REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: **24915/2018**

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

06/12/2018
Date:

MOKUTU AJ

In the matter between:

Zibsiflex Proprietary Limited **Applicant**

and

Techtronic Technology Solutions Proprietary Limited **Respondent**

Judgment

Mokutu, AJ:

Summary

[1] The applicant seeks a final winding-up order against the respondent; That the estate of respondent be placed under final winding-up in the hands of the Master

of this Court. The applicant further seeks an order directing that the costs of the winding-up application be made costs in the winding-up of the respondent.

[2] The applicant's claim is predicated on the averments that on or about 31st January 2017 and at Boksburg, the respondent duly represented by its co-directors Mr Wilhelm Arp ("**Mr Arp**") and Mr Clive Miller ("**Mr Miller**") and the applicant duly represented by the late Mr Elliot Magubane ("**Mr Magubane**"), Mr Sibusiso Samuel Khumalo ("**Mr Khumalo**") and Mr Tiaan Kotze ("**Mr Kotze**") entered into a verbal loan agreement in terms of which the applicant lent and advanced funds in favour of the respondent in the amount of R1.8 million ("**loan amount**").

[3] It is further averred on behalf of the applicant that the said loan was payable by the respondent on demand by the applicant and further that interest on the loan amount would accrue in favour of the applicant at the legal rate of interest per annum until date of final payment.

[4] As at the date of instituting its winding-up application, the respondent is reported to be indebted to the applicant (in respect of the loan agreement), in the sum of R1 887 440.84.

[5] According to the applicant, the respondent duly acknowledged its indebtedness to the applicant in writing in terms of paragraph 5.2 of a written agreement of sale of shares ("**shares agreement**") entered into between Mr Arp and Mr Miller as the respondent's seller's representatives and the applicant as purchaser of 50% plus

one shares of the issued share capital of the respondent. A copy of the said agreement has been annexed the founding affidavit.

[6] The respondent, as far as I understand its bases of defence, denies the existence and/or the conclusion of the loan agreement as alleged in the applicant's founding papers. It was submitted on behalf of the respondent that it was highly suspicious of the applicant to contend to have loaned or advanced an amount of approximately R1.8 million (just short of R2 million) to the respondent in circumstances where there was no written agreement at all.

[7] The submission made on behalf of the respondent is, with respect, ignorant of the settled legal position that an oral agreement is equally valid, binding and enforceable, the same way as a written agreement.

[8] Be that as it may, although the respondent denies the conclusion and existence of the loan agreement, in paragraph 7 of the answering affidavit, the deponent amongst other things, states that the applicant was involved in the business of the respondent at the time **when the funds were loaned to the respondent**.

[9] That notwithstanding, the respondent, in paragraph 37 of its answering affidavit, denies the conclusion, the existence and the material terms of the loan agreement referred to in the applicant's founding affidavit.

[10] It is further trite law that a litigant cannot approbate and reprobate in Court proceedings. The apparent conflation and/or contradiction contained in the

respondent's answering affidavit is crucial given the fact that the applicant predicates its claim on the conclusion of the oral agreement as I have indicated above.

[11] Other than the respondent's simultaneous admission and denial of the existence of the loan agreement, it is also critical to point it out that in its founding affidavit, the applicant has specifically placed reliance on clause 5.2 of the shares agreement. Clause 5.2 states that:

> ***"It is recorded that, on the signature date the, Sellers' loan accounts amount to R8 838 836.07 (EIGHT MILLION EIGHT HUNDRED AND THIRTY EIGHT THOUSAND EIGHT HUNDRED AND SIXTY RAND AND SEVEN CENT) and the Purchaser's to R1 887.84 (ONE MILLION EIGHT HUNDRED AND EIGHTY SEVEN THOUSAND FOUR HUNDRED AND FOURTY RAND AND EIGHTY-FOUR CENT)."***

[12] The shares agreement was signed by duly authorised representatives of both the applicant and the respondent and at the time of signing the shares agreement, the respondent's representatives ought to have known and understood the import of paragraph 5.2 of the shares agreement based on the *caveat subscriptor* principle.

Analysis of the facts

[13] The seller of the shares (in law is the respondent) and the respondent was, in terms of the shares agreement, represented by Mr Miller and Mr Arp and the purchaser was the applicant as represented by Mr Magubane.

[14] As far as I understand the pleaded facts and the submissions made on behalf of the applicant, the applicant's cause of action is the conclusion and the breach of

the loan agreement and as a result and given the respondent's inability to pay the loan amount, the applicant had to institute the present winding-up proceedings against the respondent.

[15] The applicant in its heads argument argues that regard must be had to sections 344(h) and 345(1)(c) of the Companies Act of 1973 ("**the 1973 Act**") read with item 9 of Schedule 5 of the Companies Act, No. 71 of 2008 ("**the 2008 Act**").

[16] Section 344(h) of the 1973 Act provides that:

> ***"[344] A company may be wound up by the Court if-***
>
> ***...***
>
> ***(h) it appears to the Court that it is just and equitable that the company should be wound up."***

[17] Section 345(1)(c) of the 1973 Act provides that:

> ***"[345] When company deemed unable to pay its debts -***
>
> ***(1) A company or body corporate shall be deemed to be unable to pay its debts if-***
>
> ***...***
>
> ***(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."***

[18] Item 9 of Schedule 5 of the 2008 Act provides that:

> ***"[9] Continued application of previous Act to winding-up and liquidation***
>
> ***(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).***
>
> ***(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.***

> ***(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.***
>
> ***(4) The Minister, by notice in the Gazette, may-***
>
> ***(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and***
>
> ***(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).***

[19] There is an ancillary dispute regarding the validity of the sale of shares as amplified in the shares agreement. The applicant's deponent (in the founding affidavit) states that there exists a dispute between the applicant on the one hand and Messrs Arp and Miller on the other regarding the validity of the shares agreement and to that end, both parties' legal representatives exchanged correspondence on 11th and 18th June 2018 respectively, that:

19.1. in the respondent's attorneys' letter dated 11th June 2018, it is stated, amongst other things, that there is a specific term and condition of the shares agreement in that the purchase price of R15 million would be payable in tranches of R3 million between 31st October 2017 until 30th November 2018;

19.2. the respondent's attorneys further recorded that the applicant had failed to make payments as agreed in terms of the shares agreement and an

amount of R9 million plus interest on the outstanding amount became due and payable as at 11th June 2018 in favour of the respondent;

19.3. the respondent was due to proceed to issue summons against the applicant to claim an amount of R9 million if payment was not received within 30 days from the transmission of the respondent's attorneys' aforesaid letter;

19.4. on 18th June 2018, the applicant's attorneys responded to the respondent's letter of 11th June 2018 and recorded that the applicant denied being indebted to both Messrs Miller and Arp as purported creditors of the applicant – it is to be noted that the respondent is not, per se, recorded as the creditor on the respondent's attorneys' letter of 11th June 2018;

19.5. in particular, the applicant's attorneys' letter of 18th June 2018 specifically singled out the respondent as being indebted to the applicant in the sum of R1 887 440.84 together with interest thereon, from 13th July 2017 to date of payment, which debt was said to be undisputed and has been admitted in the shares agreement;

19.6. the said letter went on to state that the debt owing by respondent (not Messrs Miller and Arp) was due and owing and payable on the demand.

[20] The characterisation of both Mr Miller and Mr Arp as creditors of the applicant (and not the respondent itself) is, in my view, significant and has a bearing in the conduct and outcome of the present proceedings.

[21] The summons referred to in paragraph 2.4 of the respondent's letter dated 11th June 2018 were not issued in the name of the respondent but rather in the name of Mr Arp and Mr Miller, under case number: 54769/2018.

[22] Paragraph 10 of the founding affidavit further states that the shares agreement dispute is not relevant in the winding-up application but was merely referenced because the applicant was advised that it would be prudent and appropriate to bring that dispute to the attention of this Court, in other words, the dispute between Messrs Arp and Miller as the plaintiff or purported creditors against the applicant as the debtor is a subject matter of a separate action which was subsequently instituted by both Mr Arp and Mr Miller.

[23] I am in agreement with the applicant's contention that the shares agreement dispute [based on the fact that the dispute for the recovery of the purchase price has been instituted by Messrs Arp and Miller (and not the respondent)] has nothing to do with the winding-up application, which application is before me.

[24] I say so because, notwithstanding the fact that a company such as the respondent enjoys distinct and separate juristic personality from its shareholders and directors, the shares agreement dispute by Messrs Arp and Miller is being pursued against the applicant and not instituted by the respondent itself. The plaintiffs in

that action are said to be Mr Arp and Mr Miller and there is no averment that they act on behalf of the respondent or they have been duly authorised to represent or to institute the action on behalf of the respondent. In particular, it is Messrs Arp and Miller who seek judgment (and not the respondent) to be entered against the applicant.

[25] I am mindful that a juristic person such as the respondent acts through a medium of its directors who must pass resolutions. I have also not seen evidence that the respondent would be prepared to ratify the actions of both Messrs Arp and Miller. As at present, I have not been referred to documentation giving credence that both Messrs Arp and Miller have been duly authorised to pursue action against the applicant under case number: 54769/2018 and in their own names.

[26] Flowing from a premise that the winding-up application therefore, emanated from the loan amount advanced by the applicant to the respondent, it is further material to point out a part-payment made which was effected by the respondent in *lieu* or as an attempt to repay the loan amount. The FNB online banking proof of payment is annexed in the applicant's papers and the execution date thereon is recorded to be the 1st September 2017 in the amount of R305 000.00.

[27] Importantly, the explanation recorded on the proof of payment on page 321 of the record, marked as annexure as "**AA12**" is titled "**Demand Deposit – 62345503701**". Furthermore, there is a handwritten note on the said proof of payment that reads as thus:

"Repayment of Zibsiflex loan Account"

[28] The respondent's counsel was invited to explain what does "*Demand Deposit*" mean on the aforesaid proof of payment and understandably, he was unable to give either a clear or satisfactory answer except to state that it meant nothing.

[29] I am thus not convinced that "*Demand Deposit*" reference on the proof of payment coupled with the fact that the respondent does not deny that it effected part-payment around 1st September 2017, was in compliance with the loan agreement as pleaded on behalf of the applicant.

[30] The respondent's explanation is that the payment of R305 000.00 was a draw down but that argument is, with respect, not alive to the fact that on the plain reading of the FNB proof of payment, payment was effected by the respondent in favour of the applicant. Furthermore, the shares agreement explicitly refers to a recordal of R1.8 million loan amount

[31] It therefore begs a question why was R305 000.00 paid by the respondent in favour of the applicant. In other words, the respondent has not furnished this Court with an explanation or a legal *causa* of why it effected the payment of R305 000.00 in favour of the applicant.

Other creditors

[32] Notwithstanding the fact that the applicant has made a *prima facie* case on its own and has demonstrated the respondent's inability to repay the loan amount, based on the inexplicable denial of the existence of the loan agreement, the applicant has further referenced the existence of other creditors of the respondent. In particular, the applicant has annexed information which lists creditors such as the Industrial Development Corporation ("**IDC**") and the South African Revenue Services ("**SARS**").

[33] It is further deposed on behalf of the applicant that the respondent is presently indebted to the IDC in respect of four loan agreements in the sum of R27 178 098.69. It is common cause fact that the respondent does not deny its indebtedness to the IDC.

[34] It is further common cause that the IDC has written to the respondent and recorded that the respondent is in arrears with its repayment obligations in respect of the aforesaid loans in the total amount of R16 527 745.07 as at 22nd June 2018 which amounts are due and payable.

[35] The dispute between IDC and the respondent is not before me, however, coupled with the fact that the respondent has placed on record the fact that it is undergoing financial turbulence and it is battling to access business, in my view, I cannot simply ignore the respondent's indebtedness to the IDC (an admitted fact by the respondent).

[36] The respondent contends that it has made arrangements with its other creditors, and I similarly take note thereof absent any litigation by any of those creditors as against the respondent.

[37] Having said so, Mr Arp's affidavit in these proceedings admits that the respondent is cash-stripped and cannot pay its debts and the applicant takes issue with the fact that the respondent continues to trade and to hold out to its creditors that Messrs Kotze, Magubane (who is deceased) and Khumalo are still directors of the respondent in circumstances where Mr Magubane had already despatched an email to the respondent and recorded his resignation as the respondent's director.

[38] The applicant further contends that the retention of both Messrs Khumalo's and Magubane's names on the respondent's letterhead is perplexing if one has regard to the letter of 6th September 2017, authored by Mr Khumalo addressed to Mr Arp and Mr Miller where Mr Khumalo recorded that Mr Arp and Mr Miller were simply abusing him (Mr Khumalo) and Mr Magubane to enable the respondent and/or Messrs Arp and Miller to achieve a certain level BEE status in order to access government business.

[39] As a further ground in opposition to the relief sought, it was further argued on behalf of the respondent that although Denel was unable to pay the respondent's invoices for the services rendered, I must also take judicial notice of the fact that there was a recent announcement made in the media (both print and electronic)

that Denel would receive a government bailout. In response, the applicant submitted that it was incumbent upon the respondent to prepare a supplementary affidavit outlining the amount that would be allocated to Denel in order for Denel to pay the respondent and the date the respondent would receive the money in order to pay its debts.

[40] I am, however, prepared to state that irrespective of the respondent's indebtedness elsewhere in regard to other creditors, the applicant has proved its case on a balance of probabilities for the grant of the relief sought based on the conclusion and existence of the loan agreement.

Case Law

[41] Where a creditor relies on section 345(1)(c), it is not necessary for him to set out the financial position of the company (of which the creditor might be quiet unaware); but the creditor must allege sufficient facts from which *prima facie* an inference of inability to pay debts can properly be drawn.[1]

[42] The applicant has done more than is required in law, to demonstrate the respondent inability to pay its debts, in particular the respondent's inability to repay the loan amount.

[43] Section 346(1)(b) of the 1973 Act states:

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[1] ***Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd*** 1962 (4) SA 593 (D) at 599 to 600.

> ***"[346] Application for winding-up of company***
>
> ***(1) An application to the Court for the winding-up of a company may, subject to the provisions of this section, be made-***
>
> ***...***
>
> ***(b) by one or more of its creditors (including contingent or prospective creditors)."***

[44] Although the respondent concedes and simultaneously disputes its indebtedness in regard to the oral loan agreement (to the extent that the respondent persisted with its defence that it disputed the oral agreement) there was no explanation as to the *causa* why the shares agreement referenced a shareholder's loan in the amount of R1.8 million. The *lacuna* in the respondent's defence in that regard leads me to the conclusion that the ***Badenhorst***[2] principle does not find application in the present matter given the fact that the respondent was unable to justify its bases of defence or its dispute of the loan amount both in its answering affidavit and in submission on its behalf by its counsel.

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[2] In the recent decision of ***Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd*** 2018 (1) SA 94 (CC), the Constitutional Court had cause to consider the matter of ***Badenhorst v Northern Construction Enterprise (Pty) Ltd*** 1956 (2) SA 346 (T) 347 to 349; which was reaffirmed by the SCA in ***Kalil v Decotex (Pty) Ltd and Another*** 1988 (1) SA 943 (A) at 980 B; and discussed in the matter of Exploitatie — en Beleggings ***Maatschappij Argonautent 11 BV and Another v Honig*** 2012 (1) SA 247 (SCA) paragraphs 11 to 12. At [27] the learned Judges in the majority decision held that:

> ***"[27] As regards liquidation, there is a general principle that, where there is a genuine and bona fide dispute concerning the Respondent's indebtedness to the Applicant the application for liquidation should be dismissed (Badenhorst principle). This principle acknowledges that liquidation proceedings are not the proper realm to determine disputed debts, and that the proceedings should not be abused in an attempt to enforce repayment.***
>
> ***[28] Applying the Badenhorst principle, the High Court held that the defence of prescription raised by the Respondent was indeed a valid defence. The High Court held further that it was not required to determine the merits of the defence or if the defence raised was likely to succeed at trial. Accordingly, the application for provisional liquidation was dismissed.***
>
> ***As the High Court found, whether the Respondent is indebted to the Applicant or not is a genuine and bona fide dispute. The dispute turns on whether the Applicant's claim has prescribed. The High Court correctly applied the Badenhorst principle and dismissed the application. The dispute was indeed palpable, and this was confirmed (in retrospect) by the very fact that the issue led to a split decision in the SCA and is now before this court."***

[45] In the result, I find that the respondent's opposition to the applicant's winding-up application has no merit and is susceptible to being dismissed.

[46] In as far as the IDC's indebtedness is concerned, the applicant contends that the respondent owes IDC an amount of R16 527 745.07. On the respondent's own version, the respondent does not deny that it is indebted to the IDC but it further states that the amount owed is lesser than the R16.5 million.

[47] The respondent however, makes a point that it has made arrangements with the IDC and other creditors and therefore the applicant should not, and cannot and will not rely on the respondent's indebtedness to other creditors.

[48] According to Henochsberg,[3] where a creditor applies for a winding-up, it is not incumbent either to allege or prove advantage to the creditors of debtor company because winding-up proceedings ought not to be confused with sequestration proceedings under the Insolvency Act. But there are cases where facts show such advantage (as alleged) may be relevant to the exercise by the Court of its discretion to wind up.

[49] The fact that it was argued, on behalf of the applicant, that the winding-up would be to the advantage of the other creditors should not, in my view, render the winding-up a nullity. As I have stated, I cannot ignore the respondent's own admission of is indebtedness to other creditors.

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[3] Commentary on the 2008 Act, Volume 2, Issue 15, APP1 – 67 [Issue 11].

[50] In its answering affidavit, the deponent states under oath the following:

> ***"[44.1] I admit that the Respondent is facing financial difficulties but I must stress that this has been the case since the Applicant first concluded the MOU."***
>
> ***[44.2] The entire purpose behind the First and Second Agreements was to diversify the Respondent's business and return the Respondent to its previous profit levels. The Applicant saw an opportunity in the respondent at the time and it decided to invest and grow the business which it purposefully neglected to do...***
>
> ***[44.3] Notwithstanding the difficult financial position of the Respondent, no other creditors have sought to take any steps in claiming money from the Respondent for payment, by virtue of the fact that the Respondent is to be paid by Denel within the near future... That the Respondent's business is not as profitable as it was does not constitute grounds for the Honourable Court to grant the Applicant any relief in the absence of a bona fide claim by the Applicant against the Respondent[4].***
>
> ***[44.4] I deny that the Respondent is insolvent. The Respondent has made the necessary arrangements with creditors and will likely restore its business operations in the coming months.[5]***
>
> ***[45.1] I admit that the Respondent's workforce has had to be reduced but not for reasons proffered by the Applicant. The Respondent's contract with General Electric South Africa (Pty) Ltd ("GE") has come to an end. Many of the workers the Respondent has had to let go were contract workers...***
>
> ***[45.2] ..., at the end of June 2018 the Respondent had 87 permanent employees. In contrast to the Respondent's peak during October 2017, when 94 permanent employees were employed...[6]."***

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[4] It was submitted on behalf of the applicant that, to the extent that the applicant was able to demonstrate to this honourable Court, its *bona fide* in pursuing its claim against the respondent, then there ought not to be any legal impediment for the grant of the order sought.

[5] The answering affidavit was deposed and commissioned on 6th August 2018 and as at the date of hearing of the present application, no supplementary affidavit by the respondent was handed in to demonstrate the changed financial position (to the better) of the respondent.

[6] The respondent's averment is made notwithstanding the fact that on the respondent's own version, at the height or during the peak of the respondent's business, the respondent has had to let go contract workers employed which, according to the respondent, amounted to R150 million worth of contract with GE.

[51] Importantly, notwithstanding its denial of the loan agreement, the respondent does not explain in its answering affidavit how it intended to pay the balance of R1.8 million less R305 000.00 that was paid in September 2017.

[52] It is important to also take cognisance of the fact that the loan agreement is said to have been concluded on 13th January 2017 and the part payment of R305 000.00 was only effected in September 2017. On that score, the respondent was hard pressed to explain why it made a part payment of R305 000.00 if such payment was not made consequent upon conclusion of the loan agreement.

[53] The test for commercial insolvency was aptly laid down in ***Ex Parte Lebowa Development Corporation Ltd***,[7] in particular the Court said the following:

> *"...*
>
> 1. ***If it can be proved that a company's liabilities exceed its assets (i.e. that it has lost its issued capital and more) it is properly described as insolvent, and it is liable to be wound up on the ground now provided by s 344(f) read with s 345(1)(c) of the Companies Act, viz that the company is unable to pay its debts. (Indeed, a company is liable to be wound up before it is insolvent in this sense, and whilst its assets still exceed its liabilities by an amount equal to 25 % or less of the issued share capital, for s 344(e) provides that a company may be wound up if 75 % of its issued share capital has been lost. This is obviously a provision designed to enable creditors of a company which appears to be heading for insolvency to have it wound up whilst there is still a good chance of being paid 100 cents in the rand from its assets. In those circumstances a winding-up order may issue despite the fact that the company may be meeting current demands as they fall due.)***
>
> 2. ***...***
>
> 3. ***A company may be wound up on the basis of commercial insolvency notwithstanding the fact that its assets may exceed its liabilities if it appears to lack the liquid assets with which to meet current liabilities on due date. In other words, a company which is actually solvent (in***

[7] 1989 (3) SA 71 (P) at 95B – 97J.

> ***that its assets exceed its liabilities) may nevertheless be commercially insolvent in that it appears to lack the liquidity to meet current demands...".***

[54] I am therefore satisfied that the applicant has, indeed, discharged its *onus* for the grant of the relief sought in the notice of motion albeit a provisional winding-up order.

[55] I am further satisfied that it is just and equitable that the relief sought in the notice of motion be granted based on what I have stated above. Furthermore, counsel for the applicant also drew my attention to the fact that the respondent continues to trade in circumstances where it seeks to get business from the State and in the process the respondent's letterhead continued to record Messrs Kotze, Magubane and Mr Khumalo as directors of the respondent in circumstances where they had resigned and the fact that Mr Magubane had resigned and is now deceased.

[56] The upshot of the applicant's argument is that the said three gentlemen concerned have stood sureties for the debts of the respondent and for as long as the respondent is allowed to trade, then there exists a potential financial prejudice that may befall them (in the case of Mr Magubane, his estate) in the event the winding-up order is not granted or should other creditors obtain a similar order in circumstances where they all stood as sureties (for the debts of the respondent).

[57] Counsel for the respondent referred me to an authority of ***Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another***,[8] for the proposition that notwithstanding the fact that a litigant may have annexed a document in its affidavit, the fact that a portion that is being relied upon by a litigant concerned is not specifically spelled out in the affidavit, the Court must ignore or reject such an annexure. It is, indeed, so that the Court in that matter held that it is impermissible in our law to decide a matter on the basis of a point not stated in the affidavit but merely recorded in the annexure to an affidavit but which is not covered in the relevant affidavit concerned.[9]

[58] With respect, the ratio referred to in ***Genesis*** (supra) does not find application in the present matter based on the fact that the applicant has pleaded that it relies on the oral agreement which was concluded between the parties on 13th January 2017 for an amount of R1.8 million and interest was to be the legal rate of interest and nothing more. In its answering affidavit, as I have pointed out, the respondent approbates (accepts) and reprobates (denies) the existence of the loan agreement, but significantly the applicant has pleaded all the material terms of the loan agreement in support of its case. The applicant's attorneys' letter of 18th June 2018 was annexed in the founding affidavit (marked "**D**") in the context of demonstrating the dispute regarding the validity of the shares agreement.

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[8] 2017 (6) SA 1 (CC) at para. 169 to 171

[9] Para. 171 of the ***Genesis*** (supra) judgment.

[59] Counsel for respondent also referred me to a case of ***Basson v Chilwan and Others***[10] where the Court stated its unpreparedness to have regard to the allegations made or raised for the first time in the replying affidavits.

[60] It is again important to highlight the fact that the applicant's case was made in the founding affidavit, as I have explained above and the applicant does not rely, for the grant of the relief sought, on what is contained in the replying affidavit. The deponent to the founding affidavit has explained why other agreements are not relevant. The respondent, in its answering affidavit, referred to other agreements which were not referenced or pleaded stated in the applicant's founding affidavit in circumstances where it was clear that the applicant's cause of action is the verbal loan agreement and nothing more. In the replying affidavit, the applicant then dealt with various other agreements and issues raised in the answering affidavit.

Conclusion

[61] In the result, I find that the has made out a case for the grant of the relief sought in the notice of motion albeit a provisional winding-up order and I hereby make the following order:

(a) the above mentioned respondent is hereby placed under provisional winding-up;

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[10] 1993 (3) SA 742 (AD) at 753F.

(b) all persons who have a legitimate interest are called upon to put forward their reasons why this Court should not order the final winding-up of the respondent on 05/02/2019 at 10:00 am or so soon thereafter as the matter may be heard;

(c) a copy of this order must be served on the respondent at its registered office;

(d) a copy of this order must also be published forthwith once in the *Government Gazette*;

(e) a copy of this order be forthwith forwarded to each known creditor by prepaid registered post or by electronically receipted telefax transmission;

(f) A copy of the provisional winding-up order must be served on:

(i) every trade union (if any) at the respondent;

(ii) the employees of the respondent by affixing a copy of the application to any notice board to which the employees have access inside the respondent's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the respondent conducted any business at the time of the presentation of the application; and

(iii) the South African Revenue Service.

E Mokutu

Acting Judge, High Court

Johannesburg

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Ref: F Barnard/Sanet/TEC3/27/T1208

Date of trial: 30 November 2018

Date of judgment: 06 December 2018