Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 23255/2010

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

ABSA BANK LIMITED	Applicant
and	
ERF 1252 MARINE DRIVE (PTY) LTD	Respondent
KING CHARLES WINELANDS (PTY) LTD	Intervening Party

JUDGMENT DELIVERED: 15 MAY 2012

BINNS-WARD J:

[1] The respondent company was placed into provisional liquidation in terms of an order made by Zondi J on 3 November 2011 in an opposed application. The current proceedings concern the application for a final winding up order on the

extended return date of the provisional order. The application is opposed by the respondent company, and also by an intervening party, King Charles Winelands (Pty) Ltd. Mr Charles Potgieter is the deponent to the principal answering affidavit on behalf of the respondent, and also to the intervening party's supporting affidavit. The intervening party is a creditor of the respondent. The respondent and the intervening party are both companies in what Mr Potgieter refers to as 'the Charles Potgieter group'. I think it may reasonably be inferred from this description that there is probably some commonality of proprietary interest or control, whether direct or indirect, in or over the component entities in the group.[1] The business of the group is property development and matters related thereto.

[2] Charles Potgieter Investments (Pty) Ltd ('CPI'), which is also a company in the group, is indebted on overdraft to the applicant bank in the sum of approximately R22 million. The respondent company stood surety in favour of the applicant in respect of an amount of up to R10 million of CPI's overdraft debt. It would appear from information set out in Mr Potgieter's affidavit in support of the intervening party's opposition to the winding-up of the respondent that CPI has been placed under a final winding-up order at the instance of JLK Construction. The provisional winding up order obtained by the applicant against the respondent company in the proceedings before Zondi J came about because of the respondent's failure or inability to discharge its obligation as surety.

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[1] In the affidavit made by Mr Potgieter in support of the intervening party's opposition to the winding-up of the respondent he indicates that the shares in CPI were held by a trust. Mr Potgieter points out in that affidavit that the applicant has instituted proceedings against him personally and 'the other trusts of which I am trustee' in respect of sureties given for the selfsame overdraft debt of CPI that is the basis for the current proceedings. Mr Potgieter describes the group as a 'conglomerate' of legal entities having as its object the 'development, possession, sale and management' of immovable property. The reference by Mr Potgieter to 'the group' having developed cashflow problems is just one of several indications in the papers of an ownership and/or control interrelationship between the entities of which it is comprised.

[3] The papers before me are in the same state as they were when the matter was before Zondi J. The only difference is that in consequence of an order by the learned judge dismissing the intervening party's application for leave to intervene in the application for a provisional order, it was necessary for the intervening party to apply afresh to be admitted as an opposing party at this further stage of the proceedings. That application was granted, without opposition from the applicant. The intervening party's case at this stage remains that set out in the affidavit that was before the court in the application for a provisional order.

[4] While the evidence might be the same as it was when the provisional order was granted, the approach to be taken to it for the purposes of considering whether a final order should be made is different. At the provisional stage the applicant had to make out only a *prima facie* case – in the peculiar sense of that term explained in *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 at 976D – 978F. In order to succeed in obtaining a final order the applicant has to prove its case on the evidence as it falls to be assessed in the usual manner in proceedings on motion for final relief. The practical distinction between the two requirements thus arises out of the application of the *Plascon-Evans* evidentiary rule in opposed proceedings for a final order; cf. *Export Harness Supplies (Pty) Limited v Pasdec Automative Technologies (Pty) Limited* 2005 JDR 0304 (SCA), at para. 4.[2] The effect has been described in terms which suggest that a higher 'degree of proof…on a balance of probabilities' is required for a final order than for a provisional order (*Paarwater v South Sahara Investments (Pty) Ltd* [2005] 4 All SA 185 (SCA), at para. 3). While the basis for that description is understandable, I would suggest respectfully that the position might

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[2] The judgment is also accessible at http://www.justice.gov.za/sca/judgments/sca_2005/2004_097.pdf .

more accurately be described as being that while the applicant must establish its case on the probabilities to obtain either a provisional or a final order, in an opposed application, a different, and more stringent approach to the evidence, consistent with the *Plascons-Evans* rule, must be adopted by a court in deciding whether the applicant has made a case for a final order. This is in contradistinction to the approach to an opposed application for a provisional order, when the case is decided on the probabilities as they appear from the papers.

[5] The import of the *Plascon-Evans* rule is so well established that it hardly bears stating: it is to the effect that where there is a dispute of fact on the papers final relief may be granted in an application only if it is justified by the averments in the affidavits of the applicant which are either admitted or not disputed by the respondent, together with the facts alleged by the respondent. It is, however, the qualifications and exceptions to that simple principle that are sometimes overlooked, and because they have borne importantly on the determination of the current application, I make no apology for quoting Corbett JA's exposition of them in full:

> In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)*(g)* of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case *supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another*1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or

> clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case, *supra* at 924A).

[6] The principal basis upon which the respondent opposes the application is its allegation that due to the unreasonably prejudicial conduct[3] of the applicant, the principal debt is not owed by CPI, as principal debtor, and thus also not by the respondent, as surety. To enable an understanding of the defence it is necessary to summarise the factual allegations made in support of it.

[7] The respondent alleges that CPI, and indeed, so it would seem, the entire Charles Potgieter group, has been adversely affected by the global collapse in the property market that has been evident since 2008/9. The effect has allegedly been exacerbated by the tightening regulation of the extension of credit by institutional lenders introduced upon the commencement in operation, in June 2007, of the National Credit Act 34 of 2005. These events provided the backdrop, at least latterly, to the relationship between the applicant, as lender on overdraft to CPI, and CPI, as borrower; in other words to the debt to which the suretyship obligation that the applicant wishes to exact pertains. The respondent alleges that the applicant breached the terms of the overdraft agreement that it had with CPI by refusing, unreasonably, to grant mortgage loans to intending buyers of property in certain residential township developments being undertaken by the principal debtor. It is this alleged breach of contract that constitutes the unreasonable prejudicial conduct upon which the respondent relies for the contention that it has been discharged from its suretyship obligation.

[3] The words of the deponent to the answering affidavit put the allegation thus in Afrikaans: '*weens die onredelik benadelende optrede van ABSA Bank Beperk…*'.

[8] The respondent's case in respect of the alleged breach of contract by the applicant was set forth in the following terms in the principal answering affidavit:

> 5.14 Charles Potgieter Investments (Edms) Bpk het 'n oortrokke fasiliteit van R20 Miljoen by ABSA Bank Beperk gehad en weens die opskorting van finansiering en verlies van inkomste veroorsaak deur die handelinge van ABSA Bank Beperk kon Charles Potgieter Investments (Edms) Bpk nie hierdie rekening diens nie en het dit agterstallig geraak.
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> 5.15 In die kontraktuele verhouding tussen Charles Potgieter Investments (Edms) Bpk en ABSA BANK Beperk:
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> 5.15.1 ABSA BANK Beperk het die geld aan Charles Potgieter Investments (Edms) Bpk geleen en voorgeskiet op oortrokke rekening sodat Charles Potgieter Investments (Edms) Bpk sy normale besigheid, naamlik die ontwikkeling en verkoop van eiendomme kon doen en voortsit;
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> 5.15.2 Te alle relevante tye en in die besonder ook by die aangaan van die ooreenkoms ten aansien van die oortrokke rekening, was dit in die kontemplasie van ABSA bank Beperk en Charles Potgieter Investments (Edms) Bpk, en was dit as sodanig geïnkorporeer as 'n stilswyende of/of geïmpliseerde term van daardie ooreenkoms, dat ABSA BANK Beperk, in die gewone loop van besigheid, soos al die ander finansiële instellings, finansiering sal verskaf aan kopers van eiendomme van die Groep, en in die besonder ook die van Charles Potgieter Investments (Edms) Bpk, op die normale bankpraktyk en standaarde, welke beperk is tot:
>
> (a) Die koper se finansiële vermoë, dit is sy vermoë om die verbandverpligtinge na te kom; en
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> (b) Die bestaan van sekuriteit, in die vorm van die waarde van die onroerende eiendom.
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> 5.15.3 In die omstandighede het daar:
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> (a) 'n Regsplig op ABSA BANK Beperk gerus om nie gewillige en daartoe instaat kopers van Charles Potgieter Investments (Edms) Bpk se eiendomme, teen billike en markverwante pryse, se finansiering af te keur op gronde nie verbandhoudend met die koper se finansiele vermoë en die bestaan van voldoende sekuriteit in die waarde van die betrokke onroerende eiendom, nie.

(b) ’n Regsplig op ABSA BANK Beperk gerus om hul nie skuldig te maak aan onredelike besigheidpraktyke en samespanninge deur ander finasiele instansies te oortuig om gewillige en daartoe instaat kopers van Charles Potgieter Investments (Edms) Bpk se eiendomme, verkoop teen billike en markverwante pryse, se finansiering af te keur op gronde nie verbandhoudend met die koper se finansiele vermoë en die bestaan van voldoende sekuriteit in die waarde van die onroerende eiendom, nie.

5.16 In stryd met sy regspligte:

5.16.1 Het ABSA BANK Beperk gewillige en daartoe instaat kopers van Charles Potgieter Investments (Edms) Bpk se eiendomme, verkoop teen billike en markverwante pryse, se finansiering afgekeur op gronde nie verbandhoudend met die koper se finansiele vermoë en die bestaan van voldoende sekuriteit in die waarde van die onroerende eiendom; en

5.16.2 Het ABSA BANK Beperk hom skuldig gemaak aan ’n onredelike besigheidpraktyk deur Eerste Nasionale Bank en Standard Bank te oortuig om gewillige en daartoe instaat kopers van Charles Potgieter Investments (Edms) Bpk se eiendomme, verkoop teen billike en markverwante pryse, se finansiering af te keur op gronde nie verbandhoudend met die koper se finansiele vermoë en die bestaan van voldoende sekuriteit in die waarde van die onroerende eiendom.

[9] The basis upon which a surety can escape its obligations because of the prejudicial conduct of the creditor has been considered by the Supreme Court of Appeal in two cases: *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) and *Bock and others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA). In *Davidson*, at para. 16, Olivier JA rejected the notion that there was a general so-called ‘prejudice principle’ in our law to the effect that if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released. The learned judge of appeal went on, at para. 19, to hold:

> As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal

> agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer.

In *Duburoro*, at para.s 20-21, Harms JA endorsed the judgment of Olivier JA in *Davidson* in this respect, and rejected the criticism of it expressed in Forsyth & Pretorius, *Caney's The Law of Suretyship* 5th ed., at 205-206.

[10] The liability which the respondent contests arises out of CPI's failure to repay its overdraft. The breach of the overdraft loan agreement upon which the respondent - conforming with the approach laid down in *Davidson* - relies to establish the alleged prejudicial conduct consists of the breach of an alleged tacit (Afr. *stilswyende*) or implied (Afr. *geïmpliseerde*) term of the contract (see para. 5.15.2 of the answering affidavit, quoted above). Probably the most authoritative explanation of the distinction between an implied and a tacit term is that given in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531-533. An implied term in the true sense is a term imputed by law: it is a *naturalium* of the contract. A tacit term, on the other hand, is an unexpressed provision of the contract, which derives from the common intention of the parties, as inferred by the court from the expressed terms of the contract and the surrounding circumstances.

[11] A learned and detailed consideration of the nature of a contract of loan on overdraft by a banker was undertaken by Selikowitz J in *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 (4) SA 510 (C) at 546I – 551B.[4] The learned judge found that a loan made by a bank to its customer on overdraft was, in the absence of agreement between them on distinguishing terms, repayable from the

[4] This section of the judgment was unaffected by the judgment on appeal in *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* 1998 (1) SA 811 (SCA).

moment the advance was made, and that no specific demand by the bank for repayment was needed to make the loan due and repayable.[5] The learned judge remarked in this connection '*When the customer requests an overdraft he must be taken to know that the loan is repayable on demand and that if he wishes to repay the loan at a later fixed date or only after receipt of notice of repayment from the bank, he must conclude the necessary agreement with the bank to vary the common law that a loan without an agreed date of repayment is repayable on demand without specific notice.*'[6] An ordinary overdraft agreement is therefore a loan repayable on demand. The term alleged by the respondent is thus most definitely not a *naturalium* of a loan on overdraft; on the contrary, such a term would constitute an exception to the usual character of such a contract. It follows that the allegation that there was an implied term of the nature alleged by the respondent must be rejected. Thus the only question is whether there was a tacit term in the overdraft agreement with the import alleged by the respondent.

[12] At p.550E-I of his judgment in *Oneanate*, Selikowitz J made the following observations about the scope for the existence of a tacit term in an overdraft agreement of the nature alleged by the respondent, which I find to be pertinent:

> I accept that where, for example, a businessman seeks an overdraft from his bank he will often intend to use the overdraft facility to fund his business on an ongoing basis and that it could not be said that he intended the loan to be repayable on demand. It may well be that in such circumstances it can be established that the parties varied the usual role but each such case will have to be decided on its own facts. In my view it cannot, as a general rule, be said that either by necessary implication or in order to ensure business efficacy the grant of an overdraft in circumstances such as those just described must necessarily involve the recognition of a tacit term that the bank will give its customer specific notice before requiring repayment. The

[5] See the judgment at 550I-J.
[6] At 550E-H.

customer may feel that he requires such notice in order to efficaciously conduct his own business, but such a term is hardly necessary for the proper conduct of the banking relationship between the parties to the loan. As Millin J observed in *Rapp and Maister v Aronovsky* 1943 WLD 68:

> It has often been pointed out that it is not sufficient to show that the term [which it is alleged should be implied as a tacit term of the contract] would be highly reasonable or convenient to one or other or even both of the parties. The cases show that the Court has to be continually on its guard against being persuaded to introduce a term which, on analysis of the argument, appears to be no more than a term which would make the carrying out of the contract more convenient to one of the parties or to both of the parties and might have been included if the parties had thought of it and if they had both been reasonable.

(At 74-5.)

[13] The dicta of Millin J in *Rapp and Maister* have, of course, been approved in many subsequent judgments, including in the authoritative dissertation on the existence and imputation of tacit terms in *Wilkens NO v Voges* 1994 (3) SA 130 (A) by Nienaber JA. As noted[7] by the learned judge of appeal:

> *Being unspoken a tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.*'

In related vein, in *Maphango v Aengus Lifestyle Properties* [2011] ZASCA 100, 2011 (5) SA 19 (SCA), at para. 13, Brand JA observed:

> *Because a tacit term is derived from an inference as to what both parties must have intended, if they had applied their minds, the inference will be drawn only if the court is satisfied that it*

[7] At 136I- 137C.

> *is a necessary one. Once there is difficulty and doubt as to how the term should be formulated or how far it should go, it can hardly be said that the parties clearly intended the proposed term to be part of their agreement (see eg South African Mutual Aid Society v Cape Town Chamber of Commerce 1962 (1) SA 598 (A) at 606B; Desai v Greyridge Investments (Pty) Ltd 1974 (1) SA 509 (A) at 522H-523A).*

As observed by Brand JA in *Cape Town, City of (CMC Administration) v Bourbon-Leftley NNO* 2006 (3) SA 488 (SCA); [2006] 1 All SA 561, at para. 19, the cases show that the courts do not easily infer the existence of tacit terms.

[14] The observations of Selikowitz J, quoted earlier, bear out the view that it is not a necessary feature of an overdraft agreement entered into by a businessman to fund his business on an ongoing basis that it not be repayable on demand. In my view it is even less evident that a term that the bank should, by granting its customer an overdraft facility, hold itself willing on its usual terms to extend finance to other persons, to enable them to do business with its customer, should be imputed to an overdraft loan agreement. It is far from axiomatic why such a term should be regarded by both the bank and its customer as necessary to ensure the efficacy of the overdraft agreement. The alleged tacit term bears with it the implication that the applicant bank would, while CPI remained indebted to it on overdraft, be obliged - for so long as CPI continued to do business - to finance qualifying purchasers in developments undertaken by CPI. This begs the question when or in what conditions would the applicant be able to call up the overdraft? If one proceeds on the basis of an acceptance of the averments made on behalf of the respondent, the answer to the question is far from obvious. Indeed, the implication bound up in the tacit term alleged by the respondent that in agreeing to extend an overdraft facility to CPI, the applicant committed itself, while CPI remained indebted to it under the agreement, to

do business with CPI's customers, is on the face of it, and in the absence of a compelling effect in support of it in the evidence of the circumstances surrounding the conclusion of the agreement, quite palpably a far-fetched one.

[15] The applicant has denied the respondent's allegation as to the existence of the alleged tacit term. It did so quite baldly in its replying affidavit, but then I do not think it can be seriously criticised for the baldness of its denial when – bearing in mind the onus upon it, referred to by Nienaber JA in *Wilkens* in the passage cited earlier - the respondent had put up no detailed facts with which the applicant might have been expected to engage concerning the conclusion of the overdraft agreement and the inclusion in it of the alleged tacit term. The respondent did not allege when, and by whom representing the bank and CPI, respectively, the overdraft agreement was concluded. It also did not set forth the express terms of the agreement, or allege whether the express terms were agreed to orally or in writing. It made no allegations to establish with any particularity what the factual circumstances were attending the conclusion of the agreement that militated in favour of its contention as to the existence of the alleged tacit term. If the respondent wished to raise a real, genuine or *bona fide* dispute of fact on the existence of the alleged tacit term, it behoved it to provide this detail.

[16] There is authority to the effect that the rule about bald denials by a respondent not giving rise to a genuine dispute of fact also holds true in respect of bald allegations of fact in the answering affidavits; see *Dausa v Middleton NO and others* [2005] 2 All SA 83 (C)[8] at 93 in fin -94 (approved in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA), [2008] 2 All SA 512, at

[8] Also reported in the SALR *sub nom Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C)

para. 12). Compare also *National Scrap Metal v Murray & Roberts* [2012] ZASCA 47 (29 March 2012), at para. 19, which exemplifies the effect of a party's failure to put up such substantiating evidence as it might have been expected to, as a factor to which regard may be had in determining the existence or not of a real or genuine dispute of fact on a point in issue.

[17] The absence of corroborating or supporting detail is significant in a situation where the allegation made by the respondent is not just improbable, but so improbable as to appear on its face, as I have said, to be far-fetched. In the current case the position is underscored by the respondent's failure to apply to cross-examine the deponent to the bank's replying affidavit on the latter's denial of the existence of the alleged tacit term. It is also underlined by the absence of any evidence to suggest that CPI sought to assert the existence of the alleged tacit term when the applicant bank called up the overdraft debt. On the contrary, the Managing Director of CPI wrote to the applicant on 8 December 2009, after the applicant had indicated its refusal to finance purchases in the Burgundy Estate development, requesting the applicant to extend CPI's overdraft facility to 30 June 2010. The tenor of the lengthy letter is that of a plea for the applicant's understanding of the difficult trading conditions in which CPI found itself. The letter contains no suggestion whatsoever of the existence of the tacit term or the legal obligation (Afr. *regsplig*) on which the respondent relies in opposition to the winding up application; this despite having been written in circumstances in which a reference to the term or the obligation – if they existed - would have been to be expected.

[18] In the circumstances I have concluded that the respondent's bald and unsubstantiated allegation of the existence of the alleged tacit term was not sufficient to raise a genuine dispute of fact concerning CPI's liability as principal debtor to repay its overdraft debt on demand, as ordinarily the case in such contracts. In reaching this conclusion I have not overlooked the recent judgment of the Supreme Court of Appeal in *Mathewson & another v Van Niekerk & others* [2012] ZASCA 12 (16 March 2012) in which it was held[9] that the test entailed in the rejection of a respondent's allegations as so far-fetched or untenable as to be susceptible to rejection on the papers is a stringent one. It is significant that in that matter, in which the allegation of a tacit term was also central to the dispute, the SCA was of the view that the probabilities actually supported the existence of the tacit term alleged by the respondent. Obviously the more inherently improbable the respondent's allegation is, the more amenable it becomes to rejection as untenable or far-fetched. The baldness with which an inherently most improbable allegation is made must, in my view, be a material factor in the application of the test to determine whether it falls to be rejected in terms of the qualifications or exceptions to the *Plascon-Evans* rule.

[19] As appears from the passage from the answering affidavit quoted above, the respondent founded the existence of the legal obligation, the alleged breach of which is said to have excused CPI from its obligation to repay its overdraft debt, in contract. I have found that baldly made allegation to be so far-fetched as to justify rejection on the papers. This renders it unnecessary for me to canvas, or make any determinative findings in respect of the factual allegations on which the respondent relied to make out the alleged commission of the breach. These pertained to the applicant's refusal

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[9] At para. 7 of the judgment.

to be involved in the provision of financial assistance to purchasers in two sections of the Burgundy Estate residential development being undertaken by CPI. Suffice it to say, however, that it was evident, on the basis of documentation which the respondent appears to be in no position to contravert, that the applicant's refusal to be involved was predicated upon the use by CPI of contracts of sale which - in breach of the terms of an agreement between CPI and the applicant under which the applicant agreed to treat with purchasers of property in the development seeking bond finance on the basis of a pre-valuation of standardised building units in the development - allowed for the deferment of the payment of the purchase price deposit by buyers, and also for the provision in favour of buyers of a rental guarantee scheme for use to subsidise their bond repayments. For the reason mentioned, whether CPI was in breach of its contract with the applicant in this regard has no bearing on CPI's liability to pay up on its overdraft debt. The apparent breach by CPI of its contract with the applicant concerning the financing of sales of property in the Burgundy Estate development does, however, have some relevance to the consideration of CPI's alleged counter-claim for damages against the applicant, which is a subject to which I shall now turn.

[20] The allegation that CPI enjoys a damages claim against the applicant in an amount exceeding its overdraft debt is also predicated on the breach by the applicant of the alleged tacit term. The finding that I have made in respect of the alleged existence of the term is adversely determinative of the alleged claim for contractual damages. However, Mr *Joubert* SC, who, together with Mr *De Vries*, appeared for the respondent and the intervening party, submitted that the allegations in para. 5.16 of the answering affidavit also supported the existence of a claim in delict by CPI

against the applicant. For present purposes, and without making any finding to that effect, I am prepared to approach the determination of the application assuming that Mr *Joubert*'s argument in this respect is well-founded.

[21] On that approach CPI's claim for damages would fall to be regarded as an unliquidated counter-claim, which, upon judgment in CPI's favour, would give rise to a set-off against its overdraft liability. It is a well established practice in South Africa to allow a defendant to use an unliquidated counter-claim as a dilatory defence to a liquidated claim. The effective availment of the defence is, however, subject to the court's discretion. The practice, insofar as it pertains in actions, is reflected in the provisions of rule 22(4) of the Uniform Rules of Court. I am willing also to accept in favour of the respondent that in the circumstances the defence would be available to it as a surety; cf. *Muller and others v Botswana Development Corporation* 2003 (1) SA 651 (SCA), at para.s 9-11.

[22] In Blackman *et al*, *Commentary on the Companies Act* vol. 3 (Juta) at 14-93 it is stated, with reference to English, Australian and New Zealand authority, that '*It has been held that where a company has a genuine and serious counterclaim – whether of liquidated or unliquidated damages, and whether or not arising out of the same transaction – which it has been unable to litigate, in an amount equal to or exceeding the amount of the applicant's debt, the court will in the absence of special circumstances, dismiss or stay the winding-up application in the exercise of its discretion under s 347(1).*' I have not undertaken a detailed examination of the foreign cases cited in Blackman's work. Suffice it to say that my consideration of the judgment in *Re Bayoil SA; Seawind Tankers Corp v Bayoil SA* [1998] EWCA Civ

1364, [1998] BCC 988, [1999] 1 All ER 374, [1999] 1 BCLC 62, [1999] 1 Lloyd's Rep 211, [1999] 1 WLR 147, which rehearses the effect of the English Court of Appeal's earlier judgments in *Re Portman Provincial Cinemas Ltd,* (1964) 108 SJ 581, [1964] CA Transcript 207 and *Re L H F Wools Ltd,* [1969] 3 All ER 882 (CA), [1970] Ch 27, [1969] 3 WLR 1 bears out the proposition; at least in English jurisprudence. The effect is that the judicial discretion to grant a winding-up order in the context of a 'genuine and serious' counter-claim by the respondent of the nature mentioned is narrowly circumscribed in English practice. The English courts do not have a 'discretion at large' in such matters. The winding-up application will therefore usually be stayed, or refused.

[23] In *Ter Beek v United Resources CC and another* 1997 (3) SA 315 (C) at 333H-J, Van Reenen J - despite actually mentioning the decisions in *Portman Provincial Cinemas* and *LHF Wools Ltd* - described his understanding of the position under English law with no acknowledgement of the narrow nature of the discretion available to an English court and, after citing two South African cases[10] which merely recite the trite principle that a South African court has a discretion to refuse to make a winding up order even when the applicant has proved the elements necessary to obtain such an order, opined[11] that there existed no reason why the English approach should not be followed in South African law. With respect, however, in failing to appreciate

[10] *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (D) at 844C-D and *SAA Distributors (Pty) Ltd v Sport en Spel Bpk* 1973 (3) SA 371 (C) at 373C. The learned judge also cited an English case, *Re JD Swain Ltd* [1965] 2 All ER 761 (CA) at 762, which is to the same effect as the two South African cases, but which did not deal with the peculiar nature of the discretion under consideration in *Portman Provincial Cinemas* and *LHF Wools Ltd*.

[11] At 334A.

its limiting effect on the breadth of the applicable judicial discretion, the learned judge appears to have misdirected himself on the import of the English law in point.[12]

[24] The approach in English law - following on what Nourse LJ, in *Bayoil*, said may have been an incorrect assumption by the court in *Portman Provincial Cinemas* of the contextual effect of a reference by Greene MR in *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 (CA) to a passage in *Buckley on the Companies Act* - would seem to be predicated on equating opposition based on the existence of genuine and serious counter-claim by a respondent company to an application for its liquidation with opposition by a company based on the *bona fide* dispute by it of its alleged indebtedness to the applicant. Notwithstanding his evident misgivings about the soundness of such an approach, Nourse LJ nonetheless considered that English courts were obliged to follow the precedent created in *Portman*, expressing himself thus '*From the terms in which Lord Denning MR and Harman LJ, in particular the latter, expressed themselves in* Re Portman Provincial Cinemas, Ltd *it seems that they assumed, perhaps wrongly, that the practice that had been adopted in disputed debt cases had also been adopted in cross-claim cases. Be that as it may, the actual decision in that case is clear authority for the proposition that the petition ought to be dismissed in cross-claim cases, except in special circumstances*'. Appearing to hold (through his reference to *Kalil v Decotex*, where the question was in fact left open) that the *Badenhorst* rule,[13] which pertains to the determination of 'disputed debt

[12] The learned judge was in distinguished company in this respect, however, as reflected in the Court of Appeal's disapproval in *Bayoil* of the judgments of Warner J in *Re F S A Business Software Ltd* [1990] BCLC 825 and Millett J (as he then was) in *Re a company* (*No 006273 of 1992*) [1993] BCLC 131. Both distinguished judges had applied the law in England just as van Reenen J appears to have understood it to be; that is as affording them a discretion at large. The Court of Appeal's judgment in *Bayoil* was handed down two years after van Reenen J's judgment in *Ter Beek*.
[13] So named after the ratio in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-8; see *Kalil v Decotex* supra, at 980F-H. 'The *Badenhorst* rule' is the label used to

cases' in our law, went to *locus standi*, van Reenen J expressed himself (at 334 of *Ter Beek*) against following that approach in South African law and, to that extent, qualified his opinion that we should, in general, follow the English judicial practice, as he understood it to be.

[25] I am hesitant to accept the notion that the *Badenhorst* rule goes to standing. After all, as Corbett JA observed in *Kalil v Decotex* supra, at 980, it is conceivable that a creditor could establish on a balance of probabilities that it had a claim against the respondent company in winding-up proceedings, while the respondent at the same time was able to establish that the claim was disputed on *bona fide* and reasonable grounds. The applicant in such a case would have established its standing, while the respondent would have established, irrespective of the merits of the claim or its defence to it,[14] that the remedy sought by the applicant should not be granted. The *Badenhorst* rule would thus seem to constitute a self-standing (and possibly flexible) principle that winding-up proceedings are not an appropriate procedure for a creditor to use when the debt is *bona fide* disputed. Availment of the procedure in circumstances in which the *Badenhorst* rule applies can be an abuse of process. It is so, however, only when the creditor knew, or should reasonably have foreseen that the debt was disputed on *bona fide* and reasonable grounds at the time of the institution of the proceedings. I am thus unable, with respect, to find any substance in the qualification to which van Reenen J expressed his willingness to follow the English law as he understood it.

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describe the principle that winding-up is not an appropriate procedure to be availed of by a creditor whose claim against the respondent company is *bona fide* disputed on reasonable grounds.

[14] Cf. *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening)* 1998 (2) SA 208 (C) at 219F-220B.

[26] It is possible to state the position in South African law without reference to the English law. There is no reason for our courts to adopt or entrench what Nourse LJ, in *Bayoil*, clearly suspected to be a mistakenly taken course in English jurisprudence determined in *Portman*. In my view reliance by a respondent on a 'genuine and serious' unliquidated counterclaim to oppose an application for its a liquidation is a quite distinguishable basis for resisting winding-up from that premised on a *bona fide* and reasonable dispute of an alleged indebtedness to a creditor-applicant. As pointed out by van Reenen J in *Ter Beek*, reliance by a respondent company on a counterclaim to avert a winding-up order actually entails an admission by it of the alleged indebtedness to the applicant relied upon by the creditor applicant. The allegation of the existence of the unliquidated counter-claim is nothing more than the putting up by the respondent of a basis upon which it is able to ask the court to exercise its discretion against making a winding-up order, notwithstanding that the applicant may have satisfied the technical requirements to achieve the remedy. There is accordingly no basis in our law in such circumstances to treat the application for winding-up as an inappropriate procedure, as a court would, applying the *Badenhorst* rule, in the circumstances of a claim for winding-up by a creditor when the existence of the debt in question is reasonably and *bona fide* disputed. For the same reason there is no reason in our law for a court, as a matter of principle, to adopt a general disposition against the granting of the remedy just because the existence of an unliquidated counterclaim is alleged by the respondent. There is also no basis in our law, in the postulated circumstances, to apply s 347(1) of the 1973 Companies Act[15] in a manner as would circumscribe the judge's discretion, as under English law.

[15] Act 61 of 1973.

[27] I venture that in the majority of cases the distinction between the English approach and ours will be notional rather than real, certainly in respect of the result. A court will in the nature of things be inclined to exercise its discretion against making a winding up order in a matter in which it appears that there is a reasonable possibility that a counter-claim by the debtor company will upon its determination extinguish the debt relied on by the applicant in its application for a winding-up. The exercise of a broad discretion by South African courts in closely analogous circumstances is well established, and as mentioned, in respect of actions, reflected in the provisions of rule 22(4). It is for the respondent to persuade the court to exercise the discretion in its favour by showing on the papers that its counterclaim is what the English judges would call a 'genuine and serious' one. This requires more of a respondent than is needed if its basis for opposition is the existence of a disputed indebtedness. If the respondent fails in this respect the court is unlikely to exercise the discretion in terms of s 347(1) of the Companies Act in its favour. *Ter Beek*'s case is an example in point. The court granted a winding-up order in *Ter Beek* notwithstanding the allegation of an unliquidated counterclaim by respondent. It did so because of the features of the case apparent on the papers that militated against existence of the alleged breaches of contract upon which the alleged counterclaim fell to be founded. The factors to which the court had regard in this respect included '*the startling lack of particularity in respect of the alleged breaches of contract and the manner in which the amounts claimed as damages are calculated and arrived at*'.[16]

[28] It is time to apply the principles just rehearsed to the case in hand. Proceeding from the passage of the answering affidavit quoted in para. [8], above, the deponent to

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[16] *Ter Beek* supra, at 337.

the respondent's principal answering affidavit described CPI's alleged counter-claim against the applicant in the following terms:

> 5.17 As gevolg van ABSA BANK Beperk se verbreking van sy regsplig teenoor Charles Potgieter Investments (Edms) Bpk het Charles Potgieter Investments (Edms) Bpk skade gely in 'n bedrag van minstens R50,067,250.00, welke bedrag as volg bereken en saamgestel word:
>
> 5.17.1 Verlies aan netto inkomste bereken teen 35% van die verkoopsom ten aansien van die 65 eiendomme wat verkoop was en wat gestaan het om geregistreer te word teen 'n gemiddelede prys van R799,000.00 in 'n totale bedrag van R18,177,250.00;
>
> 5.17.2 Afkeuring en veroorsaking van afkeuring van finansiering van 'n verdere geskatte 30 eenhede teen 'n gemiddelde prys van R630,000.00 en 'n winsmarge van 10% in 'n totale bedrag van R1,890,000.00; en
>
> 5.17.3 Verdere voorsiene/kontemplatiewe gevolgskade in die omgewing van R30 miljoen deurdat geen verdere bemarking gedoen kon word nie aangesien bankbeleid bepaal dat 'n enkele bank nie meer as 25% van 'n projek se eindfinasiering doen nie en die nodige voorverkoopsyfers gevolglik nie bepaal kon word nie.
>
> 5.18 In die vooropstelling het Charles Potgieter Investments (Edms) Bpk 'n eis teen ABSA Bank Beperk wat by verre ABSA Bank Beperk se vordering teen Charles Potgieter Investments (Edms) Bpk oorskry, met en die se borge, wat die respondent insluit nie enige bedrag teenoor ABSA Bank Beperk verskuldig is nie.

[29] The damages alleged in terms of para.5.17.1 of the answering affidavit are related to the Burgundy Estate transactions mentioned in para. [19], above. I have already remarked that it appears *ex facie* the documentation in respect of the applicant's withdrawal as financier of the Burgundy Estate developments that CPI's manner of marketing and selling properties in that development was in breach of the applicant's conditions which forbad any contract that allowed deferred payment of the deposit on the purchase price or a scheme of guaranteed rental It cannot be said that the applicant was under any duty in law, outside of any applicable contractual

obligation (and, as already held, such has not been established) to finance the purchase of property in the development. The only basis for the allegation of delictual liability by the applicant to CPI is the alleged persuasion by the applicant of other banks not to advance mortgage loans to qualifying purchasers in the development. As mentioned, I am prepared for this purpose to assume, without finding, that the allegations do make out a cognisable delict.

[30] The only evidence offered in support of the supposed delict is the presence of an employee of First National Bank at a meeting held between representatives of CPI and the applicant to discuss the applicant's position on the Burgundy Estate sales. The insinuation that this pointed to some form of collusion between the applicant and other banks, at the instigation of the applicant, to refrain from extending finance to CPI's buyers is fatally undermined by the production of an email from one of CPI's agents in terms of which the First National Bank employee had been invited to the meeting. The implication that the applicant's competitors would forego the opportunity to engage in viable business simply to support the applicant in a grievance against CPI is inherently improbable. On the contrary, the unwillingness of other banks to be involved in the financing of purchases in the development is understandable because of the very characteristics of the sale agreements used by CPI to which the applicant objected, and for the same reasons.

[31] In any event the allegation of the make-up of CPI's alleged damages is also suspect. Such a wide margin of profit (35%) for a housing developer in a property market acknowledged by the deponent to the answering affidavit to have been in a state of 'collapse' is dubious. In this respect it appears from the answering affidavit

that CPI's 'business plan', which allowed for an up to five year interest-free deferral of payment of the 10% deposit on the purchase price by purchasers in CPI's developments and the provision of a rental guarantee scheme, which would enable purchasers to subsidise the bond repayments on their acquisitions, was a response to the difficult business conditions prevailing. It is self-evident that the cost of the so-called 'business plan' would necessarily impinge materially on CPI's profit margin. There is no indication, however, that the cost of the business plan has been factored into the calculation of the alleged profit margin used to quantify the damages allegedly sustained by CPI. Mr Potgieter has furthermore been noticeably unforthcoming about the relationship of the company, Itakane Trading (Pty) Ltd, that was to underwrite the rental guarantee scheme, and the Charles Potgieter group. According to his evidence, Itakane (to which he cryptically refers as 'a third party') would in terms of the scheme only begin to realise a nominally positive return in year three of the contemplated five year rental period. It seems to me inherently unlikely that a company outside the Charles Potgieter group would be willing to undertake the outlay and risk involved in such a scheme if its shareholders did not have in common with the shareholders of CPI an interest in maintaining the sale of units in CPI's developments during difficult market circumstances.

[32] Indeed, the answering affidavit contains no meaningful particularity as to how the alleged profit margin is calculated or arrived at. Having regard to the fact that the answering affidavit was made by Mr Charles Potgieter on 23 November 2010, some 11 months after the applicant had indicated its refusal to provide mortgage finance to purchasers in the development, one would have expected a more detailed and substantiated setting out of the alleged counterclaim than has been provided. One

might also have expected CPI to have taken steps in the year that intervened between the deposition of the answering affidavit and the making of the order of provisional winding-up to institute proceedings to exact the claim if it were a 'genuine and serious' one. There is no evidence that any steps were taken to pursue the claim for damages.

[33] The allegations in paragraphs 5.17.2 and 5.17.3 are even vaguer than those in para. 5.17.1. Why the reference to an 'estimated' (Afr. *geskatte*) 30 additional units referred to in para. 5.17.2? When asked, the respondent's counsel were unable to give me any meaningful explanation of the import of the allegation in para. 5.17.3.

[34] It is striking that Mr Potgieter stated that he had until very shortly before making his affidavit been of the view that it would not be worth the candle to oppose the winding-up applications brought against CPI and the respondent. In this regard he expressed himself as follows (I translate from the Afrikaans): '*I made the decision not to oppose the liquidation application (s)…..because I did not see the sense, in the hugely difficult economic climate prevailing, of expending further time and energy continuing with the businesses in circumstances in which the market leader* [the applicant], *was vetoing all the business of these entities*'. That is hardly a credible attitude if the deponent had any genuine belief in the existence of a R50 million plus damages claim against the applicant.

[35] In all the circumstances the respondent has not persuaded me that its alleged counterclaim is a genuine and serious one. It has failed to convince me that the court's discretion in terms of s 347(1) of the 1973 Companies Act should be exercised in its favour.

[36] But Mr Potgieter avers that the applicant has in any event failed to make out a case in terms of s 344(f) of the 1973 Companies Act that the respondent is unable to pay its debts as described in s 345. He asserts that the respondent is not insolvent 'commercially or otherwise'. It is not necessary for an applicant who proceeds for the winding up of a company in terms of s 344(f) to show that the company is actually insolvent. The applicant has to prove to the satisfaction of the court that the company is unable to pay its debts – a condition commonly referred to as 'commercial insolvency' (see s 345(1)(c)). Actual insolvency might be a powerful indicator of a company's inability to pay its debts, but evidence of a failure of a respondent company to pay on demand a debt which is due for payment is regarded as a cogent *prima facie* proof of an inability by the company to pay its debts; cf. *Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597H.

[37] In the current case it is clear that CPI's assets by value consisted in the main of immovable property. The respondent's opposing affidavit gives abundant proof of the difficulties confronting intending sellers of fixed property into a 'collapsed' market. The indication by Potgieter that he had initially not been disposed to cause the applications for the winding up of CPI and the respondent to be opposed suggests that conditions had not improved by the time these proceedings were instituted. Thus, even accepting for present purposes his allegation that the respondent's assets, fairly valued, exceed its liabilities, it is evident that they are illiquid. In the affidavit made by him in support of the intervening party's case, Mr Potgieter indeed expressly states that the Charles Potgieter group - of which both the respondent and the intervening party are part - has been experiencing cashflow problems. Mr Potgieter ascribed these problems as having been in consequence of the pressure exercised by the applicant in

refusing to do business with purchasers in developments undertaken by the group because of the failure by CPI to undertake remedial work at a development known as Tyger Falls II. The applicant's position on Tyger Falls II is also relied upon by the respondent as evidence of the applicant's prejudicial conduct towards CPI, so it is convenient at this stage to deal with those contentions.

[38] Tyger Falls II is an apartment complex developed by CPI. The applicant financed the purchase of a number of apartments in the complex by means of loans to the purchasers advanced against the security of mortgages over the units concerned. After the purchasers had taken occupation of the units it became apparent that the building was affected by serious structural problems; so badly, in fact, that parts of the structure either collapsed or were in imminent danger of collapse. The result was that the value of the applicant's security as mortgagee was imperilled.

[39] It seems that the purchasers of the units in the development were not able themselves to afford the extensive remedial work required. The applicant sought to persuade CPI, as the developer, to undertake the required remedial work. CPI maintained that the structural faults had happened as a result of defective work undertaken by building contractors employed by them. It denied that it was liable for the remedial work. The applicant maintained that CPI was responsible, as a developer in the business of home-building, amongst other reasons, because of the provisions of the Housing Consumers Protection Measures Act 95 of 1998. CPI, however, appears to have adopted the attitude that the provisions of the Act did not inure to the benefit of the applicant as mortgagee, which really was to obfuscate because any remediation

of the defects at the instance of the purchasers of the units would redound to the applicant's benefit as mortgagee..

[40] Whatever merit there might, or might not have been in the position adopted by CPI in respect of liability to address the problems with the Tyger Falls development, it was one likely to engender circumspection amongst institutional lenders in respect of future involvement in developments undertaken by CPI. It is evident that the problems with the development attracted publicity. The reputational damage that such publicity would have done CPI, whatever the technical merits or demerits of its position in respect of a liability to repair the defects, is not difficult to imagine. On the face of matters that would seem to me a more likely cause of a general reluctance by institutional lenders to become involved with CPI's developments than a collusive scheme instigated by the applicant, which Mr Potgieter seems to allege. As pointed out by Mr *Van Riet* SC who, together with Mr *Vivier*, appeared for the applicant, the events in respect of Tyger Falls II preceded by a year the withdrawal of the applicant from the financing of purchases in the Burgundy Estate developments in the circumstances described earlier, which undermines the allegation that the applicant was engaged in a concerted campaign to destroy CPI's business.

[41] It remains to consider the case of the intervening creditor. The intervening creditor contends that if the respondent were to be afforded a period to sell the properties which are its stock in trade in the ordinary course it would be able to generate sufficient net proceeds to pay all its creditors in full, including the amount allegedly due to the applicant. It alleges that this will not be the result if there is a fire sale of the respondent's properties upon its liquidation. The intervening creditor seeks

to persuade the court in the circumstances to exercise its discretion against granting a winding up order, having regard to the adverse effect that such an order would allegedly have on the respondent's other creditors.

[42] The applicant's counsel argued against the position of the intervening creditor, relying strongly in this respect on the *dicta* of Berman J in *Absa Bank Ltd v Rheboksklo of (Pty) Ltd and others* 1993 (4) SA 436 (C) at 440-1 to the effect that the court's discretion to refuse a winding up order is limited when the creditor-applicant is entitled to seek such remedy *ex debito justitiae*. The authority of the *Rheboksklo of* case does not appear to me to be in point. No creditor intervened to oppose the winding up application in that matter. Indeed the learned judge mentioned the absence of opposition by any other creditor as one of the factors to which he had regard in refusing to exercise what he regarded to be his limited discretion against the applicant-creditor.

[43] As stated in *Henochsberg on the Companies Act* at 699-700, with reference to a number of cases, 'the principle that an unpaid creditor is entitled to an order *ex debito justitiae* applies between the creditor and the company, not as between creditors'. The limiting effect of the *ex debito justitiae* principle on the exercise by the court of its discretion when a creditor seeks a winding-up does not apply to the exercise of its discretion at the instance of other creditors who intervene to oppose the application.

[44] That said, the only creditor that opposes the winding-up of the respondent, to which the applicant is entitled *ex debito justitiae*, is another member of the Charles Potgieter group. Mr *Joubert* stressed that it is not possible on the papers to say that

the shareholders of the respondent are the same persons as the shareholders of the intervening party. The correctness of the submission does not afford an escape from the characterisation (*pace* Mr Potgieter) of the intervening party as a member of the same group as the respondent. Commonality of proprietary interest or control is inherent the concept of a 'group' in the sense that Mr Potgieter used the word and he has said nothing in his affidavits to distinguish that position in the context of the current matter. On the contrary, he identified a Mr Jacques Du Toit as the general manager of the group. The interests of other creditors urged for consideration by the intervening creditor would have been a much more telling consideration had they been put forward by a creditor at arm's length from the respondent.

[45] In the circumstances of this matter it also weighs heavily against the exercise of the court's discretion in the respondent's favour that even on the case advanced by the intervening party, a recovery period of up to five years is required to enable the respondent to order its affairs in a manner that would enable it to fully repay its debts, including that owed to the applicant. On any approach that is too long in my view. If the winding up application were to be refused the applicant would in any event be entitled to pursue its claim by way of ordinary recovery proceedings. The execution of the judgment which it would probably obtain in that context, well within the five year period contemplated by the intervening party, would in any event completely upset the gradual and orderly realisation of the respondent's assets which the intervening party would like to see, with a result probably not markedly distinguishable from that which will follow on a winding-up order.

[46] The intervening party identified certain properties of the respondent which it was alleged had been mortgaged in favour of the applicant to secure the respondent's contingent liability for CPI's overdraft. There is no explanation, however, as to why these properties were not sold to settle the debt during the long drawn out process between the institution of this application and the granting of the provisional order.

[47] Another factor which weighs against the exercise of the court's discretion against a winding-up on the grounds contended for by the intervening party is the failure of the intervening party, notwithstanding the intervention of more than a year since its supporting affidavits were sworn, to provide an update of the respondent's financial state. Mr *Joubert* explained that the intervening party had not provided updated information because the respondent was already in the hands of a provisional liquidator. The explanation given is not persuasive. There is no reason why the intervening party could not have sought whatever information it required to update its case from the provisional liquidator. There is no suggestion that the intervening party did anything to attempt to obtain and put before the court an updated picture of the respondent's ability to pay its debts. The explanation in any event does not address Mr Potgieter's failure to describe the financial status of the respondent as at the beginning of November 2011, when he was divested by the provisional order of management of the affairs of the company.

[48] In the result the following orders are made:

1. A final winding-up order is granted in respect of the respondent company.

2. The applicant's taxed costs of suit, including the costs of two counsel, shall be allowed as costs incurred in the winding-up.

3. The applicant is directed to attend forthwith to arrange service of this order by the Sheriff in compliance with the provisions of s 346A of the Companies Act, 1973.

A.G. BINNS-WARD
Judge of the High Court