IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 12458/10

DATE: 2010/11/12

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

21/2/2012
DATE

pp Boruchowitz
SIGNATURE

In the matter between -

STANDARD BANK OF SOUTH AFRICA LTD PLAINTIFF

and

REP PROPS 40 (PTY) LTD DEFENDANT

JUDGMENT

BORUCHOWITZ J: This is the return date of a provisional winding up order. The applicant, Standard Bank of South Africa Ltd, seeks to finally wind up the respondent on the ground that it is unable to pay its debts within the meaning of Section 344(f) read together with Section 345(1)(c) of the Companies Act.

The applicant's case is that, as at 28 February 2010, the respondent was and remains indebted to it in the amount of R7 855 856.24 together with interest, in respect of moneys advanced to it and an entity Benmond Property Development (Pty) Ltd [Benmond], under a written loan agreement [Annexure D to the founding affidavit].

The alleged indebtedness is disputed by the respondent. The essential question and which is dispositive of the matter is whether the applicant's alleged claim is disputed by the respondent on *bona fide* and reasonable grounds. It is settled law that the Court must refuse a winding-up order where the respondent shows on a balance of probabilities that the alleged indebtedness is so disputed. This is the well-known Badenhorst rule enunciated in the case of *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) 347 at 348. See also *Calil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 980 and cases there cited, as well as *Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd* 1998 (2) SA 208 (C) at 219E-H as to the sufficiency of evidence required to discharge such onus.

As will become apparent, one of the grounds upon which the respondent relies is that it has a counterclaim which exceeds any claim which the applicant has against it. Here, too, the respondent bears the onus of showing that the alleged counterclaim is genuine and has a reasonable prospect of success [*Terbeek v United Resources CC* 1997 (3) SA 315 (C) at 333C-334D.

With these legal principles in mind I turn to a consideration of the relevant facts disclosed in the affidavits. The respondent is the owner of an immovable property in an area known as Toekomsrus, Extension 1. The property is some three hectares in extent, it is being proclaimed as a township and has the necessary developmental rights. In about 2008 it and its joint venture partner, Benmond, approached the applicant with the view to financing a

residential development on the property. It was envisaged that 1200 residential properties would be built as well as a commercial section with a supermarket, petrol station and other conveniences.

A written loan agreement was entered into on 14 March 2008, between the applicant and the respondent and Benmond. The material terms of the agreement included the following: the applicant granted to the respondent and Benmond a loan facility of R50 781 088.00 to part-finance phase 1 of the development [the loan facility], and a general short-term bank facility of R4 414 219.00 to fund the payment of VAT.

The loan was subject to certain pre-conditions which are listed in clause 5 of the agreement. These included the execution of a first continuing covering mortgage bond in favour of the applicant for the amount of R100 million. It was expressly provided in clause 3 of the loan agreement that the applicant would advance the moneys in respect of the loan facility upon receipt by it of progress draw-certificates provided for in clause 26 of the mortgage bond, provided that the respondent and Benmond had complied with all the bank's other requirements in terms of the loan agreement and the bond.

It was recorded in clause 6.5.1 and 6.5.2 that prior to drawdown in respect of funding for the service installation, the respondent would provide proof of pre-sales of 50% of the development in the sum of R28.5 million of which R13 million shall be from the sale of full-title units and prior to draw-down, in respect of funding for the development phase, proof of presales of the balance of the development in the sum of R28.5 million. An acceptable "pre-sale" is described in clause 6.5.3,

inter alia, as an agreement of sale completed and signed by both seller and purchaser in which the purchaser is a *bona fide* third party who is a cash buyer, or has secured bond finance approved in principle for the balance of the purchase price by a recognised financial institution.

All moneys advanced under the loan and VAT facility would bear interest at a floating rate equal to Standard Bank's prime lending rate from time to time and would be calculated on daily balances and payable on the last business day of each month.

Repayment of the loan is provided for in clause 4 of the loan agreement, sub-clauses 4.1.1 and 4.1.2 which are germane to an argument advanced on behalf of the respondent reads:

> "4.1 The loan facility and GSTBF is to be repaid as follows:
>
> 4.1.1 The GSTBF of R4,414,219 [four million four hundred and fourteen thousand, two hundred and fourteen and nineteen rand] is to be repaid in full from VAT refunds, alternatively the sale of properties.
>
> 4.1.2 The loan facility is available for a period of 14 [fourteen] months after the first drawdown, after which the loan facility will be repayable in full. Repayment shall be effected from the net sales income generated from the sale of the full title, and sectional title units or from shareholders or members' contributions."

Apart from the loan facility which was payable upon the production of draw certificates and proof of presales, the agreement made provision for certain additional payments to be made. These are recorded in clauses 8.1, 8.2 and 8.3 of the loan agreement. Clause 8.1 provides for a payment of R250 000.00 to an entity styled Tessa's Choice Investments (Pty) Ltd. Clause 8.2 makes provision for payment of R3 million to the Council, and clause 8.3 for an amount of R2.5 million in respect of expenses incurred in completing a perimeter wall or show sales house and other expenses prior to the pre-sales condition being fulfilled as set out in paragraph 6.5 of the agreement.

It is common cause or not disputed that nine payments totalling R6 655 300.52, together with VAT in an aggregate sum of R345 799.65 were made by the applicant in terms of the loan agreement. The applicant contends that it is not obliged to advance any further moneys to the respondent and Benmond and that the sums already advanced should have been repaid in full on 23 December 2009. This repayment date is determined on the basis that the first advance under the loan agreement was made on 24 October 2008 and in terms of clause 4.1.2 the full loan facility should have been repaid within 14 months.

Although the respondent asserts that its assets exceed its liabilities, it appears that it does not, short of selling the immovable property which is its major asset, have current assets which are sufficient to satisfy the applicant's alleged claim. It lacks readily realisable assets and if forced to pay the applicant's claim would be

commercially insolvent. According to its balance sheet, Annexure AA2 to the answering affidavit, its current assets as at 28 February 2010 total R811 653.00. It is clear therefore that if the applicant's claim is found to be due and payable, the respondent would not be able to pay same from its readily realised assets and can be characterised as commercially insolvent (see *Rosenbach and Company (Pty) Ltd v Singhs Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597C-D).

The respondent has put up two affidavits, the main answering affidavit and a supplementary affidavit which it styles a "fourth affidavit". From the latter affidavit it is clear that the respondent has jettisoned the essential defence put forward in the main affidavit, namely that there was a fraudulent misrepresentation on the part of the applicant which allegedly induced the respondent to enter into the loan agreement.

Counsel for the respondent readily conceded that what was stated in the main affidavit does not constitute a valid defence to the applicant's claim. What is particularly disturbing are the statements made by Mr Minnaar, the sole director and shareholder of the respondent and deponent to the answering affidavit in paragraphs 13 and 19 of the fourth affidavit. Minnaar explains that when he deposed to the main answering affidavit negotiations were afoot for the acquisition of the shareholding of the respondent by Big Five Group of Companies. He says that on the advice of the respondent's erstwhile attorney, Mr Simmons of Senekal Simmons, it was suggested that he depose to the answering affidavit in order to "buy time" to persuade the applicant that it would be in its interest for the acquisition of the

respondent's shareholding to take place and to make sure that the respondent was not placed in liquidation.

What is clear from the statements of Minnaar is that the respondent has had no hesitation in putting up an untenable and spurious defence, and this reflects negatively on the *bona fides* of the respondent. If what is purported to have been said by Minnaar in paragraphs 13 and 19 of the fourth affidavit is true, such statements are to be deprecated and deserving of the strictest censure.

In the light of the respondent's abandonment of the defence of misrepresentation raised in the main affidavit, the only defences that fall to be considered are those set out in the fourth affidavit. There are other aspects raised in the main affidavit but these are not, in my view, material.

The defences proffered in the fourth affidavit would appear to be the following: the loan agreement embodies reciprocal rights and obligations. The applicant's obligation was to advance the full loan facility in order to finance the construction of the development and the obligation of the developer [the respondent and Benmond] was to procure offers to purchase units in the development [the pre-sales described in clause 6.5 of the agreement].

By refusing to advance the full loan facility as the applicant and undertaken to do, the applicant breached the agreement and rendered it impossible for the respondent to achieve the required presales and thereby occasioned the respondent damages in the sum of R64.6 million which will, so it is submitted, form the subject matter of a counterclaim against the applicant.

Reliance is placed by the respondent on the *exceptio non adimpleti contractus*. The reliance on this defence is, in my view, misplaced. The *exceptio* is available as a defence in a synallagmatic or reciprocal contracts where the obligations are consecutive in the sense that the performance of the one obligation is conditional on the prior performance of the other. In order to establish whether this is the case one has to examine the express wording of the loan agreement entered into between the parties. There is no express indication in the wording thereof that the respondent's obligation to obtain offers to purchase units in the development [the pre-sales], was to be conditional upon the applicant first advancing the full loan facility to the respondent. In fact, the contrary is the position. Clause 6.5 makes it plain that prior to the respondent being able to draw down the loan it had to furnish proof to the applicant of total pre-sales in a sum of R28 500 000.00. Furthermore, clause 3.1 makes it plain that no drawdowns would take place until progress draw certificates were provided to the applicant. It is common cause that no pre-sales of units were achieved by the respondent and that the pre-condition that pre-sales of 50% amounting to R28.5 million was not achieved.

Counsel for the respondent referred to the wording of clause 4.1.2 to the effect that repayment was to be affected from the net sales generated from the sale of units as an indication that reciprocity was intended. Clause 4 regulates the position in regard to repayment and says nothing in regard to conditions regulating advances to be made by the applicant. There is thus no merit in that contention; in any event, the wording of that sentence must be read together with what is contained in regard to the pre-sales condition in 6.5.

To overcome the difficulties presented by the express wording of clause 6.5 and the other pre-conditions to which the loan facility is subject [clause 5]. Counsel for the respondent submitted that, on the facts, the applicant had waived all pre-conditions, or certain pre-conditions, had been fulfilled. The alleged waiver is said to have occurred when the applicant advanced the amount of R7 855 856.24 without all pre-conditions, especially the pre-sale condition, having being met. It is submitted that having waived the pre-conditions, the applicant could not rely upon them any longer.

The respondent's contention as to waiver cannot, in my view, be sustained. In the first instance it is not raised in the fourth affidavit as a defence and the applicant has not had an opportunity to deal therewith. Secondly, clause 16 of the loan agreement would preclude reliance on the waiver sought to be relied on. Clause 16.1 provides that no novation or variation of any of the terms and conditions that the loan facility will be of any effect, unless recorded in writing and signed by both the bank and the borrower.

The waiver sought to be relied upon amounts in effect to a variation of the agreement by deleting the pre-sale requirement contained in clause 6.5. Waiver is in law never lightly presumed and there is no probability in favour of the respondent's assertion. It is in any event unlikely from a commercial point of view that the applicant would have waived the most important requirement that there be pre-sales.

Moreover, it is clear from the provisions of clauses 8.1, 8.2 and 8.3 to which I have referred that the applicant was under a duty to pay the amounts reflected in these clauses prior to any of the advances being made under the loan facility. These discreet payments were required to be made prior to any drawdown in terms of the loan facility and would appear to approximate the payments made by the applicant.

The alleged counterclaim has, in my view, no reasonable prospect of success as it is premised on the erroneous contention that there was a prior reciprocal obligation on the part of the applicant to advance the full loan facility to the respondent. No detail is, in any event, given as to the compilation of the alleged counterclaim permitting the exercise of any discretion by this Court to permit this defence to be pursued.

For these reasons I am satisfied that the respondent has not shown that the indebtedness to the applicant is disputed by it on *bona fide* and reasonable grounds as required. It follows therefore that the applicant has established the requirements necessary for a final winding up order to be made against the respondent.

The following order is granted:

The respondent is placed under final winding up in the hands of the Master of the High Court.

P BORUCHOWITZ
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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