IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPETOWN)

CASE NO.:3506/2010

In the matter between

DOLPHIN RIDGE BODY CORPORATE Applicant

and

EXPRESS MODEL TRADING 289 CC Respondent

JUDGMENT DELIVERED ON 22 FEBRUARY 2012

DOLAMO. J

[1] The Applicant, a body corporate of a development known as Dolphin Ridge, obtained an interim order placing the Respondent in provisional liquidation. This is the extended return date of that rule *nisi.*

[2] The Respondent is the registered owner of a number of sectional title units, in a Sectional Title Scheme known as Dolphin Ridge, situated in Otto Du Plessis Drive, Big Bay, Western Cape. These properties are let by the Respondent to tenants for income generation purposes.

[3] The Applicant alleged that the Respondent had, for a number of years, failed to pay levies due by it to the body corporate, which levies were due in terms of Section 37(1) and 32 of the Sectional Titles Act 95 of 1986 (the "Sectional Title Act"). The allegations by the Applicant were that the Respondent had in the past effectively controlled the actions of the Applicant body Corporate by controlling the elections of trustees and their consequent actions. Throughout that period the Respondent managed to secure its annual voting rights by making last minute payments of arrear levies at the Annual General Meeting (AGM) of the Applicant, the latest being on 18 November 2009. At this last AGM the Respondent, however, failed to secure a majority of the trustees as the balance of the Applicant's property owners secured a majority vote by mobilising members and conducting trustee elections on the applicable participation quota as provided for in Section 32 of the Sectional Titles Act, thus effectively ousting the Respondent from control of the Applicant body corporate.

[4] Since the last payment referred to above the Respondent had failed to make any further payments of the levies due. As a result the Applicant caused a notice in terms of Section 69(1)(a) of the Close Corporation Act 60 of 1984 to be served on the Respondent demanding payment of the sum of R77 156-00, being the arrear levies as at December 2009. The Respondent failed to respond to this notice. Consequently the Applicant launched the liquidation proceedings on the grounds set out in Section 69(1)(a) of the Close Corporation Act, namely, that the Respondent was deemed to be unable to pay its debts. The Applicant made further allegation of the Respondent's indebtedness to other instances which included debts owed to the Cape Town City Council. I shall for purposes of this judgment restrict myself to the debts relating to the levies payable to the Applicant.

[5] The Respondent initially opposed the application on a number of grounds. These were that the deponent to the Applicant's affidavit was not duly authorised by the Applicant to bring the Application; that the amount it claimed was not due and payable as the Respondent had a bona fide defence to it as well as a counterclaim against it (the alleged bona fide defence being that the Applicant has failed to perform its duties and responsibilities in terms of the Sectional Titles Act); that it was able to pay its debts in the

ordinary course of business; that it would be able to provide a guarantee for the payment of any obligations which the court may find due and payable to the Applicant; that it had sufficient assets which it could liquidate, if necessary, to satisfy any indebtedness to the Applicant and which process would not leave Respondent unable to continue operating profitably ; and that the Section 69(1) notice was incorrect and fatally flawed.

[6] A brief history of the matter will serve to highlight the issues that stand to be determined as well as which issues had already been resolved, in order to establish whether a final order for the liquidation of the Respondent should be granted.

[7] The application was first brought on an urgent basis and set down for hearing on the 25 February 2010. On that date the matter was postponed to the 30 August 2010 and the Applicant ordered to file its replying papers by the 09 April 2010. The Applicant was furthermore ordered to file its heads of argument by the 16 August 2010 while the Respondent was to do so on the 20 August 2010. It would appear that the matter was only heard on 31 August 2010 when a provisional winding up order was granted, returnable on the 6 October 2010. On 6 October the matter was postponed to 28 October 2010; thereafter to 21 April 2011. On 21 April 2011 the matter was again postponed to 1 August 2011 when it was finally argued. I need to point out that some of the defences which were originally raised by the Respondent were disposed of by the Court which granted the provisional liquidation order. The issues which have already been determined relate to the Applicant's authority to bring the winding-up application; whether the Applicant was a creditor of the Respondent; whether the latter was entitled to withhold payment of its levies on the strength of the allegations that it had a defence and a counterclaim, and the validity of the Section 69(1) notice.

[8] What remains to be determined is whether the Respondent was unable to pay its debts and whether it would be just and equitable to grant a final order of liquidation. A corollary to

this issue is the *locus standi* of the Applicant. This point came about as a result of the fact that, after the granting of the provisional winding-up order, the Respondent made payment of the sum of R338 800-69. Does this payment bring to an end the Applicant's *locus standi* to apply for the Respondent's winding-up or has the Applicant, this payment notwithstanding, retained its *locus standi* and the right to press for a final liquidation order?

[9] The Applicant maintains that the sum of R338 800-69 paid to it by third parties did not have the effect of terminating the Applicant's *locus standi,* since that payment did not include interest and, secondly, because the Applicant remained a contingent creditor as contemplated in Section 346(1)(b) of the Companies Act, read with Section 66(1) of the Close Corporation Act. For support of the latter contention the Applicant relied on the remarks of the authors of the *Commentary on the Companies Act: Blackman Jooste Everingham (Juta loose-leaf publication) Vol 3 at 14-152* and the decision of Trengove *J in Gillis-Mason Construction Co (PTY) Ltd v Overvaal Crushers (PTY) Ltd 1971(1) SA 524 (T) at 528.*

[10] As regards the allegation that the Respondent was unable to pay its debts the Applicant submitted that the Section 69(1) notice complied with all the formal requirements set out in Section 69(1)(a) was valid and that the Respondent's failure to pay, secure or compound the debt within the prescribed period of 21 days, justified the conclusion that it was unable to pay its debts. The Applicant went further and alleged that it had indeed proved, to the satisfaction of the court, that the Respondent was unable to pay its debt. In this respect the Applicant relied on the supplementary papers filed of record and, in particular, the provisional liquidator's report which indicated that the Respondent's liabilities far exceeded its assets; and that the Respondent had insufficient income to pay for its monthly expenses and debts as and when they fell due. The payment made on behalf of the Respondent in October 2010, the Applicant argued, did not reflect on the Respondent's ability to pay its debts as and when they fell due simply because such payment was made by third parties.

[11] The Applicant went on to allege that the Respondent's history of repetitive substantial defaults on payment of its levies and other obligations to the scheme, and its continuation to do so, have seriously prejudiced all the other parties who own properties in the scheme. For this reason, the Applicant contended, it would be just and equitable to wind up the Respondent.

[12] The Respondent in turn disputed that it was unable to pay its debts nor that it would be just and equitable to have it wound up.

[13] While the Respondent confirmed that it derived its income from letting the units in the scheme, (the Respondent did not indicate any other source of revenue) it alleged to have demonstrated through its financial records its ability to pay its debts when they fell due in the normal cause of business; that 25 of its units were unencumbered and that in the circumstances those assets formed a substantial portion of its property and as such can be readily realised on the open market, if necessary. This, according to the argument, provided evidence to refute a finding in terms of Sec 69 (1)(a), i.e. that the Respondent was deemed to be unable to pay its debts; that through its financial statements and the subsequent payment made to the Applicant it had assailed the legal conclusions contemplated by Section 69 (1)(a); that no evidence was provided by the Applicant of the allegation that the Respondent had for a number of years failed to pay levies when they fell due; that its ability to pay its debts should be assessed by virtue of its globular liabilities (i.e. mortgage bond repayments utilities and levies) as opposed to the payment of levies only.

[14] The Respondent concluded by stating that the Applicant has failed to make out a case for, among others, actual inability of the Respondent to pay, alternatively deemed inability to pay.

[15] I turn attention first to the question whether the Applicant, after the payment on behalf of the Respondent of the sum of R338 800-69 in October 2010, after the provisional liquidation order was granted, retained its *locus standi* in this proceedings. The Applicant argued that the payment aforesaid did not extinguish its *locus standi.* First it argued that the payment did not include interest which had accumulated between September 2010 and October 2010 in the sum of R18 061-95. Secondly it based its argument on the provisions of Section 346(1)(b) of the Companies Act read with Section 66(1) of Close Corporation Act that a contingent or prospective creditor of a company may bring an application for its winding up. The Applicant maintained that by reason of a prospective or contingent claim it had against the Respondent it had retained its *locus standi* to apply for the latter's winding up.

[16] In *Holzman NO and Another v Knights Engineering and Precision Works (Pty) Ltd 1979 (2) S.A 784 (W) at 787 (F-H)* Nestadt J, relying on the judgment of Trengrove J in the Gills-Mason case (supra) stated the following:

> *"To return for a moment to TRENGROVE J's definition of a contingent or prospective creditor, it will be seen that there are two elements: a claim against the company, which (1) arises from some existing vinculum juris, and which (2) may in the future ripen into an enforceable debt. It is clear therefore that the claim of the "creditor" need not be due or payable at the date of the presentation of the application for winding-up (Henochsberg The Companies Act 3rd ed at 606). But it is essential that there actually exists a vinculum juris with the company. It does not suffice that it will probably arise in the future.*

[17] In casu the Applicant clearly meets the requirements set out by Nestadt J. I am satisfied that there is an existing *vinculum juris* which may in the future ripen into an enforceable debt. On this basis the Applicant has *locus standi* to proceed with this application.

[18] Is the Respondent unable to pay its debts?

[19] The Applicant claimed that at the time when it caused the Section 69(1) notice to be issued, the Respondent owed the sum of R77 156-00 which has since escalated. The Respondent, on the other hand alleged that the sum claimed was not due and payable at the time when Section 69 notice was served. It also alleged to have a bona fide defence to the claim as well as a valid counterclaim. I shall, in dealing with the Respondent's alleged bona fide and counter-claim simultaneously deal with the Applicant's response thereto. To complete the analysis I shall also deal with the Respondent's contentions that the Applicant has failed to make out its case on the founding papers.

[20] Let me deal with the Respondent's alleged bona fide defence(s), which are set out hereinafter.

[21] That the amount claimed was not due and payable: The Respondent argued that the amount of R77 156-00 which was said to be due and payable as levies for December 2009 and January 2010 could not be correct because, as on 23 December 2009, the January 2010 levies were not yet due and payable. According to the Respondent, the only amount that would have been due and payable at that stage would have been the sum of R40 878-00 and not R77 156-00. The alleged overstatement according to the Respondent invalidates the claim and consequently the Section 69(1) notice. The Applicant's response is that while it is correct that the demand in present case was only effective as a statutory demand for the amount that was due and payable as at the date of the demand it was not correct to allege that the demand was not effective in respect of that part of the debt that was due and payable when the demand was made, simply because an amount was included therein that was not yet due and payable, that provided that the amount that was due and payable met the requirements of liquidity for the purposes of Section 69(1) the notice would be valid.

[22] There is merit in the Applicant's argument. This position is in fact supported by the authorities. In *Ebrahim (PTY) Ltd v Pakistan Bus Services (PTY) Ltd 1964 (4) SA 146 (N) at*

146 - 147 (a decision of Wilter J which the Applicant referred to) the following said:

"In its affidavit the Respondent gives its version of the transaction which gave rise to the alleged indebtedness and contends that it does not owe the applicant R1 700 although it admits unequivocally that it does owe the applicant R1 300. Mr Kriek for the respondent, correctly conceded that in those circumstances it could not be said that the existence or validity of the debt was in dispute. If it were in dispute, it might be an effective bar to the grant of the present application. It is impossible, on the papers before me, to decide whether the amount of the debt is R1 700 or R1 300. It is sufficient for applicant's purposes that the respondent admits an indebtedness of R1 300 and I need not pursue that question further. It is common cause, moreover, that on 27th May, 1964, the applicant served on the respondent a letter which required the amount of R1 700 to be paid within three weeks from the date of receipt of that letter and that the amount in fact has not been paid. Notwithstanding that it may be that the applicant in that letter demanded payment of an amount greater than the amount in fact owed by the respondent, it is clear that the deeming clause in sec 112 comes into operation, for once it is conceded by the respondent that an amount of R1 300 was owing, the unalterable fact is that he failed to pay his indebtedness within the time stipulated in sec 112."

[23] From the above quotation it is clear that the Respondent's defence on this point cannot be sustained. The Section 69(1) notice was valid in so far as the amount which the Respondent admitted it owed. Its failure to pay, secure or compound the debt to the satisfaction of the Applicant triggered the deeming provisions of the section: the Respondent was rightfully deemed to be unable to pay its debts. The application for its winding up on this ground ought to succeed.

[24] The next defence the Respondent raised was that the Applicant had failed to carry out the duties and responsibilities imposed on it by Section 37 of the Sectional Titles Act and, consequently, the Respondent was relieved from paying the levies imposed on it.

[25] Section 37 reads as follows:

> *"(a) to establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, up-keep, control, management and administration of*

the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate;

(b) to require the owners, whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the body corporate: Provided that the body corporate shall require the owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules made under Sectional Titles Act, 1971 (Act No. 66 of 1971), to make such additional contribution to the fund as is estimate necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of rules the owners concerned are responsible for such costs;

(bA) to require from a developer who is entitled to extend the scheme in terms of a right reserved in section 25 (1), to make such reasonable additional contribution to the fund as may be necessary to defray the costs of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution for the provision of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts;

(c) to determine from time to time the amounts to be raised for the purposes aforesaid;

(d) to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections;

(e) to open and operate an account or accounts with a banking institution or a building society;

(f) to insure the building or buildings and keep it or them insured to the replacement value thereof against fire and such other risks as may be prescribed;

(g) to insure against such other risks as the owners may by special resolution determine;

(h) subject to the provisions of section 48 and to the rights of the holder of any sectional mortgage bond, forthwith to apply any insurance money received by it in respect of damage to the building or buildings, in rebuilding and reinstating the building or buildings in so far as this may be effected;

(i) to pay premiums on any policy of insurance effected by it;

(j) properly to maintain the common property (including elevators) and to keep it in a state of good and serviceable repair;

(k) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building or buildings;

(l) to comply with any reasonable request for the names and addresses of the persons who are the trustees of the body corporate in terms of the rules referred to in section 35, or who are members of the body corporate;

(m) to notify the registrar and the local authority concerned of its domicilium citandi et executandi, which shall be its address for service of any process;

(n) improvement of land comprised in the common property;

(o) to keep in a state of good and serviceable repair and properly maintain the plant, machinery, fixtures and fittings used in connection with the common property and sections;

(p) subject to the rights of the local authority concerned , to maintain and repair(including renewal where reasonably necessary) pipes, wires cables and ducts existing on the land and capable of being used in connection with the enjoyment of more than one section or of the common property or in favour of one section over the common property;

(q) on the written request of any owner or registered mortgagee of a section, to produce to such owner or mortgagee, or any person authorized in writing by such owner or mortgagee, the policy or policies of insurance effected by the body corporate and the receipt or receipts for the last premium or premiums in respect thereof; and

(r) in general, control, manage and administer the common property for the benefit of all owners.

[26] The Applicant refuted this defence as baseless. I agree with the Applicant that there is nothing in Section 37 which creates the impression that levies can be withheld on the basis that the trustees of a Sectional Title Scheme have failed to discharge their duties in terms of this Section. A dissatisfied Sectional Title holder has remedies available to address any complaint it may have. These were set out by Malan J, in *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd 2003 (5) SA 414 (W)* at 421 D-G as follows:

"The remedies available to the respondent are the following: an application to court for a mandatory interdict to compel the trustees to perform the duties imposed upon them by s 39(1) of the Sectional Titles Act, read with the various sections (including, in particular, s 37(1) of Act); an application to court in terms of s 46 of the Sectional Titles Act for the appointment of an administrator to perform the duties imposed upon the body corporate to the exclusion of the body corporate and its trustees; the convening of a special general meeting of the body corporate as contemplated by Rule 13(e) of Annexure 8 to the Sectional Titles Regulations, for the purpose of removing the trustees from office and electing other trustees to perform the duties imposed upon the body corporate by the Sectional Titles Act."

[27] In the same judgment Malan J put to rest any notion of withholding levies as a form of protest against the non- performance of the trustees of a body corporate. At page 419 G-H he stated that:

“Section 37(2) of the Sectional Titles Act 95 of 1986 provides that any contributions levied in terms of s 37(1) of the Act shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court of competent jurisdiction from the persons who were owners of units at the time when such contributions became due.”

[28] The Respondent's counter-claim: the respondent alleged to have a counter-claim against the Applicant's claim. It claimed to have lodged a claim in July 2009 for damages which it suffered at one of its units in the Sectional Title Scheme. The Applicant was indemnified by its insurers for these damages in the sum of R29 076-45. According to the Respondent this amount should have been credited to the Respondent's account which the Applicant failed, refused and/or neglected to do. The Applicant was again paid the sum of R13 482-10 in January 2010 by its insurers for a burst geyser in one of the respondent's units in the sectional title scheme. This amount too was to have been credited to the Respondent's account and which the Applicant failed to do. The Respondent also claimed to have suffered damages amounting to R12 620-00 made up R1 420, financial obligations (no details supplied) and loss of income of R11 200-00 as a result of the Respondent's tenant giving notice to vacate the units due to their poor state of repair as a result of the Applicant's failure to perform its duties in terms of Section 37(1) of the Sectional Title Act. The Applicant negated the Respondent's claim that it had a counter-claim against the Applicant's claim. The Applicant alleged that a "Developers Account" was opened when the Respondent was still in effective control of the affairs of the Applicant and that the two insurance amounts were paid therein. In the absence of any counter-argument from the Respondent I am satisfied that the Applicant's version is correct and the counter-claim argument therefore falls away.

[29] That the Respondent was able to pay its debts:

The Applicant's point of departure was that the Respondent was served with a valid Section 69(1) notice and the sum referred to in the demand was not paid, secured or compounded within the 21 days required by the Act. The inescapable conclusion therefore was that the Respondent was deemed to be unable to pay its debts. This point has already been dealt with in paragraphs 22 and 23 supra and the conclusion arrived at is that the deeming provisions of section 69(1)(a) have come into operation by the Respondent's failure to respond.

[30] The Applicant was furthermore of the view that it had gone beyond just a mere reliance on the deeming provisions and proved on a balance of probabilities that the Respondent was unable to pay its debts as and when they fell due. The Respondent vehemently resisted these allegations. It claimed to be able to pay its debts.

[31] The Applicant's contention is that the Respondent is commercially insolvent. In *ABSA Bank Ltd v Rheboksklloof (PTY) Ltd and Others 1993 (4) SA 436 (C) at 440 F-I* Berman J held that a company is commercially insolvent in the following circumstances:

"The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry a normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning ofs 345(1)(c) as read with s 344 (f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up."

[32] I am of the view that the financial position of the Respondent set out in the Report by Bester, the provisional liquidator, bar for the amounts which it challenged and which were conceded to be incorrect by the Applicant, clearly proves that the Respondent is commercially insolvent as set out by Berman J in the *Rheboksklloof* case supra. The cash flow position of the Respondent, according to this report reveals that it is unable to meet its monthly financial commitments. There is a monthly shortfall of R31 309.39. I need not go into the details of this monthly management accounts as they are fully set out in the provisional liquidator's report. This shortfall is a substantial amount and from the Respondent's operations there is no indication that it will be able to make up for it since there is only one source of income, namely the rental collected which is woefully short of covering all the expenses.

[33] Finally, there was a dispute regarding the value of the Respondent's units, because there were conflicting estimates of the value of these units the provisional liquidator

appointed an independent sworn appraiser who valued the Respondent's properties at R26 990 000.00. The Respondent on the other hand produced a valuation by a sworn appraiser, Adval Valuation Centre CC which reflected the combined value of the properties and the other immovable property belonging to the Respondent and which is situated in Parow at R40 500 000.00, the Parow property being evaluable at R1 500 000.00. There is a difference in the two evaluations of approximately R12 010 000.00. One would have expected the valuation to be close enough to make an easy call on their accuracies. The desperate differences require a look at other factors which may assist in determining the true value of these properties for purposes of these proceedings. One such factor is whether the properties are readily realisable. Although the Applicant's reference to the deed search for transfers of units in the Dolphin Ridge scheme showing only three transfers in the period between may not be a true measure of how difficult it would be to dispose of the units nevertheless deem it sufficient to go a long way in providing guidance. I agree with the Applicant that in the depressed property market it may not be easy to realise these assets for their true market value. The failure to dispose of these units for their true value and within a reasonable period of time will leave the Respondent unable to meet its financial obligations. The Respondent in the circumstances is in my view commercially insolvent.

[34] I am therefore satisfied that the Applicant has made out a case for a final order of liquidation of the Respondent.

[35] The order I make is the following:

1. A final order of liquidation of the Respondent is hereby granted.

2. The Respondent is placed under a final winding up order in the hands of the Master of the High Court.

3. The costs of the application shall be costs in the winding up of the Respondent's estate.

DOLAMO, AJ