REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 7841/19

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

SIGNATURE 10 May 2020 DATE

NOTE: JUDGMENT HANDED DOWN ELECTRONICALLY

In the matter between:

FIRST RAND BANK LIMITED	Applicant
and	
VEGA HOLDONGS PROPRIETARY LIMITED	First Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent
THE MINISTER OF FINANCE	Third Respondent
THE MINISTER OF PUBLIC WORKS	Fourth Respondent

J U D G M E N T

KEIGHTLEY, J:

1. On 19 December 2019 this Court granted a provisional winding-up order at the instance of the applicant, FirstRand Bank Ltd, against the first respondent, Vega Holding (Pty) Ltd. As none of the other respondents have played an active role in the litigation, I refer to the first respondent simply as "the respondent" in my judgment.

2. This judgment concerns the return day of the provisional winding-up order. The issues before me are essentially the same as those facing the Court when it granted the provisional order, albeit, of course, that the test for granting a final winding-up order is different to the test that applies at the provisional stage. In opposing the final order the respondent raises the same defences as those raised previously, and has advanced no further facts in support of its opposition.

3. The dispute arises out of a loan agreement entered into between the applicant and respondent on 14 May 2015 in terms of which the applicant afforded a loan to the respondent of R5 million. It is not necessary for present purposes to set out in any detail the material terms of the loan agreement, save for those that are in dispute, which I will deal with later. Suffice it to record that the loan was provided for purposes of enabling the respondent to acquire certain immovable property and, among other forms of security, a mortgage bond in the applicant's favour was registered over the property. It is common cause that the respondent is a property-holding entity, and does not trade.

4. The loan agreement was subsequently varied by way of a written variation agreement entered into between the parties. Loan amounts were duly advanced to the respondent, which made monthly repayments to the applicant over the period

2015 to 2018. The last repayment was made on 18 September 2018, and thereafter the respondent failed to make any further payments of its monthly instalments. This failure to pay the amounts due prompted the applicant to hold the respondent in breach of the loan agreement, and to give effect to the acceleration clause, which permitted the applicant to call up the full amount due.

5. It is common cause that the applicant subsequently sent three letters of demand to the respondent under section 345 of the Companies Act,[1] calling on the respondent to make payment of the full outstanding amount due under the agreement. Various meetings and discussions were held with a view to the parties reaching some sort of settlement, but this did not come to pass. The final letter of demand under section 345 was served by the Sheriff on 25 January 2019, but the respondent failed to comply with its terms.

6. The applicant's case is that the respondent is, for this reason, deemed to be unable to pay its debts. The applicant contends further that the respondent is also factually unable to pay its debts. This is because the respondent owes an amount of over R60 000. 00 to the City of Johannesburg (CoJ) for rates and taxes; some R4 million to the South African Revenue Service (SARS) and another R4 million to the applicant. The applicant says that the respondent has no income, and the municipal value of its immovable property is R5,5 million. The applicant provided an initial, and subsequently, an updated certificate of balance as proof of the respondent's indebtedness to it. Under the agreement, a certificate of balance provides *prima facie* proof of the respondent's indebtedness.

7. As we shall see shortly, the respondent makes a bald attempt to dispute that it is indebted to the CoJ and to SARS, and to dispute the certificate of indebtedness.

[1] Act 61 of 1973

However, it does not provide any proof to substantiate its denials in this regard. I will return to this point later. What is of more immediate importance is the respondent's main arrow in the bow of its defence, viz. its contention that the loan agreement was subject to suspensive conditions that were never fulfilled, and hence that the loan agreement never came into effect and is void *ab initio*.

8. On this basis, the respondent says that it is not indebted to the applicant under the agreement (as the agreement is a legal non-entity); it did not breach the agreement (as no instalments ever fell due for payment); and the certificate of balance is of no effect. The respondent says that this constitutes a *bona fide* and reasonable defence to the applicant's claim, and that the well-known rule laid down in *Badenhorst v Construction Enterprises (Pty) Ltd*[2] should apply. That rule says that a winding-up application is not a legitimate means of seeking to enforce the payment of a debt which is *bona fide* disputed by a respondent.

9. At the centre of the respondent's defence is clause 4 of the loan agreement, read together with Appendix 2. That clause reads:

> "*DISBURSEMENT*
>
> *4.1 FNB shall not be obliged to advance (and the Borrower may not draw against the Loan) unless (1) the Borrower has signed this Agreement and returned the original thereof to FNB, and (2) the Specific Loan Conditions contained in Appendix 2 have been fulfilled (or waived) to FNB's satisfaction.*
>
> *4.2 The Specific Loan conditions have been inserted into the Agreement for the benefit of FNB. FNB may, in its sole and absolute discretion, and subject to clause 4.1 (Disbursement), waive each and every condition by delivering written notice of waiver to the Borrower at any time.*
>
> *4.3 To the extent that FNB allows the Borrower to utilise the Loan before the Borrower complying with its obligations in terms of this Agreement, the Borrower shall comply with the outstanding obligation within 7 days of notice in writing calling upon the Borrower to do so. Failure to comply with the terms*

[2] 1956 (2) SA 346 (T) at 347H - 348C

of this clause 4.3 (to the extent applicable) shall constitute an Event of Default." (my emphasis)

10. Appendix 2 is headed "*Disbursement Conditions*". It records that: "*The advance of the Loan is subject to the fulfillment, to the sole and absolute satisfaction of FNB, of the following conditions:*". It goes on to list various conditions involving, among others, the forms of security the applicant would require, and other more formal conditions, such as proof of FICA compliance, provision of occupational certificates etc. It is not disputed that the security required by the applicant was forthcoming. A mortgage bond was duly registered against the title deed; other suretyships were provided and a cession of income was subsequently also entered into in favour of the applicant.

11. It is not disputed that until 27 August 2018 neither of the parties raised any concern that the loan agreement may have been subject to suspensive conditions that may not have been fulfilled. This issue was raised for the first time in a letter addressed to the applicant's attorneys by Mr Kerr-Phillips, the respondent's attorney. At that stage, the applicant had alleged that the respondent had committed events of breach under the agreement, and it was threatening winding-up proceedings. Mr Kerr-Phillips stated as follows in his letter (in relevant part):

> "*3. Your client is obliged to show that the suspensive conditions of the loan agreement in appendix 2 were timeously fulfilled, before your client is entitled to enforce the loan agreement and our clients put your client to the proof thereof.*
>
> *4. Assuming the loan agreement is enforceable (which is not conceded by our clients) then ..... .*"

12. The letter did not identify what the "suspensive conditions" were, and the loan agreement itself does not refer to any "suspensive conditions" as such. The letter

thus hardly provided a concrete basis upon which to dispute the enforceability of the loan agreement. It is perhaps not surprising that the applicant did not deal with this issue in its founding affidavit. The challenge was mounted by the respondent in its answering affidavit and countered in the applicant's replying affidavit. After the settlement of a strike-out application, both parties filed supplementary affidavits dealing more fully with the suspensive conditions defence relied on by the respondent.

13. From these affidavits, and from the heads of argument and oral submissions made by the parties, the respondent's case is that the conditions in Appendix 2 are "true conditions", i.e. they had the effect of suspending the legal operation of the entire loan agreement until such time as they were either fulfilled or waived in writing by the applicant. Further, that properly interpreted, the agreement required that fulfilment of the conditions, or the relevant written waiver, had to take place prior to the first advance of loan funds to the respondent. If this did not take place, then the effect of the suspensive conditions is that the loan agreement did not take effect, and must be treated as being void *ab initio*.

14. The respondent says that the applicant has the *onus* to satisfy the court that these "suspensive conditions" were met, and thus that the agreement is enforceable. It says that there is a material dispute of fact in this regard, i.e. as to whether the conditions were met and when this occurred. This is all sufficient, in the respondent's view, to found a *bona fide* and reasonable defence to the applicant's claim of indebtedness, and for this reason, it contends that the court should not contemplate granting a final winding-up order.

15. The first issue to consider is the proper interpretation of the relevant clauses, particularly clause 4, read with Appendix 2. The respondent says it is these clauses

that give rise to the "suspensive conditions". Are they of such a nature that they comprise true suspensive conditions? Do they suspend the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, in the words of Christie?[3] Or are they more properly to be interpreted as terms of the agreement, along the lines of the distinction drawn in *R v Katz*:[4]

> "*The word 'condition' in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, i.e. an accepted stipulation, as for example in the phrase 'conditions of sale'. In this sense the word includes ordinary arrangements as to time and manner of delivery and of payment of the purchase price, etc - in other words the so called acccidentalia of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz. of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain event ... In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the contract, whereas provisions which are not true conditions bind the parties as to their fulfillment and on breach give rise to ordinary contractual remedies of a compensatory nature, ie (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these.*"?

16. As this *dictum* explains, the term "condition" is often used loosely to refer to both terms of the agreement (which do not have suspensive effect), and true conditions (that do). There is no magic in the use of the term "condition" as opposed to "term". Indeed, the two words are commonly used in conjunction in many contracts, as in the phrase "the terms and conditions". This means that an interpretive exercise must be undertaken in order to determine the true legal nature of the particular contractual provisions in question.

17. In his submissions Mr Kerr-Phillips contended that the conditions contained in Appendix 2, read with clause 4 of the contract fell into the category of true conditions, having suspensive effect. One of the reasons for this, he said, was because the

[3] Christie, The Law of Contract in South Africa (7ed), pg 164
[4] 1959 (3) SA 408 (C) at 417

conditions related to future events over which the respondent did not have control. For example, it was not in the respondent's control whether a certificate of occupancy would be issued and when this might be. He submitted that the applicant could not enforce compliance of such a condition, because the respondent was dependent on a third party issuing the certificate. This was an indication, he submitted, that the conditions in Appendix 2 introduced that element of contingency characteristic of true suspensive conditions, and thus placing the legal effect of the loan agreement in abeyance until fulfilment of the Appendix 2 conditions.

18. Although Appendix 2 is headed "Disbursement Conditions" this is not an indication, for the reasons discussed earlier, as to their true legal nature. If one considers the conditions themselves it appears, contrary to Mr Kerr-Phillips' submission, that a number of them place obligations on the respondent, and are thus within the respondent's control.

19. For example, clause 2 of the Appendix provides that the costs of each Security and Security Document shall be borne by the respondent. Clause 3 of the Appendix requires that each listed security must be accompanied by, for example, a special resolution of shareholders, a board declaration regarding solvency etc. This is not the type of condition that would normally be regarded as being dependent on a future, uncertain event. On the contrary, the respondent has offered security, in a form acceptable to the applicant, and common sense dictates that the respondent will have some control over ensuring that these requirements are met. Indeed, one of the sureties listed is Mr Chimpelo himself, who was the deponent to the respondent's answering and subsequent affidavits.

20. Similar considerations apply to the requirement, in clause 10.1, that a bond be registered over the property. Although the registration is effected by the Registrar of

Deeds, it is not as if the respondent doesn't have some control over the process: it would be required to take whatever steps are necessary, and sign whatever documents may be required to put the process of registration in motion. Clause 10.3 requires the respondent to cede as security all right, tile and interest in existing and future income derived from the property. And clause 10.4 requires the respondent to insure the property. These clauses clearly place obligations on the respondent, and are not in the nature of conditions that are dependent on events outside of its control.

21. There are other indications in the loan agreement that the "Disbursement Conditions" in Appendix 2 are not true suspensive conditions. Clause 4.3 is instructive in this regard. It provides that: "*To the extent that FNB allows the Borrower to utilise the Loan before the Borrower complying with its obligations in terms of this Agreement*" the applicant may place the respondent on notice as to compliance and failure to comply will constitute an event of default. There is an obvious link between clause 4.3 and clause 4.1. The latter clause says that the applicant has no obligation to permit the respondent to draw against the loan funds until the Appendix 2 conditions are fulfilled or waived. However, clause 4.3 qualifies this. It makes specific provision for the applicant nonetheless to give the respondent access to the loan funds even if it has not met its obligations, and to place the respondent in *mora* as to compliance. This is completely incompatible with an interpretation of the conditions in Appendix 2 as being true, suspensive conditions. As noted earlier, true suspensive conditions cannot be enforced or, to put it differently: there can be no question of a party being in *mora* in respect of the fulfilment of a true suspensive condition.[5]

[5] *Cardoso v Tuckers Land and Development Corp (Pty) Ltd* 1081 (3) SA 54 (W)

22. Mr Kerr-Phillips attempted to persuade me that clause 4.3 did not apply to performance of any obligations arising from the Appendix 2 conditions, but to other obligations under the agreement. The thrust of his submission was that clause 4.3 only has application after the Appendix 2 conditions have been met, and once the loan agreement has come into existence.

23. I am not persuaded by this submission. Clause 4.3 must be seen in context. Clause 4 deals with "Disbursements", i.e. access to the loan funding. As I have already noted, there is a clear and obvious link between this provision, and clause 4.3. The effect of the link is that clause 4.3 qualifies the stipulation in clause 4.1 requiring either fulfilment or waiver of the Appendix 2 conditions before access to the funds will be permitted. It is plain from this link that clause 4.3 cannot be read as a stand-alone provision unrelated to the conditions set out in Appendix 2 and the obligations of the respondent pursuant thereto. The Appendix is part and parcel of the agreement, and any obligations on the respondent under it would be "*obligations in terms of this Agreement*" for purposes of clause 4.3.

24. Appendix 2 provides that: "*The advance of the Loan is subject to the fulfilment, to the sole and absolute satisfaction of FNB, of the following conditions*". As the applicant pointed out in its submissions, the respondent wants this to read instead: "*The Loan Agreement is subject to the timeous fulfilment (i.e. before the advancement of the Loan) of the following suspensive conditions*." Such a reading is simply untenable when one considers the provision in its full context. Apart from what I have already discussed above, Appendix 2 makes no reference to the entire loan agreement being dependent on the fulfilment of the conditions. It is only the advance of the "*Loan*" that is so subject. "*Loan*" is defined as "*the Loan amount ...*", rather than "*the Loan agreement*". The Appendix echoes clause 4.1, which says that: "*FNB shall not be obliged to advance and the Borrower may not draw against*

the Loan) unless ... ." Clause 4.3 then envisages that nonetheless the applicant may permit the respondent to use the loan. It would be absurd to interpret the Appendix conditions as suspending the legal effect of the entire loan agreement when the agreement itself provides that the funds may be advanced despite the respondent not complying with its obligations.

25. There is also no time stipulated for the fulfilment of the Appendix 2 conditions. The respondent submits that fulfilment had to be before the first advance of funds. However, this is contrary to clause 4.3. It is also at odds with the provision that permits the applicant to waive the conditions "*at any time*".

26. The sensible businesslike interpretation of the conditions is that they were no more than terms upon which the applicant agreed to extend the loan to the respondent. They were not true suspensive conditions, and the legal effect of the agreement was not dependent on their fulfilment. This is consistent with the relevant provisions read in context. It is consistent with the qualification in clause 4.2 that the Appendix conditions were included for the benefit of the applicant, and the statement in the Appendix that fulfilment of the conditions is to be determined to the sole and absolute satisfaction of the applicant.

27. While the subsequent conduct of the parties cannot be determinative in determining the legal nature of the provisions, that conduct in this case is absolutely consistent with the above interpretation of the conditions. There is no evidence that either party understood that the very existence of the loan agreement depended on the Appendix 2 conditions being fulfliled before the respondent accessed the loan funds. On the contrary, they conducted themselves throughout as if the loan had taken effect. They even signed a variation agreement. The respondent made monthly

payments from 2015 into 2018. It only raised the suspensive conditions defence when it was facing the prospect of a liquidation application by the applicant.

28. I find that the suspensive conditions defence does not constitute a *bona fide* and reasonable defence to the applicant's claim that the respondent is indebted to it under the loan agreement. As such, the *Badenhorst* rule does not present an impediment to this court granting a final order of winding up in this regard.

29. The respondent also advanced a second basis for contesting its indebtedness. It claimed that it was not indebted to the applicant because the applicant had overcharged the respondent in terms of the monthly instalments due under the agreement. This is because in Appendix 1 of the loan agreement a monthly repayment amount of R60 761. 99 is indicated under the heading "loan details". The respondent says that the statements emanating from the applicant show that it was charged more than this amount, and that, if a recalculation is done, it is in fact the applicant that owes the respondent money.

30. There is simply no merit in this defence. Appendix 1 makes it clear that the monthly repayment amount is "*an indicative amount only*". The terms of the loan are that the respondent would be charged interest at the prime rate. This is a rate that fluctuates over time. Thus, the indicative monthly repayment amount could never be regarded as being a fixed amount representing a ceiling above which the applicant could not claim repayments. It is inherent in the agreement that the monthly repayments would vary, particularly given that the loan was over a period of time. This is an obvious feature of most loan agreements.

31. In any event, the applicant has provided an updated certificate of indebtedness, based on a reconciliation of the respondent's liabilities and payments. A party is entitled to use only a certificate of indebtedness to show that the amount is owing,

and is due and payable by the debtor.[6] This constitutes *prima facie* evidence of such indebtedness, and the debtor bears the *onus* of rebuttal. The debtor must prove on a balance of probabilities that the certificate is incorrect.[7] If the *prima facie* evidence is not rebutted, it becomes conclusive proof of the indebtedness.[8] The respondent has done no more than make general and unsubstantiated averments that it has been overcharged and that it is not in fact indebted to the applicant. Its averments do not constitute evidence to upset the *prima facie* evidence constituted by the certificate of indebtedness. I conclude that this purported defence also does not constitute a basis for denying the applicant relief based on the *Badenhorst* rule.

32. In the circumstances, the applicant has satisfied the first jurisdictional requirement for purposes of the grant of a final winding-up order. It has established that it is a creditor and that the respondent is indebted to it in excess of R100.

33. The remaining jurisdictional requirement is for the applicant to satisfy the court that the respondent is unable to pay its debts.[9] The applicant relies primarily on section 345 in this regard and on the letter of demand served on the respondent in January 2019. It is common cause that the respondent received the demand. It denies, in bald terms, with no substantiation, that the applicant delivered a valid and enforceable section 345 notice. The denial cannot hold water. It is common cause that the respondent did not comply with the terms of the demand. It avers that it was unable to do so because it was disputing the enforceability of the loan agreement. There is obviously no merit in this defence. Section 345 provides that

6 *Trust Bank of Africa Ltd v Senekal* 1977 (2) SA 587 (W) at 592 F-G; *Senekal v Trust Bank of Africa* Ltd 1978 (3) SA 375 (A) at 381H-382A; *Bank of Lisbon International Ltd v Venter* 1990 (4) SA 463 (A) at 482 A-B

7 *Senekal* at 382G-383D; *Trust Bank* at 593 C-F

8 *Salmons v Jacoby* 1939 AD 599 at 593

9 Section 344(f) of the Companies Act 61 of 1977

a company will be deemed to be unable to pay its debts if it fails to pay the sum contained in the demand within a period of three weeks. It follows that in terms of this section the respondent is deemed not to be able to pay its debts, and the applicant has satisfied the second jurisdictional requirement.

34. In any event, on the evidence before the court, it also appears that the applicant has established that the respondent is factually insolvent. It has provided nothing to substantiate its bald averments that it is not indebted to the CoJ and SARS in the amounts set out in the founding affidavit. Nor has it provided any evidence to substantiate its bald averment that in its view the immovable property is worth R7.5 million. Even if this estimate was accurate (of which there is no proof), the respondent's asset (the immovable property) would still be insufficient to cover the totality of its debt to its creditors, which the applicant avers are over R8 million.

35. Generally speaking, an unpaid creditor has a right, *ex debito justitiae*, to a winding-up order against a respondent company that has not discharged its debt.[10] The discretion of a court not to grant a winding-up order in those circumstances is narrow, and not wide.[11] The applicant is in this very position. Consequently, it is entitled to an order placing the respondent under final winding up.

36. I make the following order:

1. The first respondent is placed under final winding-up in the hands of the Master of the High Court of South Africa.

2. The costs of the application are costs in the winding-up.

[10] *Afgri Operations Limited v Hamba Fleet (Pty) Ltd* 2017 JDR 0558 (SCA) at para 12
[11] *Afgri*, at para 13

KEIGHTLEY J

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (by videolink):	20 April 2020
Date of Judgment:	10 May 2020
On behalf of the Applicant:	Adv. PG Louw
Instructed by:	Werksmans Attorneys Inc.
On behalf of the First & Second Respondent:	Mr. M Kerr-Phillips
Instructed by:	MK Attorneys