IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

22/9/2016

CASE NO: 22421/2013

Before His Lordship Mr Acting Justice Davis
Heard on 14 September 2016
Judgment delivered: 22 September 2016

In the matter between:

THE BODY CORPORATE ELMA PARK Applicant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED ✓

22/9/2016 .....
DATE SIGNATURE

and

ERF 195 ELMA PARK LTD Respondent

JUDGMENT

DAVIS, AJ:

[1] This is an application by a body corporate for the winding-up of an allegedly defaulting member thereof.

[2] **CHRONOLOGICAL BACKGROUND**:

The hearing of this matter on this court's opposed motion court roll on 14 September 2016 was preceded by a number of historical and procedural facts of which the Respondent's counsel has during argument furnished me

with a useful chronology. Reading from this together with the papers, I extract the following:

2.1 1996 – The Respondent acquires the land and the buildings which comprise the scheme.

2.2 April 2008 – The Respondent opens the sectional title register for a "*mixed use scheme*". I interpose to state that the property which makes up the scheme is a 22 storey skyscraper located in Edenvale and which is commonly known as the "*Orion Building*". The sectional title scheme was opened by the Respondent as developer after the property had been revamped, reconstructed and refurbished to the extent where it since then comprises a retail section in turn comprising of two floors of commercial units, some of which are let or are available as shops and offices and a residential section comprising of 20 floors of residential units occupied by approximately 200 tenants.

2.3 16 January 2012 – A settlement agreement was reached in respect of a financial reconciliation and some set-off between the parties of amounts due and payable by the Respondent.

2.4 13 December 2012 – The Applicant's notice in terms of Section 345 of the Companies Act, No. 61 of 1973, is delivered containing a demand in the amount of R1 392 780,64.

2.5 16 January 2013 – The Respondent's attorney responds to the Section 345 demand.

2.6 16 April 2013 – The application for winding-up is launched.

2.7 4 August 2014 – The answering affidavit and counter-application is delivered.

2.8 14 May 2015 – The replying affidavit and answering affidavit to the counterclaim is delivered.

2.9 14 November 2016 – The Applicant issues summons out of the Gauteng High Court Local Division Johannesburg in case no. 2241/2015 seeking payment of R30 159 064,43 from the Respondent in respect of levies.

2.10 4 February 2016 – The Respondent delivers a replying affidavit to the Applicant's answering affidavit in the counter-application.

2.11 4 March 2016 – The Respondent launches an application to refer the disputes between the parties to arbitration in the Gauteng High Court Local Division Johannesburg in case no. 4941/2016.

2.12 7 March 2016 – The Respondent launches an urgent application for a stay of the liquidation application and has it set down for 22 March 2016.

2.13 7 March 2016 – The Applicant's notice of motion to set aside the replying affidavit in respect of the counter-application as an irregular step is delivered.

2.14 15 March 2016 – The urgent application for a stay of the winding-up application is struck from the roll for want of urgency.

2.15 22 March 2016 – The winding-up application is postponed and costs are reserved.

2.16 7 September 2016 – Judgment is reserved in case no. 4941/2016 in the Gauteng High Court Local Division Johannesburg.

2.17 14 September 2016 – The opposed winding-up application is heard.

[3] **FURTHER PROCEDURAL MATTERS**:

3.1 Although the previous application for a stay of the winding-up application is technically still "*alive*", counsel for the Respondent confirmed that it is not proceeded with by the Respondent.

3.2 No particulars have been placed before the court as to the detail of the disputes between the parties which is the subject matter of a request for referral to arbitration and it is not alleged that those comprised the same disputes which form the subject matter of this winding-up application. The reservation of judgment in respect of this referral is therefore not a bar to this application proceeding.

3.3 No reliance was placed on the replying affidavit to the Applicant's answering affidavit in the counter-application and the issue of the late delivery thereof as an irregular step need not be adjudicated on. So far the status of the papers and the disputes.

3.4 Further requests and answers in terms of Rule 35(12) were also exchanged resulting in hundreds of pages of bank statements and other invoices forming part of the papers.

3.5 The first point *in limine* regarding the authority of the Applicant to litigate in these proceedings was not pressed on with and no dispute was raised as to compliance with the formal aspects of the application and service thereof.

[4] **APPLICANT'S CAUSE OF ACTION**:

4.1 The Applicant alleges that the Respondent, as the owner of 19 of the 98 units in the scheme is indebted to it in an amount in excess of that claimed in the Section 345 notice as outstanding levies and that the Respondent is commercially insolvent in that it is unable to meet its debts, including the claim of the Applicant as and when they become due and that it may only able to do so by way of financing from its holding company. The Applicant further alleges that it is just and equitable in the circumstances that the Respondent be wound up.

4.2 In addition to the chronology already mentioned, a summary of the history on which the Applicant relies is the following:

4.2.1 As developer the Respondent appointed a surveyor to survey the individual units in the scheme with a view to establishing the participation quota of each unit. The participation quota which was approved in terms of the Sectional Title Act and which formed part of the current Surveyor-General Sectional Title documents (SG No. D1509 of 2007) provide that the two non-residential units, numbers 1 and 2 (*"the retail section"*), have each been allocated a 40% participation quota percentage whilst the remaining 98 residential units (*"the residential section"*) have varying participation quota percentages allocated depending on the floor area of each unit, the total of which comprises the remaining 20% of the participation quota.

4.2.2 The purchasers of residential units, of which the Applicant's deponent, being one of its trustees is one, relied on the participation quota as well as the other advertisements and marketing furnished by the Respondent to the effect that the scheme would be a "*Manhattan style living with uninterrupted views*".

4.2.3 The uninterrupted views were for a substantial period of time indeed interrupted as the Respondent had an advertising wrap of some 13 storeys in height wrapped around the building. This was later deemed a life-threatening hazard by the Regional Manager: Emergency Services of the Local Authority and removed and there is an outstanding dispute as to the apportionment of the revenue generated herefrom by the Respondent to the Applicant. A similar dispute also rages pertaining to the letting out of common area in the scheme by the Respondent to a "*car wash business*" as well as a further display of the Orion brand on the sides of the building. None of the monetary values of these disputes play a role in the determining the Respondent's indebtedness for purposes of this application.

4.2.4 After the managing agent initially employed by the Respondent was replaced in July 2012 with the current managing agent, the issue of levies was investigated. In defence of its non-payment of levies, the Respondent *inter alia* alleged that it had to be credited due to electricity usage paid by it for the common areas of the scheme directly to the local authority.

4.2.5 The issue of calculation of the electricity was put to bed in August 2012 when a settlement agreement was reached in terms whereof a calculation was made of such electricity payments and the Respondent was entitled to set-off thereof against its outstanding levies. There is some dispute further as to non-payment by the Respondent of an amount calculated in terms of the settlement agreement regarding electricity payments and the Applicant alleges that it is threatened with electricity cut-offs by the Ekurhuleni Local Authority. There was also another attempted settlement which has failed to result in payment by the Respondent.

4.2.6 The Applicant's deponent stated that, notwithstanding the two settlement agreements, the Respondent remained in arrears with its levy account and owed the Applicant almost R3 million and annexed the Respondent's statements of account indicating how this total amount was arrived at.

4.2.7 There is some dispute as to whether the Respondent had previously at an annual general meeting through its legal manager acknowledged its indebtedness to the Applicant in circumstances where the Respondent's deponent denies this but simply states that the acknowledgement was that R100 000,00 per month would be paid as an "*interim monthly*

payment" until final resolution of the dispute. Despite this, the Applicant stated that sporadic short-payments resulted in the Respondent falling deeper and deeper into debt with the Applicant.

[5] **THE TEST FOR A PROVISIONAL WINDING-UP ORDER**:

5.1 It is trite that, for purposes of the granting of a provisional winding-up order, the Applicant need only *prima facie* prove its case.

See *inter alia*: **Orestisolve (Pty) Ltd v NDFT Investment Holdings (Pty) Ltd and Another** 2015(4) SA 449 (WCC).

5.2 In circumstances such as the present, where the Respondent denies the Applicant's status as creditor, the test has, traditionally, been summarised with reference to, *inter alia*, **Kalil v Decotex (Pty) Ltd** 1988(1) SA 943 (AD) at 980, **Hulse-Reutter v HEG Consulting Enterprises (Pty) Ltd** 1998(2) SA 208 (C) as follows by the learned author Meskin in **Henochsberg on the Companies Act** at the discussion of Section 344:

> "*Winding-up proceedings ought not to be resorted to in order by means thereof to enforce payment of a debt, the existence of which is bona fide disputed by the company on reasonable grounds; the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt (the 'Badenhorst rule after* ***Badenhorst v Northern Construction Enterprises (Pty) Ltd*** *1956(2) SA 346 (T) at*

347-348')... It is submitted that where the debt is disputed and hence the Applicant's locus standi as creditor, the application will be dismissed (if the dispute is bona fide and on reasonable grounds) not because the Applicant lacks locus standi, but because winding-up proceedings are inappropriate for the purpose of determining whether or not he does."

5.3 The more developed test is that, even where an applicant has established his *locus standi* as creditor, he should not be entitled to the remedy sought in circumstances where the respondent could at the same time establish that the claim was disputed on *bona fide* and reasonable grounds. The Badenhorst-rule thus seems to constitute a self-standing and possibly flexible principle. See the **Orestisolve**-case *supra* and **GAP Merchant Recycling CC v Goal Reach Trading 55 CC** 2016(1) SA 261 (WCC).

5.4 Once the Applicant has crossed the hurdle of *locus standi* as creditor and where his application is not opposed by other creditors, the court's discretion is very narrow, for an unpaid creditor who cannot obtain payment and who brings his claim within the Act is as against the company entitled *ex debito justitiae* to a winding-up order. See *inter alia* **Sammel v President Brand Gold Mining Co Ltd** 1969(3) SA 629 (A) at 662.

5.5 It is therefore necessary to examine the Respondent's contentions to evaluate whether the debt is *bona fide* disputed on reasonable

grounds. The reasonableness of a defence will generally indicate the *bona fides* of it being raised since the requirement of *bona fides* is satisfied if the company genuinely wishes to contest the claim and believes it has reasonable prospects of success (the **Orestisolve**-case *supra*).

[6] **THE RESPONDENT'S DEFENCES**:

6.1 The Respondent contends that the origin of the dispute "*is to be found in the disproportionate manner in which levies and other charges are presently apportioned amongst owners of units in the scheme*".

6.2 The Respondent says that the inequitable levy structure arose from a patent error which occurred when the scheme was initially established. The Respondent alleges (correctly) that the present management rules of the scheme and the participation quotas do not provide for a "*ring-fencing*" or separation of expenses (and contributions) as between the retail and the residential sections of the scheme. The Respondent contends that the amounts to be paid by the Respondent are unrealistically high when compared to those paid by owners of the residential sections particularly when usage of common facilities such as a boiler water heater and lifts are considered. The Respondent's counsel was at pains to point out that the defence was not a "*unfairness complaint*" but an allegation that

the original intention of apportionment of participation quotas was not followed through when the scheme was established.

6.3 The result of the Respondent's ownership of the retail section and a number of units in the residential section is that it is liable for 84% of the total levies.

6.4 In making the abovementioned submissions, the Respondent appears to lose sight that at no stage since the establishment of the scheme and the inception of the participation quotas have any steps been taken by the Respondent for the amendment of the management rules of the scheme or the participation quotas determined and established initially by it as developer.

6.5 The current counter-application for an order compelling the holding of a special general meeting presumably with a view to amend the rules or participation quotas has not previously been set down nor is it contended that such a meeting should first take place and in fact the counter-application was not proceeded with. It was also conceded that the management rules themselves make provision that such a meeting can be called without an order of court and could in fact have been called or insisted on by the Respondent at any time prior to the launching of the winding-up application.

6.6 In fact, when a security palisade was installed at the expense of the Applicant, the Respondent's manager: Orion Group Legal Services,

dealt with the apportionment of the cost thereof as follows in an e-mail dated 19 June 2012:

> *"I have discussed the topics below with the director of Erf 195 Elma Park Ltd, Franz Gmeiner and my instructions are the following:*
>
> - *In respect of the palisade fencing around Erf 257: Erf 195 Elma Park Ltd (the owner of Erf 257) does not require a fence around his property but will not object to the body corporate erecting a fence around Erf 257 at the expense of the body corporate (which will entail that Erf 195 Elma Park will contribute around 85% of the fence through its levy).*
>
> - *The amounts owing in respect of section 1 and the residential sections – still to be determined finally – can be paid at instalments of R100 000,00 per month at the prime interest rate."* (my emphasis)

6.7 In view of the aforementioned concession and the long-standing existing apportionment of levies in accordance with the registered participation quota of units in the scheme, the issue of the "*patent error*", the "*inequitable levy structure*" and the refusal to pay without having taken any steps for the reapportionment of the participation quotas is therefore neither a reasonable nor a valid defence.

6.8 If there is any further doubt as to the Applicant's *locus standi* as creditor and the Respondent's liability, it has been dealt with as

follows by the Respondent in paragraph 19 of its abovenamed director's answering affidavit:

> "*I can confirm that the Respondent is in a position to pay all amounts which it admits are due and payable to the Applicant as well as the arrears owed to Ekurhuleni and that such amounts will be paid prior to the hearing of this application.*"

Nothing has been placed before this court as to what amount the Respondent "*admits*" or that anything has been paid. At the hearing of the application it was complained of on behalf of the Respondent that the court is called upon to decide the issue of winding-up on "*historical figures*". Despite this complaint, nothing has been added to the abovementioned paragraph to "*update*" the figures despite the answering affidavit having been deposed to as long ago as 4 August 2014.

6.9 If one has further regard to the previous broken promises of regular payment and apply the principle that the probabilities are that, unless otherwise indicated, a *status quo* will continue to exist, then the Respondent has not furnished any evidence or reasonable grounds upon which it can be found that the arrears complained of when the Applicant had launched the application had since been paid.

6.10 The manner in which the Respondent formulated its abovementioned promise further gives rise to doubt as to its *bona fides*. If a party says that he will pay what he admits is due, it is reasonable to expect

such a party to state what that admission or amount is. The interwovenness of the issues of *bona fides* and reasonableness referred to above are explained as follows by Rogers J in the **Orestisolve**-case at [13]:

> "*Including or excluding bona fides as a distinct requirement is unlikely in practice to lead to different results because bona fides (genuineness) is on any reckoning not on their own sufficient and because a finding that the claim is disputed on substantial (i.e. reasonable) grounds could rarely coexist with a finding that the company is not bona fide in disputing the claim.*"

In not stating what amount is admitted or what has been paid leaving a disputed balance, smacks both of a lack of genuineness and substantial grounds.

6.11 The Respondent also cannot claim that it was unable to do the abovementioned calculation as, in response to the Section 345 notice, the Respondent through its attorneys stated the following:

> "*Our client denies that it is indebted to your client in the sum of R1 392 780,64 or any amount of whatsoever nature at this juncture. Our client is presently computing and analysing whether your client is due any amount. Due to the disputes which arose between our client relating to the levies and the electrical consumption charged by your client ... our client denies that it is obliged at this juncture to secure or compound the amount claimed by your client whilst such amount is*

disputed and whilst involved in negotiations with your client." (again my emphasis)

6.12 Since the aforementioned statements have been made papers have been exchanged and extensive answers and documentation furnished in terms of Rule 35(12). Despite this, no calculation has been forthcoming indicating that nothing is due.

6.13 In fact, a calculation annexed to the Respondent's answering affidavit states the following:

"*Total levies as at end June 2014*	*R16 932 385.74*
Less special levy and interest thereon	*R 8 424 835.74*
Less electricity paid to Ekurhuleni	*R 3 262 859.55*
Less electricity charged by BEC	*R 1 967 115.43*
Less amounts owed to Orion	*R 357 347.18*
Total levies potentially due by Orion	***R 2 920 227.84***"

6.14 The abovementioned amount is higher than the amount initially claimed in the Section 345 notice and the Applicant stated that, due to the Respondent's ongoing default, the outstanding levies continued to increase.

6.15 The Respondent's denial of liability for the special levy referred to in the above calculation is also questionable. The Respondent contends that after the institution of the present proceedings the

special levy was raised on 13 June 2013 at an annual general meeting from which the Respondent was absent. The Respondent states that it is advised that if the amount to be raised by way of a special levy is intended to be utilised for any luxurious improvement of the common property then it would be invalid unless it has been approved by members of the Applicant by way of a unanimous resolution. The Respondent's deponent states that in the circumstances he is "*led to the inescapable conclusion that the special levy was no more than a stratagem on the part of the trustees aimed at the harassment of the Respondent. The Respondent therefore disputes the validity of the special levy and has made no payment in respect thereof.*"

6.16 However, in a letter to the Respondent the following was stated regarding the special levy:

> "*The special levy was implemented by the trustees of the scheme who were legally and duly elected. As you are aware the responsibility and legal obligation of the Act is carried over to the trustees and it is their fiduciary responsibility to ensure adherence with the requirements of the Act.*
>
> *The main reason for the special levy is in order to ensure that the Rational Fire Design is done and implemented which should have been done prior to occupation and which was not done by the developer and is a legal requirement. In general the building fails safety standards.*

Your client has since October 2012 when Ekurhuleni first started threatening with legal action not achieved anything substantial. The local authority indicated it cannot wait any longer, is ready to take legal action against the body corporate (which includes all the members) and the insurer has withdrawn cover. Insurance cover is a requirement in terms of the Sectional Title Act."

[7] Considering all the above, I find:

7.1 That the Applicant has *prima facie* established its *locus standi* as creditor of the Respondent;

7.2 The Respondent is liable to the Applicant for the arrears and outstanding levies calculated in terms of the existing management rules and participation quota of the scheme; and

7.3 The Respondent has not *bona fide* disputed the aforementioned liability on reasonable grounds.

[8] **AD INSOLVENCY**:

8.1 The latest balance sheet produced by the Respondent is for the year ended 30 June 2013. It shows that the Respondent is solvent in that its assets of some R127 million exceed its liabilities of some R67 million leaving equity of some R60 million.

8.2 However, when one has regard to the cash-flow statement, it indicates that the Respondent had cash at the beginning of the year of some R3 993,00 and total cash at the end of the year of R1 755,00. It also suffered a nett cash loss from operating activities

in the amount of R2 303 679,00 of which R1 654 309,00 constituted finance costs. Its total cash at the end of the year was only realisable from its nett financing activities which included the proceeds from loans from group companies in an amount of some R5 327 790,00.

8.3 The above statements therefore confirm the Applicant's allegations that the Respondent is unable to pay its due debts from its own income and can only survive on loans from its group or holding companies. This effectively amounts in the proverbial *"borrowing from Peter to pay Paul"*.

8.4 I therefore find that the Respondent is commercially insolvent within the meaning of Sections 344(f) and 345(1)(c) of the Companies Act.

[9] **JUST AND EQUITABLE**:

9.1 None of the generally identified categories that would enable a court to exercise its discretion to wind up a company on the basis that it is just and equitable to do so exist, namely the disappearance of a company's substratum, the illegality of the objects of the company and fraud committed in connection therewith, deadlock in the management of the company, circumstances similar to winding-up of a partnership with regard to small companies and oppression of minority shareholders. See the discussion on this topic in the discussion of Section 344 of the Companies Act in Meskin *et al*

Henochsberg on the Companies Act and **Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd** 1985(2) SA 345 (W).

9.2 Presently the Applicant argues that it is a body corporate and that it retains its *locus standi* to collect outstanding levies and therefore would be a contingent creditor of the Respondent despite payments from time to time (see **Express Model Trading 289 CC v Dolphin Ridge Body Corporate** 2015(6) SA 224 (SCA)) and that as a result of the failure of the Respondent as a member of the body corporate to make payments of levies owing, basic services to the Applicant's building are being disrupted and the Applicant is unable to plan the management of the scheme and failing in its duties imposed by the Sectional Titles Act. The Applicant says all this is brought about by the Respondent's lack of *bona fides* and recalcitrant attitude and therefore that it should be just and equitable to wind the Respondent up.

9.3 In view of the conclusions I have already reached as set out earlier in this judgment, I need not make a finding on this aspect which can, if needs be, be more fully addressed at the hearing of the return day of the provisional order which I intend granting.

[10] Having considered all the abovementioned aspects and having read the voluminous papers filed of record and having considered the arguments of counsel and their useful heads of argument for which they are thanked, I make the following order:

10.1 The Respondent company is hereby placed under provisional winding-up;

10.2 All persons who have a legitimate interest are called upon to furnish reasons why this court should not order the final winding-up of the Respondent on the 24th day of November 2016;

10.3 A copy of this order is to be served on the Respondent at its registered address and on the South African Revenue Services and published once in the Government Gazette and in the Star newspaper.

N DAVIS
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	14 September 2016
Judgment delivered:	22 September 2016
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