REPUBLIC OF SOUTH AFRICA

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

CASE NO: **013319/17**

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

26/11/2018 Keightley
DATE SIGNATURE

In the matter between:

ABSA BANK LTD Applicant

and

57 HYDE CLOSE ESTATE CC 1st Respondent

JP KRUGERRAND DEALS (PTY) LTD 2nd Respondent

JUDGMENT

KEIGHTLEY J

1. The applicant in this matter, Absa Bank Limited ("Absa") applies for the final winding up of the respondent, 57 Hyde Close Estates CC ("Hyde Close"). A provisional winding-up order was granted previously by this court, and this judgment deals with the issues raised on the return day. Absa avers that Hyde Close is unable to pay its debts, as envisaged in sections 344(f) and 345(1)(a) and (c) off the Companies Act 61 of 1973, read with the relevant provisions of the Companies Act 71 of 2008, and sections 66(1), (2) and 69(1)(a) and (c) of the Close Corporations Act 69 of 1984.

2. Absa relies on a suretyship agreement undertaken by Hyde Close in terms of which it bound itself as surety and co-principal debtor for the debts of an entity, JP Krugerrand Deals (Pty) Ltd ("the principal debtor"), to Absa. Absa claims that the principal debtor is indebted to it in terms of an overdraft facility granted to it in March 2016 ("the facility").[1] The amount of the debt owed by the principal debtor, and hence by Hyde Close as surety, is averred by Absa to be R29 million. I should add, by way of introduction, that the principal debtor has been placed under business rescue, and one Mr Klopper, has been appointed as the business rescue practitioner.

3. On 22 May 2018, this court granted a provisional order placing Hyde Close under winding up. The order was made in terms of a written judgment handed down by Mudau J. The return day of the provisional order was placed on the roll for hearing on 1 August 2018. I am advised that at that stage the principal debtor (represented by Mr Klopper) sought to intervene in the proceedings, and to be afforded a postponement for purposes of filing an affidavit opposing the final winding up of Hyde Close. An order was granted by the court on that occasion postponing the matter, extending the rule *nisi* and giving the principal debtor, as well as the other two parties, the opportunity to file further affidavits.

4. The principal debtor duly filed its affidavit opposing the winding up on grounds I will deal with later in my judgment. Absa filed an answer to its affidavit, and Hyde Close also filed an affidavit in which it essentially made common cause with the principal debtor. Before dealing with the substantive merits of the case, there are certain preliminary issues to consider.

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[1] The facility letter includes, in addition to the overdraft facility, a number of other facilities extended to the principal debtor. However, Absa's case is premised on the alleged debt due in respect of the overdraft facility.

PRELIMINARY ISSUES

5. When the matter came before me Absa raised as a first preliminary issue the question of whether the principal debtor ought to be permitted to intervene in the proceedings. Absa submitted that in order to intervene the principal debtor would either have to be a creditor of Hyde Close, or would have to hold some other direct and substantial interest in the winding-up proceedings. While Absa acknowledged in its own founding affidavit that the principal debtor held a loan account in its (the principal debtor's) favour as against Hyde Close, Absa pointed out that both Hyde Close and the principal debtor denied that Hyde Close was indebted to the principal debtor. This, submitted Absa, ruled out an intervention based on the principal debtor being a creditor of Hyde Close. Absa also submitted that the principal debtor had not shown any other direct and substantial interest in the application to wind up Hyde Close.

6. The principal debtor, on the other hand, argued that in granting the order of 1 August 2018 this court had accepted that the principal debtor had standing to intervene in these proceedings, and that this question was no longer open for debate. Absa took issue with this submission, arguing that the question of the principal debtor's intervention had been left open for consideration by the court on the return day.

7. In view of the approach I adopt to the remainder of the issues raised, it is not necessary for me to decide this matter. I will proceed on the assumption (without deciding) that the order of 1 August 2018 gave the principal debtor leave to intervene.

8. A second preliminary issue was raised by the principal debtor. In its heads of argument, the principal debtor foreshadowed a possible application on its part to strike out certain material from Absa's replying affidavit to the principal debtor's affidavit. The material in question related to admissions made by Mr Klopper as to the existence of

the principal debtor's debt to Absa in affidavits filed in this court in the business rescue proceedings. Extracts from these affidavits were also attached to Absa's affidavit. The principal debtor indicated in its heads of argument that if I did not strike out this material it would apply for a postponement and for leave to file a further affidavit in order to respond to it.

9. At a preliminary stage of the proceedings I indicated that I would not be prepared to grant a postponement of the matter: there had been one postponement already and a further postponement would not serve the interests of justice. In addition, if Mr Klopper felt that he needed to respond to the allegations. the most practical and time effective way of proceeding would have been for him to prepare a supplementary affidavit and then simply to have asked my leave for it to be accepted at the commencement of the hearing. Counsel for the principle debtor did not press the point of a postponement.

10. As to the question of whether the allegations concerning Mr Klopper's previous admissions of the existence of the debt ought to be permitted as evidence, or disregarded, counsel for the principal debtor submitted that by including the allegations in its supplementary replying affidavit Absa was relying on new evidence which had been available to it when it drafted its founding affidavit. The principal debtor argued that Absa gave no explanation as to why it had not included this evidence in its founding affidavit. It contended that Absa ought not to be permitted to include this evidence in its reply, as this amounted to nothing short of litigation by ambush in respect of the respondents.

11. In my view, there are at least two reasons why the material complained of is admissible. In the first instance, it is quite plain why Absa introduced this evidence in its final affidavit: it was in direct response to the allegation made by the principal debtor that the principal debtor's debt was not due and payable. Once the principal debtor (represented by Mr Klopper) placed the debt in dispute, Absa was within its rights to produce

evidence of Mr Klopper's previous admission of the debt. This evidence was produced by Absa directly in response to the Mr Klopper's own averment. In these circumstances, it is difficult to understand how Absa ought to have foreseen, at the time it was preparing its founding affidavit, and when the principal debtor was not even a party to the proceedings, that it would have to produce the evidence.

12. The second reason for treating the evidence as admissible is that it is relevant to the *bona fides* of the principle debtor's defence that its debt is not due and payable to Absa. The "Badenhorst principle"[2] lays down that winding-up proceedings ought not to be resorted to as a means of enforcing payment of a debt, the existence of which is *bona fide* disputed on reasonable grounds, as winding-up proceedings are not designed for the resolution of disputes as to the existence or not of a debt. The principle debtor in this case disputes that its debt (and hence Hyde Close's obligation as surety) is due and payable. Mr Klopper's previous admissions under oath to the contrary are relevant to my consideration of whether the principal debtor is *bona fide* in disputing its debt.

13. Before leaving the preliminary issues, it is necessary to deal with a third one, this time raised by Hyde Close. It argued that certain aspects of Absa's replying affidavit should be struck out. The offending parts of the replying affidavit (there was no formal application to strike out, nor were the specific paragraphs in question identified by Hyde Close) relate to Absa's averments that the suspensive conditions in the facility agreement were fulfilled. Hyde Close's complaint is that in the founding affidavit, Absa averred that the suspensive conditions were either fulfilled or waived, whereas in the

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[2] From the judgment in *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T) at 347-8

replying affidavit, it avers that they were fulfilled. Hyde Close argues that this is tantamount to it making out a new case in reply, and changing its cause of action.

14. There is no merit in this argument. Where a party relies on statements in the alternative in a founding affidavit (viz. that suspensive conditions have been either waived or fulfilled), and is then challenged to state on what it relies, and to provide details in support of that reliance, it can hardly be accused of making out a new case in reply when it responds to this challenge. If one reads the answering affidavit of Hyde Close, it issues this challenge to Absa, and all Absa does in its replying affidavit is to state that it relies on the fulfillment of the conditions, and it provides details of how the conditions were fulfilled. Hyde Close could not possibly have been prejudiced by Absa's averments in its replying affidavit: the details provided in the replying affidavit made it clear to Hyde Close what case it had to meet. Indeed, as I discuss later in my judgment, Hyde Close advanced various submissions disputing that the conditions had been fulfilled.

DEFENCES RAISED BY HYDE CLOSE

15. Hyde Close raises the following two defences:

    (a) It disputes the validity of the facility agreement between the principal debtor and Absa on the basis that that the suspensive conditions were not fulfilled ("the suspensive conditions defence").

    (b) It disputes the validity of the suretyship agreement between Hyde Close and Absa on the basis that the intention of the parties was that Mr Salilidis (who is the sole member of Hyde Close) would enter into the suretyship agreement in his personal capacity, and not as a representative of Hyde Close ("the invalidity of the suretyship defence").

16. Hyde Close submits that these defences are raised *bona fide* and are reasonable, and that based on the Badenhorst principle, the winding-up application should be refused. It points to the established case law which provides that:

> "The *onus* on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on *bona fide* and reasonable grounds."[3]

And further:

> "(The respondents) do not,.. have to prove the company's defence in any such proceedings. All they have to satisfy me of is that the grounds which they advance for their and the company's disputing these claims are not unreasonable ... It seems to me to be sufficient for the trustees in the present application, as long as they do so *bona fide* ... to allege facts which, if proved at a trial, would constitute a good defence to the claims made against the company."[4]

17. Hyde Close submits that the two defences it raises fall within the confines of these principles. I consider each the defences in turn, starting with the suspensive conditions defence.

18. At the outset, it is noteworthy that in its answering affidavit Hyde Close relies on a bald denial that the suspensive conditions in the facility agreement were met. It does not indicate which of the conditions were not met, or say why they were not met. This is despite the fact that Hyde Close had the facility agreement at its disposal as an attachment to the founding affidavit. Furthermore, the deponent to the answering affida-

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[3] *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 980D-F, cited in, among others, *Feshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* [2016] ZASCA 168 (24 November 2016), at [4]

[4] *Hulse-Reutter & another v HEG Consulting Enterprises (Pty) Ltd (Lane and Fey NNO intervening)* 1998 (2) SA 208 (C) at 219E-20A, cited in *Freshvest Investments*, above, at [6]

vit on behalf of Hyde Close is Mr Salalidis. Mr Salalidis is also listed as the director of the principal debtor, and he in fact signed acceptance of the facility letter on behalf of the principal debtor. Mr Salalidis confirms that he is the controlling mind of both Hyde Close and the principal debtor. One would have expected that if Mr Salalidis (in his capacity as the despondent to the answering affidavit on behalf of Hyde Close) genuinely intended to dispute the validity of the facility agreement (which he had signed on behalf of the principal debtor) he would at least have been able to identify in his answering affidavit what conditions had not been fulfilled and on what basis it was alleged that they were not fulfilled. Unfortunately, these expectations are not met in the answering affidavit.

19. It was only in Hyde Close's heads of argument that an attempt was made to put flesh on the bones of this defence. There, Hyde Close pointed to clause 2.1.1 of the facility letter. This clause appears under the heading "suspensive conditions". It requires the principal debtor to:

> "sign and return the original or a copy of this Facility Letter and Facility Schedule together with a certified copy of a board resolution from the Borrower and a signed copy of the requisite indemnity to supply documentation to, and communicate and transact with, the Bank by electronic means from the Borrower (if applicable) ... ." (Words in brackets in the original)

20. Absa contended that the last requirement was not applicable to the facility in question. Hyde Close raises three arguments as regards the other requirements in this clause. It points to annexure "RA1" to the replying affidavit, which is the "*Resolution by Directors for an Overdraft*". The document goes on to say that it is an "*extract from the minutes of a meeting of the directors*" of the principal debtor. It notes that it was:

"Resolved: That Absa Bank Limited ("the Bank") is hereby requested and authorised to grant the Company overdraft facility on its cheque account(s) to maximum amount of R28, 500, 00 ... from time to time, provided that the facilities shall be at the Bank's discretion until this authority is revoked in writing."

21. Hyde Close contends, in the first place, that this is not a board resolution, as required under clause 2.1.1, as it is only an extract from the minutes of a meeting of directors. There is no substance to this complaint: at the bottom of the document, it is noted that it is a "*true extract from the minutes*". Read as a whole, it is quite clear that at a meeting of the directors held on 16 March 2016, it was resolved to enter into the facility agreement with Absa (the amount of the facility accords with the amount in the facility letter), that such a resolution was adopted, and that, for purposes of providing Absa with proof of such a resolution, the Chairman/Secretary (once again it appears to Mr Salalidis' signature appended in this capacity) provided the bank with this extract from the minutes of the meeting. It is not clear why anything more would have been required from the principal debtor to satisfy this particular suspensive condition. The complaint would not provide Hyde Close with a defence if the matter were to be tested at trial, and thus it cannot establish a reasonable defence to the winding-up application.

22. The second leg of Hyde Close's defence under clause 2.1.1 is that the resolution attached to the replying affidavit was not a certified copy, as required by that clause. Again, there is no substance to this complaint: the chairman/secretary signs the resolution on 16 March 2016, and in doing so, he signifies that the document is: "*CERTIFIED A TRUE EXTRACT FROM THE MINUTES*" (my emphasis). Absa regarded this as compliance with its own requirements under the suspensive conditions. Mr Salalidis, in either his capacity as a representative of Hyde Close, or as a director of the principal

debtor, does not dispute that the resolution was taken, nor that RA1 was, indeed, certified by him to be a true extract from the minutes. Once again, this is not a defence that would be upheld as valid if the issue were to be tested at trial, and it does not constitute a reasonable defence for purposes of opposing the winding-up application.

23. Thirdly, Hyde Close argues that there is no evidence that the original facility letter was Absa "*returned .... together with*" the board resolution. Hyde Close does not dispute that these documents were returned to Absa: copies of them are attached Absa's affidavits, and Absa expressly confirms that they were returned. Hyde Close's point seems to be that clause 2.1.1 must be interpreted to mean that there will be compliance only if all the documents referred to are provided to Absa at the same time. It does not say why this would serve the purpose of the suspensive conditions, or why it would make business sense to insist that they were returned in one pack, as it were. I can think of no reason why such a constrained meaning should be given to this requirement. The phrase is certainly broadly enough stated to mean that the facility letter and schedule and the resolution should be provided to Absa. Surely, the purpose of the requirement is to signify that only after all of the documents had been provided, could the principal debtor expect that Absa would make the facility available. I cannot see that this purpose would be served by an interpretation requiring all the documents to be provided at the same time. In my view, once again this is not a defence that could reasonably prevail at trial.

24. As to clause 2.1.2 of the facility agreement, Hyde Close also raises defences in similar vein to those raised in respect of clause 2.1.1. Clause 2.1.2 is also a suspensive condition relating to the collateral required by Absa. It requires the borrower (the principal debtor) to, among other things, provide Absa with certified copies of any resolutions

required in this regard, and to furnish Absa with duly executed originals of the collateral in question.

25. Hyde Close makes the same arguments regarding the resolutions in relation to the collateral as it did about the resolution relating to the acceptance of the facility. For the same reasons as stated in regard to the latter, I find that there is no substance to these submissions. Absa confirms in its replying affidavit that "*the collateral and resolutions required in terms of clause 2.1.2 of the Facility Letter, as read with clause 3.3, were indeed furnished to the applicant*". Hyde Close cannot dispute this. Indeed, what it does not disclose to the court is that in separate proceedings to perfect Absa's security under a notarial bond (as one of the forms of collateral held by it under the facility letter), Absa attached the relevant security documents to its founding affidavit and served them on Mr Salalidis. This was in February 2017. Mr Salalidis must have been aware that Absa had indeed been furnished with the security documents establishing its collateral under clause 2.1.2, and that it was acting to enforce its rights in terms of that collateral. This places Hyde Close's defence in relation to clause 2.1.2 in poor light, and raises material questions as to the *bona fides* of Mr Salalidis in raising this defence. For these reasons, I am not persuaded that the defences it raises in respect of clause 2.1.2 of the facility agreement are *bona fide*, or reasonable.

26. I turn now to the invalidity of the suretyship defence raised by Hyde Close. By way of background, I record that it seems Mr Salalidis and his entities (Hyde Close and the principal debtor included) have a long-standing banking relationship with Absa going back a number of years. The history of the suretyship relied on by Absa against Hyde Close goes back to 2012, when Absa extended an earlier facility to the principal debtor ("the 2012 facility"). On 31 October of that year, Absa avers that Hyde Close entered into a suretyship agreement as surety and co-principal debtor jointly and severally with

the principal debtor "*for the repayment on demand of any sum or sums of money, which the debtor owes or may hereafter owe to the bank from whatever cause arising*". Subsequently, the present facility agreement was concluded between Absa and the principal debtor, in 2016. In clause 3.2.9 of the present facility agreement, Hyde Close's 2012 suretyship was listed as "*existing collateral*" held by Absa in respect of the principal debtor. It is this suretyship that Absa contends is the basis for Hyde Close's indebtedness to it.

27. What Mr Salalidis says in his answering affidavit is that he met with a representative of Absa, one Mr Fourie, on 31 October 2012 to execute the suretyship agreement. Mr Fourie informed Mr Salalidis that Absa required a suretyship from him in his personal capacity as collateral for a facility granted to the principal debtor in 2012. He was handed the suretyship forms, but these were in blank. Clause 1, which described the surety as: "*Ioannis Salalidis - .... acting on behalf of 57 Hyde Close Close Estate CC*" had not yet been filled in. Mr Fourie told Mr Salalidis that he would attend to the insertion of the relevant details (in particular Mr Salalidis' name in his personal capacity) later. Similarly, Mr Fourie told Mr Salalidis that he should sign next to clause 20, and that Mr Fourie would fill in the relevant details required afterwards. This is the clause that describes whether the surety is unlimited (i.e. for all the liabilities of the principal debtor now or in the future) or whether it is limited to a certain amount. Mr Salalidis says that the suretyship he undertook was for a limited amount. On the basis of these averments, Mr Salalidis contends that it was the intention of both him and Absa that the suretyship would be executed by Mr Salalidis personally, and not as a representative of Hyde Close. Further, that the suretyship was to be limited only to the facilities extended to the primary debtor under the 2012 facility agreement, and not for any fu-

ture liability. For these reasons, he says, the suretyship in the name of Hyde Close is invalid.

28. In its replying affidavit, Absa secured a confirmatory affidavit from Mr Fourie. He disputes Mr Salalidi's version of events in no uncertain terms as being patently untrue. He avers further that at the time he dealt with Mr Salalidis and Hyde Close in 2012 he was a "*relationship executive*". According to Mr Fourie, it is not possible for someone with that job description to procure a signed, blank deed of suretyship and thereafter to insert material portions of the document in typed format. I note that the portions of the suretyship alleged by Mr Salalidis to have been inserted later are indeed in typed format, rather than manuscript.

29. Absa also points out that it had no need to secure a personal suretyship from Mr Salalidis in October 2012. This is because at that stage it already held an unlimited suretyship from him in his personal capacity in respect of the facility extended to the principal debtor under the 2012 facility. Indeed, Mr Salalidis attached to his answering affidavit on behalf of Hyde Close a copy of the 2012 facility agreement. It records that Absa held a personal, unlimited suretyship by "*Mr I Salalidis, supported by Cession of Loan account*" for the facility extended to the principal debtor.

30. Absa says that it also already held an unlimited suretyship from Hyde Close at the time the 2012 facility was extended to the principal debtor. This is also recorded in clause 3.1.4 of the 2012 facility letter. However, according to Absa, this existing suretyship by Hyde Close was too limited in that it did not include a cession of loan accounts between various of Mr Salalidis' entities. Accordingly, in clause 3.2.1 of the 2012 facility agreement, it was recorded that further cross suretyships were to be provided as collateral by these entities to include a cession of loan accounts. Hyde Close was one of the entities listed in respect of which a cession of loan accounts was required. Absa

avers that it was for this reason that Absa required Hyde Close to enter into a new suretyship agreement in October 2012. That suretyship agreement included, in clause 4, a cession of loan accounts. In the original suretyship executed by Hyde Close, and held by Absa already at the time the 2012 facility was extended, this same clause 4 was deleted. This is confirmed by a copy of the original cession to Absa's replying affidavit.

31. The upshot of Absa's version in this regard is thus that there is no truth to Mr Salalidis' version that Mr Fourie misled him about the identity of the surety under the 2012 suretyship agreement. Not only does Mr Fourie deny Mr Salalidis' version, but, significantly, on the one hand, there was no reason for Absa to obtain another personal surety from Mr Salalidis in 2012, and, on the other hand, there was every reason to obtain a new (and extended) suretyship from Hyde Close at that time. Absa contends that for this reason, it made perfect sense for the parties to agree that Hyde Close, and not Mr Salalidis personally, should enter into the 2012 suretyship. In the circumstances, Absa submits that this is one of those cases where the respondent's version is so patently implausible or untenable as to warrant rejection.

32. I accept Absa's submissions in this regard. What I find significant is that the paper trail from the original suretyship agreement entered into by Hyde Close prior to 2012, to the facility agreement in 2012, to the suretyship agreement of 2012, to the 2016 facility agreement, lends complete evidential support to Absa's version that both Absa and Hyde Close (through Mr Salalidis) intended the surety under the 2012 suretyship agreement to be Hyde Close, and not Mr Salalidis personally. On the contrary, there is no evidence to support Mr Salalidis' version that he signed a blank suretyship form and that he understood he was entering into a personal limited suretyship agreement. Absa already had an unlimited suretyship from him. It must have been obvious to him

that it would not require another. I also reject his version as untenable that he signed a suretyship form in blank. I note that in signing the suretyship agreement on behalf of Hyde Close Mr Salalidis expressly confirmed in clause 21. that the suretyship:

> *"was properly completed at the time of signature especially with reference to the name of the debtor and clause 20; and is in so far as no amount is specified in clause 20 as a limit if my/our liability, my/our liability shall be for an unlimited amount; and is in all respects in accordance with the agreement between me/us and the bank is not as a result of a common mistake between me/us and the bank, not representative of our true intentions."*

In my view, it is absolutely untenable that Mr Salalidis, who is by all accounts a seasoned businessman (and on his own account the controlling mind of both Hyde Close and the principal debtor) would have signed a blank suretyship form, knowing that he was confirming that the form was complete in these critical respects. Mr Salalidis must be held to that which he signed, and his version to the contrary is, in my view, without *bona fides*.

33. I accordingly find that Mr Salalidis' version as to the circumstances in which he signed the 2012 surertyship falls to be rejected: it is patently implausible and untenable and is not raised *bona fide*. It does not provide a *bona fide* or reasonable defence to the debt arising out of Hyde Close's suretyship obligations.

34. I conclude that Hyde Close has failed to establish that it has a *bona fide* and reasonable defence to its indebtedness to Absa under the suretyship agreement. Of course, if I am persuaded otherwise by any of the defences raised by the principal debtor, this will inure to the benefit of Hyde Close, as surety. I turn to consider those defences.

DEFENCES RAISED BY THE PRINCIPAL DEBTOR

35. The principal debtor raises three defences in respect of the debt allegedly due by Hyde Close under the suretyship agreement:

    (a) In the first instance, it contends that the principle debt is not due and payable because Absa did not lawfully make demand for its repayment by giving due notice to the principal debtor to remedy the default before calling up the debt ("the notice defence").

    (b) In the second instance, it contends that the application for winding up is "*stale*" ("the stale application defence").

    (c) In the third instance, it contends that there may be new employees who have not received the requisite notice of the winding up proceedings ("the new employees defence")

36. As regards the notice defence, the principal debtor points to the founding affidavit in which Absa contended that it (the principal debtor) breached its repayment obligations and for this reason the facility was not renewed. Absa averred that it addressed a letter of demand to the principal debtor on 12 December 2016 cancelling the overdraft and demanding full payment with immediate effect ("the 12 December letter"). This letter also served the purpose of section 345(1)(a) of the Companies Act. Absa averred that despite this demand, the principle debtor remained indebted to it. Absa duly issued a letter of demand to Hyde Close as surety, demanding payment from it of the amount owed by the principal debtor. The letter of demand to Hyde Close also served the purpose of section 345(1)(a) of the Companies Act insofar as the winding-up application was concerned.

37. In its 12 December letter, Absa advised the principal debtor as follows:

(a) The limit of the facility had expired on 30 November 2016 as the principal debtor had failed to furnish Absa with its audited financial information in order for Absa to review the facility.

(b) In terms of clause 6.1 of the facility agreement the facility was payable on demand and could be cancelled with immediate effect.

(c) After considering and reassessing the principal debtor's profile, Absa had decided to cancel the facility. The letter was to serve as notice of the cancellation.

(d) Absa demanded immediate repayment of the outstanding amount of R29, 002, 364. 48.

38. Clause 6.1 of the facility agreement provides that:

"**Cancellation**

6.1 Either party may at any time cancel any of the Facilities with immediate effect or according to any notice period stipulated in the relevant Product Agreement, by written notice to the other. Upon such notice being given, the Borrower shall re-pay all outstanding amounts owing to the Bank."

39. Of relevance, too, is clause 26.2 of the conditions contained in the Banking Facility Schedule ("the schedule") attached to the facility agreement. It provides that:

"Notwithstanding anything to the contrary in this Banking Facility Letter, all Over-draft Facilities are repayable by the Borrower on demand by the Bank. ..."

40. Both of these provisions were identified as material terms and conditions of the facility agreement in the founding affidavit. The founding affidavit also identified the breach provisions in the schedule as being material. In particular, clause 13.1 states that:

> "If the Borrower fails to remedy an event of default (where capable of remedy) in respect of Facilities that are not demand Facilities within 2 (two) business days of having been given notice by the Bank calling upon the Borrower to do so, or if the event is not capable for remedy and the Bank gives notice that such event has occurred, then the Bank may elect to exercise any of its rights in terms of this Banking Facility Letter ... or in law."

41. The essence of the principal debtor's case is that because Absa relied on a breach by the principal debtor, it's election to cancel the agreement is constrained by the notice requirement in clause 13.1. It submits that the right of cancellation provided for in clause 6.1, and the right of Absa to demand immediate payment of overdraft facilities in clause 26.2, are limited by clause 13.1. They must be read, so the argument goes, as giving Absa the right to cancel, or to demand immediate payment, only after the two days' notice to remedy the breach is complied with by Absa. As Absa did not give the principal debtor two days' notice to remedy its default, it could not lawfully have cancelled and demanded immediate repayment of the facility. For this reason, the principle debtor's debt is not yet due and payable.

42. I heard quite extensive argument from both counsel for Absa and counsel for the principal debtor on the correct interpretation of the relevant provisions of the facility agreement. I have also had cause to look more closely at clause 26.2, and provisions related to that clause. It is common cause that the facility in question in this case is what the agreement describes as an "*overdraft facility*". It is also common cause that the facility letter identifies no less than six facilities extended to the principal debtor.

The overdraft facility is the first, and the others include, for example, business credit card facilities, fleet card facilities and so forth. Apart from the overdraft facilities, all the other facilities were identified as being subject to specific product agreements. As I have already noted, Absa relies on the overdraft facility as giving rise to the debt underpinning the winding-up application.

43. Turning to clause 6.1, on the face of it, and in clear terms, it gives either party the right to cancel the agreement simply on written notice. Save for those facilities where a specific notice period is prescribed in a specific product agreement, clause 6.1 does not require any notice period before the right to cancel may be exercised. It is clear, too, that a cancellation under clause 6.1 is not dependent on a breach by the other party. In its letter of demand of 12 December 2016, Absa specifically relied on its right under clause 6.1 to cancel the agreement, rather than on any specific breach by the principal debtor.

44. It is so that in its founding affidavit, Absa refers to a breach by the principal debtor of its repayment obligations. While the averment made in the founding affidavit is in general terms and is not clearly stated, what is clear from the relevant passage in the founding affidavit is that Absa relied specifically on its 12 December letter for the cancellation of the facility. As I have indicated, that letter placed reliance on clause 6.1 for the cancellation.

45. Is there merit in the principal debtor's argument that because of the reference to "*breach*" in the founding affidavit, clause 13.1 of the facility agreement overrode, as it were, Absa's right to cancel on notice under clause 6.1? In my view, the argument is without merit. In the first place, clause 6.1 is not made subject to the two day notice period prescribed in clause 13.1. If clause 13.1 was intended to override the general right of either party to cancel on notice in clause 6.1, then surely the latter clause

would have made this clear? The object of clause 6.1 is to provide either party with an "out" regardless of whether breach has occurred, and without any notice period. The only limitation to this is where a specific product agreement stipulates a notice period. As I have indicated, the facility is not subject to a special product agreement.

46. There is another, and in my view, decisive, reason why the principal debtor's argument must fail. Clause 26.2 is an important provision in this regard. Clause 26 is specifically headed "*Overdraft Facility Terms*". There is an unnumbered paragraph before clause 26, which provides that: "*Except for the Revolving Loan Facilities described in clause 28, all Facilities in this section are demand Facilities*" (my emphasis). Clause 26.2 then makes it plain that as regards overdraft facilities (like the facility that is the subject matter of this dispute), they are payable on demand, "*notwithstanding anything to the contrary*" in the facility agreement.

47. In clear terms then, overdraft facilities, being "on demand facilities", have a special status as far as the bank's entitlement to demand payment is concerned. The principal debtor argued that one must read into "*on demand*" in clause 26.2 that the demand must be lawful: i.e. in cases of breach, the two-day's notice requirement applies and if that is not complied with, the demand under clause 26.2 will not be lawful. Apart from the clear interpretational difficulties with this argument, it is negated with reference to clause 13.1 itself. It is as well to repeat clause 13.1: "*If the Borrower fails to remedy an event of default ... in respect of Facilities that are not demand Facilities within two business days of having been given notice by the Bank calling upon the to do so ... then the Bank may elect to exercise any of its rights in terms of this Banking Facility Letter ....* ." I refer in particular to the portion of the clause I have underlined. As I explained earlier with reference to the unnumbered paragraph preceding clause 26, overdraft facilities are demand facilities. As such, the stipulation of a two day notice

period in clause 13.1 does not apply to, and does not circumscribe Absa's right under clause 6.1 to cancel immediately on written notice, or its right under clause 26.2 to render the overdraft facility immediately payable on demand.

48. If the agreement is read as a whole, it gives the parties broader entitlements to cancel the facilities immediately, even in the absence of breach. Furthermore, and in particular with the overdraft facility, Absa may call up payment immediately on demand, and such entitlement is expressly not limited by the notice period that would otherwise apply in respect of breach.

49. I conclude, for all of these reasons, that clause 13.1 did not limit Absa's right to cancel the agreement and to call up payment of the outstanding amount. Absa was entitled, on the basis of clause 6.1, and clause 26.2 to cancel the agreement immediately on written notice, which it did. It was also entitled to call up the full amount of the debt which amount became, on demand, due and payable. In the circumstances, the principal debtor's interpretation would not, if the matter proceeded to trial, provide a defence to the principal debt and hence, by extension, to Hyde Close's obligation as surety.

50. Turning to the "stale application" defence, the principal debtor relies on a decision of the KwaZulu-Natal High Court, *Air Treatment Engineering and Mainteance CC v PAC-Con Pharmaceuticals*,[5] in which it was held that a court should not grant an winding-up order in circumstances where there has been unreasonable delay in the proceedings. In that case, the matter was three years old, with the last affidavits having been filed years before. The present application was instituted in April 2017. Given that matter was opposed both at the stage of the provisional winding-up, and the return day, a de-

[5] [2016] ZAKZDHC 34 [25 July 2016] at paras [27] & [28]

lay of a number of months is entirely to be expected in a busy Division like this one. In fact, the last delay was caused by the principal debtor seeking to intervene. It did not do so early in the proceedings, but waited until the matter was set down for the return day hearing. This caused a further delay of the proceedings. It thus hardly lies in the mouth of the principal debtor to complain that the proceedings are stale. Whatever the circumstances may have been in the *Air Treatment case*, in my view there has not been unreasonable delay in the present matter rendering the application stale.

51. The final defence raised by the principal debtor is related to the latter defence, and relies on the same judgment. The principal debtor suggests that because of the lapse of time, it is likely that Hyde Close will have had a change in employees, and that it may well be that some of the new employees would not be aware of the application. The argument is made without any evidence to back it up at all. I also find it to be a strange point for the principal debtor to make: it is not its employees who are affected. If this were indeed the case, one would have expected that Hyde Close would have been better placed to make the argument. An abstract and tentative defence such as the one raised by the primary debtor on this score cannot establish a reasonable basis on which to prevent the confirmation of the provisional winding-up order, if the court is otherwise satisfied that such an order should be made.

52. For these reasons, I find none of the defences raised by the primary debtor find purchase. I am not persuaded that the primary debtor has shown that it has a defence constituting a *bona fide* and reasonable dispute of the primary debt that underpins the winding-up application.

THE REQUIREMENTS FOR WINDING UP

53. It follows from my findings above that the principal debt is due and payable to Absa; that the suretyship is valid; and thus that the debt relied on by Absa is indeed due and payable by Hyde Close under its suretyship obligations. This gives Absa the requisite *locus standi,* as a creditor, to pursue the final winding-up of Hyde Close, which has assumed liability for the debt under the suretyship agreement.[6] I am accordingly satisfied on this score.

54. On 4 January 2017 Absa caused to be delivered, by registered post, a letter of demand to Hyde Close, which letter included a notice under section 69(1)(a) of the Close Corporations Act. The letter advised Hyde Close that unless payment of the debt due was made within 21 days, Hyde Close would be deemed to be unable to pay its debts, and that a winding-up application could follow. Hyde Close failed to repay the debt or to compound it to the satisfaction of Absa within that time.

55. Absa submits that in accordance with section 68(1)(c) of the Close Corporations Act, read with section 344(f) and 345(1)(a) of the 1973 Companies Act, Hyde Close is deemed, in the circumstances, to be unable to pay its debts, and falls to be wound up. Although Hyde Close disputed its indebtedness, based on the defences it raised, I have rejected those defences. Hyde Close does not place any other evidence before me to rebut the presumption arising from the relevant sections that it is unable to pay its debts. In the circumstances, I find that Absa is entitled to seek Hyde Close's winding up on the basis that it is deemed to be unable to pay its debts.

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[6] See Henochsberg on the Companies Act, 71 of 2008 [Issue 15] Vol 2 APPI-48

56. Absa also submits that, in any event, Hyde Close is commercially and/or factually insolvent. It provides details of Hyde Close's property holdings and its mortgage bond and other debts (including the debt to Absa of some R29million). According to Absa, Hyde Close's total known debts amount to over R55million. Absa concedes that it does not have information as to the actual outstanding amounts due under the mortgage bonds, or a valuation for one of Hyde Close's properties. The most valuable property was purchased for R26million in 2016 and a mortgage bond of R17, 250, 000 was registered over it. The other property was purchased in 2004 for R1,3million. It is currently mortgaged to the tune of R3,5million. Even in the absence of the actual amounts outstanding on the bond, and the actual values of the properties, it is probable that their value nowhere near covers Hyde Close's debt.

57. In its answering affidavit Hyde Close fails to engage with these averments made by Absa regarding its assets and liabilities, except in the baldest of terms. It does not disclose the values of the properties, or the current mortgage bond balances. Although it claims to have a rent-paying tenant in the one property, it provides absolutely no details in this regard. It is so that an applicant for winding up must establish on a balance of probabilities that a respondent cannot pay its debts. In this case, Absa has placed sufficient evidence before the court to establish this as a probability. In the absence of any meaningful dispute raised by Hyde Close, and in the face of Hyde Close's essentially bald denials as to its inability to pay its debts, I must find that Absa has satisfied its onus in this regard. I accordingly conclude that in addition to being entitled to rely on s345(1)(a) as a basis for the winding up, Absa has also, and in any event, established a case for winding up based on section 345(1)(c).

58. It has been held that:

> "... generally speaking an unpaid creditor has a right *ex debito justitiae* to a winding-up order against a company unable to pay its debts."[7]

Further, that in these circumstances, the discretion of a court to refuse a winding up is a very narrow one.[8] I can find no reason to exercise my discretion against Absa in this case: it has established an inability on the part of Hyde Close to pay its debts, and the ordinary result should follow.

59. Finally, there is no real dispute that Absa has complied with the statutory formalities for winding-up.

CONCLUSION

60. For all the above reasons, I make the following order:

1. The above respondent is placed under winding up in the hands of the Master of the High Court;

2. The costs of this application are costs in the winding up of the respondent.

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[7] *Service Trade Supplies (Pty) Ltd v Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428
[8] *Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 662

R M, KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

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APPEARANCES

APPLICANT'S COUNSEL	: M DE OLIVEIRA
INSTRUCTED BY	: CLIFF DEKKER HOFMEYR INC
RESPONDENT'S COUNSEL	: L HOLLANDER
	A.L ROELOFFZE
INSTRUCTED BY	: HIRSCHOWITZ FLIONIS ATTORNEYS