IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

***[REPORTABLE]***

**CASE NO: 16168/2012**

In the matter between:

| | |
|---|---|
| **CHRISTIAN FINDLAY BESTER N.O.** | **First Applicant** |
| **JOHANNES FREDERICK KLOPPER N.O.** | **Second Applicant** |
| **ABDOL WHAHEED BADRODIEN N.O.** | **Third Applicant** |

And

| | |
|---|---|
| **CORAL LAGOON INVESTMENTS 232 (PTY) LTD** | **Respondent** |

And

| | |
|---|---|
| **PATRICK THONISSEN N.O.** | **First Intervening Creditor** |
| **HERMAN THEART N.O.** | **Second Intervening Creditor** |
| **ROY TREVOR BOAST** | **Third Intervening Creditor** |

**Coram:** **R.C.A. Henney, J**

**Judgment by :** **R.C.A. Henney, J**

**For the Applicant :** **Adv J A Van Der Merwe**

**For the First, Second and Third Intervening Creditors :** **Adv A Kantor**

**Date(s) of Hearing :** **4 December 2012**

**Judgment delivered on :** **20 February 2013**

Republic of South Africa

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**JUDGMENT DELIVERED ON 20 FEBRUARY 2013**

**HENNEY, J**

Introduction

[1] This is an application for the liquidation of the Respondent launched by the liquidators of one of its shareholders known as Ekosto 1901 (Pty) Ltd (“Ekosto”). This application is opposed by the intervening creditors who are all related to each other as shareholders of the Respondent, and as set out hereunder.

Background Facts

[2] Ekosto, Spec Props Trust, Rusverdient Trust and one Roy Trevor Boast are all shareholders of Coral Lagoon Investments (“Respondent”), each entity owning a 25% share of the Respondent.

[3] The sole purpose of the establishment of the Respondent was to acquire a beach front property (“the property”) and to develop it into 8 luxury self-catering beach front apartments which would be sold for a profit. The property was acquired for a total price of R2 679 000,00 which consisted of an amount of R2 350 000,00 plus VAT thereon in the amount of R329 000,00. Transfer was effected into the name of the Respondent on 26 November 2007.

[4] The purchase price was funded by a mortgage bond from Absa Bank in the amount of R1 880 000,00 and the balance of the purchase price in the amount of R799 000,00 was funded

by shareholder's loans in the following amounts:

Ekosto (Pty) Ltd : R192 500,00

Specprops Trust: R192 500,00

Rustverdlent Trust: R207 000,00

Roy Trevor Boast: R207 000,00

[5] The parties anticipated that once the necessary approvals had been obtained, the apartments would be sold and developed. Finance would be obtained from a financial institution to fund the development as well as the repayment of the mortgage bond pending the completion of the development.

[6] Until such time that the development finance had been obtained, the bond was to be serviced by the VAT refund obtained from the South African Revenue Services in respect of the purchase price. When the loan was made by the shareholders, who included Ekosto, to the Respondent, the Respondent did not have any assets or turnover.

[7] A further difficulty the Respondent had was that the development of the property was delayed. The VAT refund was depleted, and approximately a year after the registration of the land, the shareholders, including Ekosto, in order to fund the mortgage bond instalments,

agreed to supply further interim funding to the Respondent.

According to the intervening creditors, this prompted the shareholders, including Ekosto, to enter into subordination agreements in order to preserve the Respondent's solvency.

[8] This Application

Subsequently Ekosto was placed under liquidation. At the time of its liquidation, it was owed R554 994,01 by the Respondent in respect of monies lent and advanced to the Respondent by Ekosto. This prompted the liquidators to demand payment of this outstanding amount in terms of section 345(1) of the Companies Act, Act 61 of 1973. This demand was made in a letter dated 2 April 2012. It needs to be mentioned that no such demand for payment was made by Ekosto before its liquidation.

[9] On 28 August 2012, this Court per *Doiamo AJ* granted an order provisionally winding up the Respondent with a return date of 25 September 2012. On 25 September 2012 the rule nisi was extended after the Applicants had been informed that certain creditors wished to intervene. The Intervening creditors opposed the final liquidation of the Respondent and seek the discharge of the provisional order that was granted on 29 August 2012.

[10] The Application for the winding up of the Respondent is based on the grounds that, firstly, the Respondent is unable to pay its debts within the meaning of section 345 of the

Companies Act, and secondly, the Court in exercising its discretion will find that it would be just and equitable for the Respondent to be wound up.

[11] In opposing the Application, the intervening parties raise four main grounds of opposition:

11.1. Ekosto's loan to the Respondent is unlawful and void due to the fact that the loan exceeds the monetary threshold in terms of section 40(1 )(b) of the National Credit Act 34 of 2005 ("the NCA"). It therefore does not have *locus standi* to bring this application;

11.2. There was no inability on the part of the Respondent to pay its debts because they had not become due and payable;

11.3. It is not just and equitable for the Respondent to be wound up;

11.4. The court in exercising its discretion should not order the winding up of the Respondent.

[12] Regarding the first ground of opposition relating to the applicability of the NCA, the Applicants argues that in terms of section 4(1 )(a) of the NCA, the loan between Ekosto and the Respondent is a credit agreement as contemplated in terms of the provisions of the Act.

[13] In terms of section 4(1 )(a)(i) the NCA is not applicable to a credit agreement where a consumer is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined in terms of section 7(i), which is currently R1 million rand.

[14] The Applicants contend that Coral Lagoon was at the time of the transaction related to Plasto Properties 7 (Pty) Ltd, Parch Properties 107 (Pty) Ltd, Regular Trading 1 CC, Stonevest 5 (Pty) Ltd, Akula Trading 148 (Pty) Ltd, Rustverdient Trust, Spekprop Trust and Ekosto. It is contended by the Applicants that the combined asset value of these related juristic persons far exceeded the threshold value of R1 million rand, and as such the loan agreement was excluded from the ambit of the Act.

[15] The Applicants cite as an example that one of the entities, Plasto Properties 7 (Pty) Ltd, was at the relevant time the registered owner of Erf 136, Dwarskersbos, and Erf 460, St Helena, which properties it purchased in 2006 for R230 000,00 and R1 455 750,00 respectively and both of which properties are unencumbered.

[16] The Applicants further argue that in terms of section 4(2)(b)(i) of the NCA the loan Ekosto made to the Respondent, amounted to a shareholder loan between a juristic person as a consumer, Coral Lagoon investments ("Respondent"), and a person who has a controlling interest in that juristic person, as credit provider, Ekosto in this instance, and as such is viewed by NCA as a transaction which is not at arm's length and is therefore expressly excluded from the ambit of the Act.

[17] The intervening parties argue that this credit agreement between Ekosto and the Respondent is indeed subject to the NCA. They argue that the Applicants' reliance on section 4(1 )(a) is misplaced in their assertion that the credit agreement does not fall under this provisions of the NCA.

[18] They argue that a juristic person is related to another juristic person in terms of section 4(2)(d) if:

> (i) One of them has direct or indirect control over the whole or part of the business or;

(ii) A person has direct or indirect control over both of them.

[19] The intervening parties state that the shareholding in the Respondent was at all times held in equal 25% shares by the four shareholders. They contend that it was and is accordingly impossible for a person to have control over the Respondent. Therefore, for the purposes of section 4(1) of the NCA the Respondent when it acquired the loan from Ekosto was not related to any person for the purposes of section 4(1) of the NCA.

[20] In response to the argument of the Applicants that the loan agreement between Ekosto and the Respondent was not concluded at arm's length, the intervening parties argued that this did not accord with the facts, which were that the agreement was purely a commercial venture in respect of which each shareholder would make a profit for himself. Further, it was contended that in light of the fact that the Respondent's shareholding was equally vested in the four shareholders it was therefore not possible for Ekosto to hold a controlling interest in the Respondent.

[21] The intervening parties contend that the loan by Ekosto to the Respondent exceeds the threshold for registration of a credit provider as contemplated by Section 40(1 )(b) of the NCA. Given the applicability of the NCA, Ekosto is required to register as a creditor provider in terms of section 40(1) of the NCA. This it failed to do. As such, the loan agreement was void.

[22] Determination of *Locus Standi* - Intervening Creditors

The Applicants in their heads of argument state that the First and Second Intervening Creditors have not demonstrated any authority to intervene and accordingly have not demonstrated *locus standi* in these proceedings.

[23] This is contrary to what is stated by the Applicants in their Affidavit opposing the intervening creditors' application. In paragraph 5 page 73 of ... the intervening creditors state ... *"It is common cause that both the First, Second and Intervening Creditors are creditors of the Respondent".* In reply to this on page 112 paragraph 43 of... the Applicants admit this fact.

[24] They also did not oppose the joinder of the Intervening creditors as parties to this application on 9 October 2012, neither did they raise the objections and their reservations about their *locus standi* at that time. There is therefore no merit in this contention of the Applicants.

Striking Out

[25] Apart from this issue raised *in limine* by the Applicants, they also argued that the court should strike out certain hearsay averments contained in the Replying Affidavit of the Third

Intervening Creditor relating to an email sent by one Wepener on 19 November 2009. If regard is to be had to the key issues for determination to which I will refer shortly, there is no need for me to deal with this point raised by the Applicants, because it will have no bearing on the key issue for determination and it would not affect the outcome of this matter in any event.

[26] Issues for Determination

The key issue for consideration is whether the credit agreement upon which the claim is based is an agreement to which the **NCA** is applicable. If it is an agreement to which the NCA is applicable, such agreement would be unlawful and void due to the failure of Ekosto to register as a credit provider. The agreement would not therefore be a debt that is due and payable and which the Respondent in terms of section 344(1 )(b) of the Companies Act 61 of 1973 is unable to pay. Before analysing the issues for determination it would be appropriate to deal with the applicable provisions of the NCA.

[27] The Applicable Legal Provisions of the NCA

The Applicants rely on all the following, in arguing that the agreement is not subject to the NCA.

Section 4(1)(a)(i)....

*"4. (1) Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except -*

*(a) a credit agreement in terms of which the consumer is-*

*(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7( 1)".*

[28] In terms of section 4(2)(d) a juristic person is related to another juristic person if: (a) one of them has a direct or indirect control over the whole or part of the business of the other or; (b) a person has direct or indirect control over both of them.

Furthermore, Section 4(2)(b)(i) reads as follows:

*"(2) For greater certainty in applying subsection (1)-*

*.....*

*(b) in any of the following arrangements, the parties are not dealing at arm's length:*

*(i) a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider";*

*"(2) ...*
*(iv) any other arrangement -*
*(aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction";*

[29] Discussion

Section 4(1) of the NCA provides that the Act applies to every credit agreement between parties dealing at arm's length and made within or having an effect within the Republic. Section 4 further sets out certain types of credit agreements that are excluded from the application of the Act. In this particular matter, the Applicants argue that the Credit Agreement between Ekosto and the Respondent is expressly excluded from the application of the NCA in terms of section 4(1 )(a)(i), 4(2)(b)(i) and 4(2)(b)(iv)(aa).

[30] In the light of the above, the Applicants' claim that the NCA is not applicable to the loan agreement between Ekosto and the Respondent, can only be correct in the following circumstances: if, for the purposes of section 4(2)(d), the Respondent is related to the shareholders, i.e. if the shareholders had direct control over whole or part of the business of the Respondent, or, a person had direct or indirect control over both of them; or if, for the

purposes of section 4(2)(b)(i), Ekosto, as credit provider, had a controlling interest in the respondent. In the light of the above, the key questions in this matter are the meanings to be attributed to the phrase, “direct or indirect control”, for the purposes of section 4(2)(d), and “controlling interest”, for the purposes of section 4(2)(b)(i).

[31] Definition of Controlling Interest / Direct or Indirect Control

The NCA is not explicit as to what is meant by “direct or indirect control” for the purposes of section 4(2)(d). Similarly, no definition of the term “controlling interest” is provided anywhere in the National Credit Act 34 of 2005, yet it has been suggested that the term should be given its ordinary grammatical meaning.[1] Generally speaking, it is clear that a person may control a company although not controlling all the shares in the company, and further, without holding a majority shareholding,[2] In fact it is suggested in the *Guide to the National Credit Act* at Chapter 5.2.2.1 footnote 16 that, in the context in which the phrase appears in section 4(2) of the NCA, *““controlling interest” does not denote only a shareholding in a company, or members’ interest in a close corporation, in excess of 50%”.*

[32] Guidance as to the meaning of *“direct or indirect controf* or of *“controlling interest'* can perhaps be found in other statutes in which such terms, or similar, are employed. This

1 *Guide to the National Credit Act* at Chapter 5.2.2.1 footnote 16.

2 See *Dole Fresh Fruit International Ltd v MV Kapetan Leonidas and Another* 1995 (3) SA 112 (A) at page 119 E- F. See also *Guide to the National Credit Act* at Chapter 5.2.2.1 footnote 16.

method of interpretation had been confirmed by our courts in various decisions.

*FINBRO FURNISHERS (PTY) LTD v REGISTRAR OF DEEDS, BLOEMFONTEIN, AND OTHERS* 1985 (4) SA 773 (A)

*At page 805G - 806A*

*It is usual to credit the Legislature with a knowledge of the existing law on the subject dealt with. In order properly to interpret a statute a court is entitled, and in some cases bound, to look at earlier statutes dealing with the same subject-matter. That for purposes of judicial construction of a more recent statute an examination of earlier statutes dealing with like topics affords* a *useful aid is an established principle of our law. See, for example, Eckhard Hermeneutica luris (editio nova) chap XVIII at 803 axiom IV; chap XXI at 806. That principle of interpretation was profitably invoked by RUMPFF JA in the Falcon case supra and by VAN WINSEN J in the Bellville-lnry case supra. It seems to me, with respect, that, in seeking to construe the word "mineral" in s 3 (1) (m) of Act 47 of 1937, the definitions of that word to be found in earlier relevant statutes constitute not merely a permissible but an essential source of guidance. So approaching the problem of interpretation in the present appeal I find myself in entire agreement with the view expressed in the Bellville-lnry case (at 588C) in the following words:*

> *"... I find it difficult to conceive why a statute should be so interpreted as to attach a meaning to a word like 'minerals' narrower than that assigned to it in a number of statutes especially concerned with minerals and the rights associated therewith."*

[33] *WILLOWS v NATIONAL INDUSTRIAL COMMERCIAL WORKERS' UNION* 1991 (3) SA 546 (D)

*At548F-H*

*The answer to the question must be sought in the first instance in the wording of the provision itself. If that is not sufficiently unambiguous to be conclusive, it must be interpreted in the light of its context and of the intention of the Legislature as derived from the statute as a whole. Further assistance may be afforded by the manner in which similar provisions in other statutes have been interpreted, provided they are in pari materia.*

[34] *SANDOZ PRODUCTS (PTY) LTD v VAN ZYL NO* 1996 (3) SA 726 (C)

At 7311 -732B

*Mr Beckerling argued that it would not be permissible at all to have regard to the provisions of the Usury Act in order to construe the Credit Agreements Act. I do not agree. Although the Usury Act can probably not be regarded as 'kindred legislation' the provisions referred to above do serve as an additional indication that the construction contended for by respondent, based on the ordinary language of the definition, is indeed correct. The following statement in Cross Statutory Interpretation 2nd ed (by Bell and Engle) at 150 seems to me to be applicable here:*

> *'Guidance by contrast or analogy may sometimes be derived from a provision of a statute other than that under consideration although there is no question of the two of them being in pari materia, but there is no obligation on the Judge to consider such statutes as there is in the case of those in pari materia.'*

In ***MOGALE ALLOYS (PTY) LTD v NUCO CHROME BOPHUTHATSWANA (PTY) LTD AND OTHERS*** **2011 (6) SA 96 (GSJ)** the court, in attempting to interpret the meaning of controlling interest as the term appeared in the Mineral and Petroleum Resources Development Act 28 of 2002, referred to the usage of such term in other Acts.

[35] I will now deal with other statutes which also refer to terms "controlling interest" and "direct and indirect control" as contained in the NCA.

**In** terms of section 1 of the Diamonds Act ***"controlling interest",*** in relation to—

*(a) a company, means—*

*(i) more than 50 per cent of the issued share capital of the company;*

*(ii) more than half of the voting rights in respect of the issued shares of the company; or*

*(iii) the power, either directly or indirectly, to appoint or remove the majority of the directors of the company*[3]

[36] In the context of a merger, the Competition Act 89 of 1998 section 12 (2) provides an

[3] *i The relevant provision reads as follows:*
*34.* ***Applications by natural persons for transfer*** *of licences.—(1) Any natural person who desires to transfer his licence to a company or close corporation shall apply to the Regulator in writing for its approval of such transfer.*
*....*
*The Regulator shall not grant its approval for the transfer of a licence to a company or close corporation if it is of the opinion—*
*(a) that the licensee concerned* ***does*** *not* ***hold the controlling*** *interest in the company or close corporation;*

expanded notion of *ucontrof'* and provides as follows:

*(2) A person controls a firm if that person—*

*(a) beneficially owns more than one half of the issued share capital of the firm;*

*(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm,* ***or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that*** *person;*

***(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;***

*(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1 (3) (a) of the Companies Act, 1973 (Act No. 61 of 1973);*

*(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*

*(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or*

*(g) has the ability to materially influence the policy of the firm in a* ***manner comparable to a person who, in ordinary commercial practice,*** *can exercise an element of control referred to in paragraphs (a)* ***to (*** *f).*

[37] This concept of control is largely carried over into the new Companies Act. The relevant provisions of the new Companies Act read as follows:

2. ***Related and inter-related persons, and control*.—***(1) For all purposes of this Act—*

.....

(c) a *juristic person is related to another juristic person if—*

***(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with*** *subsection (2);*

*(ii) either is a subsidiary of the other; or*

***(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with*** *subsection (2).*

*(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if —*

*(a) in the case of a juristic person that is a company—*

*(i) that juristic person is a subsidiary of that first person, as determined in accordance with* ***section 3 (1)*** *(a); or*

***(ii) that first person*** *together* ***with any related or inter-related person, is —***

***(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or***

*(bb)* ***has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;***

***(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in*** *paragraph (a), (b)* ***or*** *(c).*

[38] What is dear is that the meaning of “controlling interest” or “direct or indirect control” as it appears in the NCA is dependent upon the context in which it appears. As is stated in *Mogale Alloys (Pty) Ltd* **1**/ *Nuco Chrome Bophuthatswana (supra)* at *paragraph [23]:*

> *“It is trite that when interpreting words in a statute they must be interpreted within their context. The 'context' refers not only to the language of the remainder of the statute but also to the scope, purpose and background of the statute. ”*

[39] It is however submitted that the expanded definition of “controlling interest” as it appears in section 4 of the NCA should apply. There appears little purpose in limiting the term to a majority shareholding considering the purposes of the relevant clauses. The insistence in the NCA on agreements taking place at arm’s length is to prevent a situation where *“each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction.”*[4] It is clear that a person can influence the affairs of another person by means other than holding a majority shareholding in the latter, and as such, it is suggested that the application of an expanded definition would fall in line with the purposes of the Act.

[40] If regard is to be had to the facts of this case for the purposes of section 4(1 )(a)(i) the combined asset value of the Respondent together with the combined asset value of all the juristic persons associated to it at the time of the agreement was made, may have equalled or exceeded the threshold value of R1 million rand, but as will be shown below, they are not related juristic persons for purposes of sect 4(1)(a)(i).

[41] These other associated juristic persons the Applicants refers to which are Plasto

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[4] See section 4(2)(b)(iv)(aa).

Properties 7 (Pty) Ltd, Parch Properties 107 (Pty) Ltd, Regular Trading 81 CC, Stonevest 5 (Pty) Ltd, Akula Trading 148 (Pty) Ltd are companies not related to the Respondent in which the shareholders or directors of the Respondent has an interest in.[5] These companies do not have a controlling interest as defined above for the purposes of the NCA in the Respondent and cannot therefore be regarded as a related person.

[42] Whilst the director or shareholders of the Respondent might be shareholders and directors in these companies, these companies cannot merely on this basis be regarded as related person having a direct or indirect controlling interests in the Respondent, to the extent that it would be able to have an influence in the affairs of the Respondent either due to a majority shareholding, which they clearly or by any other means as discussed above.

[43] The next question however is whether Ekosto or any of the other juristic persons were related persons. As pointed out earlier [para 19 -20] the Respondent was at all times held in equal 25% shares by the four shareholders. Ekosto did not have a controlling interest therefore in the Respondent as contemplated in section 4(2)(d) of the NCA. The Applicants has also not shown that Ekosto has any interest whether direct or indirect over the Respondent.

[44] This is not only due to their limited shareholding, but also to the fact that Ekosto had no power to either directly or indirectly control or influence the Respondent, it had no controlling interest in the Respondent. This would mean that for the purposes of section 4(1), this is an agreement at arm's length to which the NCA would apply. If the NCA is applicable, a credit provider has to be registered in terms of the Act.

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5 See page 38 of record.

[45] Registration of Credit Providers

In terms of Section 40 (1)(b) of the NCA:

> *"(1) A person must apply to be registered as a credit provider if-*
>
> *a) the total principal debt owed to that credit provider under all outstanding credit agreements other than incidental credit agreements exceeds the threshold prescribed in terms of section 42(1)".*

Such threshold today stands at R500 000,00. The amount advanced by Ekosto to the Respondent is R554 994,04, which exceeds the threshold for which a person may advance credit without being a registered credit provider.

[46] In terms of section 40(4) a credit agreement entered into by a credit provider who is required to register in terms of subsection (1), such as in the present instance where the debt or loan advanced exceeds the threshold amount of R500 000,00, and is not registered, is an unlawful agreement and void to the extent provided for in Section 89[6]. As such, in the light of my findings above, given the failure of Ekosto to register as a credit provider, the loan agreement was void.

[47] Given that the loan agreement was void, such loan cannot be said to be due and

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[6] **Sec 89(5) of the NCA provides:**

*G*(5) **IF A CREDIT AGREEMENT IS UNLAWFUL IN TERMS OF THIS SECTION, DESPITE ANY PROVISION OF COMMON LAW,** ANY **OTHER LEGISLATION OR ANY PROVISION OF AN AGREEMENT TO THE CONTRARY, A COURT MUST ORDER THAT**

(A) THE **CREDIT AGREEMENT IS VOID AS FROM THE DATE THE AGREEMENT** WAS **ENTERED INTO;**

(B) .....
**(C) ..."**

payable, and the demand made in terms of section 345(1) of the 1973 Companies Act must be of no force and effect. In such circumstances, the Applicants cannot base their claim for the liquidation of the Respondent on section 344(f) of the 1973 Companies Act, i.e. on the alleged inability of the Respondent to pay its debts.

[48] It may well be that a party will have the right to recover its money which it advanced to a debtor on other grounds in the absence of a valid credit agreement in terms of the NCA, for example, on the basis of unjust enrichment. See in this regard the as yet unreported Judgment of *Binns-Ward J* of *Opperman v Boonzaaier and Others (24887/2010 of 17 April 2012 (WCC),* which was held to be correct by the Constitutional Court.[7] The facts of this case however are not **similar to the facts in that case. The issue was also not raised by the parties.**

[49] I hold therefore that the Applicant has failed to establish that the loan was due and payable, and hence, has failed to prove that the Respondent is unable to pay its debts as described in section 345 of the Companies Act 61 of 1973.

Just and Equitable

[50] Even if I should be wrong in my conclusion that the agreement was invalid, if regard is to be had to the facts of this matter, I am of the view that in exercising my discretion, it would

[7] **Binns-Ward J found that the provisions of Section 89 (5) of the NCA, which deprives a credit provider to exercise its common law rights to enforce a credit agreement which is void in terms of the NCA is inconsistent with the provisions of the Constitution. This judgment was confirmed by a majority judgment of the Constitutional Court on 10 December 2012 -** *Opperman v Boonzaaier and Others CCT 34/12 [2012] ZACC 29.*

not be just and equitable to grant a final order of liquidation of the Respondent.

[51] The very purpose of the creation of the Respondent was for the benefit of the shareholders of which Ekosto is one. The Respondent was established solely as a vehicle through which the property was to be acquired, which property was to be developed and which the other shareholders still intend to develop into 8 luxury self- catering units, which would be later sold for a profit.

[52] Such property is the only asset of the Respondent. It is clear from the shareholders' conduct in opposing this application and by continually making payments to Absa that they wish to continue with the arrangement, and their reason for establishing the Respondent still exists. In fact there was an agreement between the shareholders including Ekosto to maintain the Respondent's solvency.

[53] Apart from the debt owing to Absa, the only other major creditors of Respondent are the other shareholders (intervening parties). The bond is being serviced it seems to the satisfaction of the major secured creditor, who has not sought to intervene in these proceedings.

[54] The very reason or substratum for the existence of the Respondent is still in existence.[8] **The other shareholders, who are also creditors, would not stand to benefit if the Respondent is liquidated. For these reasons in my view, it would therefore not be just and equitable to wind up the Respondent and grant a final order for its liquidation.**

[8] See *Apco Africa Incorporated v Apco Worldwide (Pty) Ltd and another [2008] 4 All SA 1 (SCA).*

[55] It should be noted that this is not a case where the relationship between the shareholders of a company which had been formed for a specific purpose, has broken down, due to reasons such as internal disputes, mutual disillusionment and distrust, to the extent that such company cannot function to achieve the specific purpose for which it had been formed, or cannot function without detriment to its creditors.[9]

[56] In this instance the reason for the existence of the Respondent was purely for the commercial benefit of the shareholders, who sustained the Respondent in order to protect their commercial interests. Therefore, in exercising my discretion in terms of Section 344 of the 1973 Companies Act, I am of the view it is not just and equitable to wind up the Respondent and grant a final order for its liquidation.

[57] In the result therefore I make the following order:

1) The Application for the winding up of the Respondent is dismissed with costs.

2) The rule *nisi* issued on 29 August 2012 by *Dolamo AJ* is discharged.

**HENNEY, J**

Judge of the High Court

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9