not disclose its annual financial statements or management accounts. It disclosed no detailed information of any particular relevance as to commercial solvency. Significantly, the respondent has not disclosed the total or monthly costs of the development to date, which has allegedly included the construction of sixty housing units (of which seven were sold for R2,7 million). The use to which the monthly rental surplus of approximately R208, 000.00 is put, is also not explained. The respondent has failed to show that it is factually or commercially solvent. If anything, the absence of relevant information speaks effectively to the fact of insolvency.

[30] It is common cause that the respondent has failed, despite years of negotiations and extensions, to make payments that were due and owing to the applicant, resulting in the undisputed amount of the Debt. This constitutes *prima facie* evidence of the respondent's inability to pay its debts [*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D)] and the applicant is entitled *ex debito justitiae* to a winding up order [*Absa Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 463 (C)].

[31] The applicant seeks a final winding up order. In *Johnson v Hirotec (Pty) Ltd* 2000 (4) SA 930 (SCA), the court dealt with the discretion whether to grant a final or provisional winding up order, and referred to the practice in this division:

> *"[9] The remaining question is whether this Court should issue a provisional or a final order of winding-up. The Act does not require a final order to be preceded by a provisional order, but in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 976A - B Corbett JA referred to the practice, which he regarded as well-established, of granting a provisional order of winding-up and a rule nisi calling upon persons concerned to show cause why a final order should not be granted. From the information*

given to us by counsel it would seem that there is no longer a uniform practice in this regard throughout the country. According to the Practice Manual of the Transvaal Provincial Division, a Judge of that Division appears to have a wide discretion to grant a provisional or a final winding-up order, as the case may require, and is under no constraint to issue a provisional order as a matter of course. This Court should ordinarily apply the rules of practice of the Division from which the appeal emanates and, adopting this principle, there is no reason why, in an appropriate case, this Court should not grant a final order. This is such a case. The respondent opposed the grant of a winding-up order in the Court a quo and in this Court. The issues have been fully ventilated and the respondent has put nothing forward to persuade us that further relevant facts would be forthcoming if a rule nisi were issued."

I am mindful that the Court was speaking specifically with reference to the discretion of that Court (or of another appeal court).

[32] Recently, the Supreme Court of Appeal dealt more pertinently with the discretion to be exercised by this Court:

"*Ordinarily, following an application for the liquidation of a company and the exchange of affidavits, the usual procedure is to grant a provisional order of winding-up and a rule nisi calling on all interested persons to show cause why a final winding-up order should not be granted. This procedure is not laid down in the Act or any of its predecessors. It is, however, in our law, a well-established practice. Granting an outright final winding-up order might be suggested in some practice manuals or directives of divisions of our High Court, but usually only where there are good reasons to do so. However, the grant, firstly, of a provisional winding-up order should be ordinarily preferred, where this is appropriate and required in the interests of justice.*"

[*Selective Empowerment Investments Ltd v Companies and Intellectual Property Commission* 2025 (6) SA 495 (SCA) [49]].

[33] Applying these *dicta*, I can find no reason why I should not grant a final winding up order. The two main defences, to the applicant's standing and to the respondent's indebtedness, turn on issues of contractual interpretation and have been fully ventilated and considered. The agreements are common cause and the applicable principles of interpretation are well-established. As to the third defence, there is no indication that the facts pertaining to the respondent's insolvency, in particular to its inability to pay debts as they fall due, will

substantially change in the next few weeks or that further relevant facts will be presented if a rule *nisi* is issued. None of the facts that were presented by the respondent is alleged to be subject to any material improvement in the foreseeable future. I am not convinced that any purpose will be served in delaying the inevitable.

[34] I grant the following order:

1. The respondent is placed in final winding up.

2. The costs of the application shall be costs in the cause.

[redacted]

P STAIS
Acting Judge of the High Court
Johannesburg

APPEARANCES:

Applicant:	Mr J Brewer
Instructed by:	Werksmans Attorneys
Respondent:	Mr L Hollander
Instructed by:	Swartz Weil Van der Merwe Greenberg Inc
Hearing:	13 February 2026
Judgment:	28 February 2026