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

**Case no: 21304/2009**

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| **NATIONAL HOUSING FINANCE CORP LTD** | Applicant |
| v | |
| **HOUSING ASSOCIATION BLAAUWBERG** | Respondent |

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**JUDGMENT DELIVERED THIS TUESDAY, 9 FEBRUARY 2010**

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**CLEAVER** J

[1] The applicant applies for the provisional winding-up of the respondent, an association incorporated under section 21 of the Companies Act, No 61 of 1973 ("the act"). The order is sought on two bases, namely

1. That the respondent is unable to pay its debts as contemplated in terms of section 344(f) of the act, read together with section 345(1)(c) thereof; and
2. That it would be just and equitable for the respondent to be wound up.

[2] The relationship between the applicant and the respondent is somewhat unusual and an appreciation of the history of that relationship is necessary when dealing with the application. The history is succinctly set out in the heads of argument delivered by the applicant's counsel which I utilise with due recognition to the author:-

2.1 The respondent was formerly part of the Blaauwberg Municipality until it was separated and established as an independent association incorporated in terms of section 21 of the act.

2.2 The respondent was obliged to undertake the development of certain property in Atlantis ("the Atlantis property"), and to this end it was envisaged that the respondent would:

2.2.1 Engage in undertaking loan agreements with third parties for purposes of securing the development of the housing units on the property.

2.2.2 Oversee and facilitate the construction of the residential units by building contractors.

2.2.3 Conclude, manage and administer any agreements with residents for the housing units which were developed (and which would include the collection of rentals).

2.2.4 Attend to the instructions for the subdivision of the properties so that the subdivided units could ultimately be transferred to the new owners upon payment of an agreed purchase price.

2.3 The Atlantis property was formerly municipal land which was transferred to the respondent.

2.4 The residential units which were to be constructed by the respondent formed part of the broader intention of the Government of the Republic of South Africa ("the government") to provide subsidised housing to previously disadvantaged persons.

2.5 The city effectively outsourced the carrying into effect of the housing project on the Atlantis property to the respondent.

2.6 The applicant is a public company, the sole shareholder of which is the government. The mandate of the applicant is to provide finance for purposes of constructing and making available housing to previously disadvantaged persons.

2.7 To this end, and on 7 November 2000, an entity known as the Housing Institutions Development Fund ("the HIDF") entered into a loan facility agreement ("the agreement") with the respondent, pursuant to which *inter alia* HIDF made available to the respondent a loan facility of R19 145 160.00.

2.8 The purpose of the facility was recorded as being *"to provide finance for the construction of new housing units in Atlantis, Western Cape for end users in the lower, medium income categories."*.

2.9 On 27 November 2000 and as security for the loan advanced in terms of the agreement, a mortgage bond was registered over certain erven constituting, collectively, the Atlantis property.

2.10 On 20 June 2001 HIDF and the applicant concluded a written agreement of delegation and cession, pursuant to which the applicant effectively stepped into the shoes of the HIDF, and took over its rights and obligations in terms of the agreement.

2.11 On 9 November 2001 an addendum to the agreement was concluded between the applicant and the respondent, confirming that the cession and delegation was recognised as between the applicant and the respondent.

2.12 The respondent has fallen substantially in arrears in regard to payments due in terms of the agreement, and the respondent's indebtedness to the applicant is now in the region of R20 077 091.85.

2.13 Following a letter of demand written at the instance of the applicant, the respondent's legal advisor on 28 September 2009 addressed a lengthy letter to the applicant. The letter confirms the financial predicament in which the respondent finds itself, and indeed records that one of the options available to the respondent is its winding-up.

2.14 To date hereof, the respondent has not repaid the monies due by it to the applicant.

[3] The application is opposed on a number of grounds, one of which is raised *in limine*.

[4] The agreement in terms whereof the rights and obligations of HIDF (referred to in para 2.10 above) were ceded and delegated to the applicant contained a suspensive condition to the effect that its provisions were to be suspended *inter alia* until the written consent of the respondent had been obtained to the transaction, and written confirmation had been received from the respondent that it was bound to all the

provisions of the loan agreements concluded with HIDF. In its answering affidavit, the respondent draws attention to these conditions and records that it has no evidence that the conditions were fulfilled. It accordingly places the applicant to the proof that the suspensive conditions had been complied with. In reply, the applicant's deponent records that he made a diligent search of the records of the applicant but did not succeed in locating the documentation relating to the fulfilment of the conditions. The deponent points out, however, that

4.1 Since the cession took place in 2001 the respondent has conducted itself in such a manner that there can be no doubt as to its standing in terms of the loan agreement.

4.2 The cession of the mortgage bond from HIDF to the applicant was recorded in the Deeds' Registry on 27 September 2001.

4.3 The cession of the mortgage bond could not have taken place had all the contractual conditions between HIDF and the applicant not been satisfied.

[5] The argument advanced on behalf of the respondent that the failure of the applicant to produce proof of the respondent's consent as required in terms of the agreement, renders all further transactions null and void and non-suits the applicant overlooks the existence of a document filed as an annexure to the founding papers. This is the addendum to the loan facility agreement referred to in 2.11 which was concluded between the applicant and the respondent and signed on 1 November 2001 on behalf of the respondent and on 9 November 2001 on behalf of the applicant. This agreement, which is accompanied by an extract from a resolution of the Board of Directors of the respondent appointing the chairman and a director of the respondent

to sign the addendum, *inter alia* confirms that the cession and delegation was recognised as between the respondent and the applicant. The purpose of the addendum, as stated therein, was to rectify the description of the Atlantis property which had been incorrectly stated in the loan agreement concluded between the respondent and HIDF on 7 November 2007 *"which consists of the Facility Letter, and all documents referred to in the said Facility Letter and all other documents and agreements incorporated in the loan agreement by reference;".* The addendum also contains a reference to the mortgage bond which had been passed by the respondent in favour of HIDF and which had by then been ceded to the applicant. The respondent does not deny that the suspensive conditions were complied with; it merely submits that it is incumbent on the applicant to prove that the conditions were complied with. In my view, the respondent's signature to the addendum agreement which in effect recognises the validity of the cession is dispositive of the issue and in the result the point taken *in limine* cannot be sustained.

[6] In the answering affidavit the urgency of the application is challenged, but this defence was not seriously persisted with in argument. As I understand the law, in order for the point of urgency to succeed, the issue should be finalised as a separate issue and if successful will result in the matter being removed from the roll. In this division, applications for liquidation or sequestration are treated, at the very least, as semi-urgent applications. In the applicant's papers the case for urgency is made out on the basis that the financial position of the respondent is precarious and it is unable to pay its debts and that a liquidator should be appointed as soon as possible

to take charge of the affairs of the respondent. In my view, a satisfactory case as to the urgency of the matter has been made out.

[7] A point which was said to be one which was to be dealt with *in limine*, namely that much of the applicant's founding affidavit was based on hearsay, was ultimately addressed as part of the opposition to the merits of the application. The objection was based on the fact that the deponent to the founding affidavit had been in the employ of the applicant only from about the middle of 2009 and that accordingly he had *"no foundation in the history of the matter"*. Accordingly it was submitted, albeit only in the heads of argument delivered by the respondent's counsel, and not during argument, that his hearsay evidence should be excluded. Confronted by the point made by applicant's counsel that there had been no application to strike out any specific portions of the deponent's evidence, respondent's counsel merely submitted that perhaps less weight should be attributed to the evidence of the deponent. I confess that I do not understand precisely what I was expected to do. Much of the affidavit comprises historical detail as to the history of the relationship of the parties and as far as I can see there is no dispute as to the facts presented on behalf of the applicant. As will be seen when I discuss the defence raised on the merits more fully, it was submitted by the respondent that the applicant, together with the City Council of Cape Town, had over a period of years frustrated its ability to proceed with the development of the erven in question, but there are no specified averments as to how this occurred, save the contention that the applicant was not assisting by failing to make available to the respondent the title deed for the properties which are

bonded in favour of the applicant. I will deal with this issue in the following paragraph. There is no merit in the objection to the contents of the affidavit.

[8] The defence put up by the respondent, as I understand it, is that the applicant has frustrated efforts by it to procure the transfer of portions of the properties bonded in favour of the applicant. The complaint has been raised in a vague and unsubstantiated manner. It seems that the respondent has from time to time requested the applicant to make available to it the title deed for the properties bonded to the applicant for the purpose of preparing documentation for the transfer of certain properties. A number of emails are attached to the answering affidavit which have not been explained and which certainly require a proper explanation. The applicant points out that since early 2008 a total of only seven sub-divided units have actually been transferred, the consideration for which, totalling approximately R200 000, has been paid to the applicant and allocated to the respondent's indebtedness. The applicant's deponent says that the failure to transfer more properties was not a consequence of the applicant's reluctance to furnish its consent to the cancellation of the bond, but arose *inter alia* from

> *"the failure on the part of HAB* (the respondent) *to sub-divide the properties, making it possible for beneficiaries on the Atlantis property to apply for and purchase the properties which they occupy; and*
>
> *the inability, at the time of registration of transfer, on the part of the attorneys acting on behalf of the purchasers, to furnish guarantees for payment to the applicant prior to the applicant being in a position to grant its consent the cancellation of the bond pertaining to the particular erven in question. Therefore the transfers of such properties could not, for obvious reasons, take place."*

The applicant's deponent also says that while requests were made by the respondent to the applicant to furnish all the documentation, i.e. *"(title deeds and consents to cancellation of the bonds) in respect of all 676 properties, the applicant was not in a position to hand same over without suitable guarantees being in place. Had it done so it would have effectively relinquished the only security which it had in place for its loan to HAB".* The applicant in turn attaches to its papers copies of correspondence which reveal that certain guarantees which it had received were not paid when they fell due. The applicant points out that the fact that tenants elected to purchase properties does not strictly mean that the transactions were bound to be successful for as already mentioned, according to the applicant's records, only seven sub-divided properties have been transferred. The applicant is correct in recording that for transfers for any properties to take place, the following is necessary:

> *"* The would-be purchaser is required to procure finance for the said purchase of the erf in question;*
>
> * *The property itself must have been sub-divided and a separate titled deed issued;*
>
> * *The applicant is required to obtain a guarantee from the would-be purchaser's attorney or financial institution;*
>
> * *Only upon receipt of such a guarantee would the applicant be in a position to furnish its consent to the cancellation of the bond over a particular erf prior to transfer taking place;"*

The applicant says that in addition to the seven units which have been successfully transferred, four further properties are waiting to be transferred. However, at the time of deposing to the affidavit, guarantees for payment in relation to the purchase consideration in respect of these properties had not been furnished with the result

that the applicant's consent to the release of these properties from the bond was being withheld. Applicant accordingly says that the failure on the part of the respondent to secure the sales of the properties is no fault of the applicant.

[9] It is by no means clear why the respondent has required the original title deed for the 28 properties bonded to the applicant. The making available of a title deed in the course of transferring a property to a purchaser is something which is best left to the conveyancers dealing with the transaction and it is not clear why the respondent has been involved to the extent that it has been in this regard. As I understand the position, the original title deed is not required until such time as a transaction is dealt with in the deeds office. If the respondent wished to obtain a copy of the title deed in order that transfer documents could be prepared, this could easily have been obtained from the deeds office. In the result I am not satisfied that the respondent can resist the application on the basis of the alleged frustration of its activities by the applicant.

[10] It accordingly remains to be considered whether the applicant has made out a sufficient case to justify the granting of a provisional order of liquidation. For the applicant to succeed it must make out a *prima facie* case that

10.1 The applicant is a creditor or a member of the respondent; and

10.2 The respondent is unable to pay its debts.

A *prima facie* case is to be established on a balance of probabilities.

[11] There is no dispute that the applicant is a creditor of the respondent, nor is the amount owing to the applicant disputed. Accordingly, the applicant would normally be entitled, *ex debito iustitiae*, to a winding-up order[1].

[12] The respondent's answer to the allegation that it cannot pay its debts reads as follows:

> *"96.1 The contents hereof are noted save to aver that Respondent is in possession of certain assets which, properly managed, and with the cooperation of the Applicant will turn the Company around.*
>
> *96.2 It is humbly submitted that the liabilities of the Respondent does not exceed its assets. I have been advised that the court will not easily refuse the relief sought by the Applicant in circumstances where the Respondent is unable to service it's commitment to the Applicant unless it could be proved that the debt is easily realizable. It is submitted that this is certainly the case here. To date we have over 100 pre-approved sales which can be transferred to the purchasers forthwith should the Applicant deliver the said documentation against the necessary undertakings. Second the Respondent is unwilling and able to bring an application to compel the City of Cape Town to transfer the property developed by the Respondent an Application that would benefit the Applicant irrespective of whether the Applicant elects to continue with the liquidation Application or not."*

This answer does not deal with the averment that the respondent cannot pay its debts. Furthermore, nowhere does the respondent reveal what its assets and liabilities are. The applicant points out in its papers that of the 28 erven bonded to the applicant, only eight have thus far been properly subdivided. There is accordingly no indication as to whether the erven to which the respondent refers have been subdivided, or whether they are in a position to be transferred. The applicant points out that even if had it not called up the full indebtedness under the

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[1] *"Where an unpaid creditor seeks the winding-up and 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 iustitiae to a winding-up order and is not bound to give the company time."* (Blackman 'Commentary on the Companies Act' at 14-141 –14-142)

loan agreement, the respondent's monthly commitment would be in the region of R175 000 per month which it is clearly unable to meet. Counsel for the applicant cited the much quoted judgment in *Absa Bank Ltd v Rhebokskloof*[2] which is particularly apposite in the present matter.

> *"The oft-repeated and, with respect, eminently commonsensical and practical statement of Innes CJ in De Waard v Andrews & Thienhans Ltd 1907 TS 727 at 733 is singularly apposite in the instant context, viz:*
>
> > *'To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes',*
>
> *words which were echoed by Bristowe J in his judgment in the same case, in which he said at 739:*
>
> > *'After all, the prima facie test of whether a man is insolvent or not is whether he pays his debts; and if he cannot pay them, that goes a long way towards proof that he is insolvent.'"*

I am satisfied that the applicant has made out, at the very least on a *prima facie* basis, that the respondent is unable to pay its debts. In fact, this was in effect conceded by counsel for the respondent during the course of argument, who however submitted that in the exercise of my discretion, I should not grant the application.

[13] The averment that it will be just and equitable for the respondent to be wound up is dealt with by the respondent in the following unsatisfactory manner:

> *"The averments contained in this paragraph are noted. In amplification it is averred that the Applicant has contributed by making performance impossible. This position as argued elsewhere is easily reversible with cooperation from the respective stakeholders. The units are priced far below market value which makes the opportunity doubly attractive to the tenants."*

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[2] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd and Others* 1993 (4) SA 436 (C) at 446I to 447A

[14] Bonded to the applicant was municipal land which was transferred to the respondent on the basis that the respondent would deal with the property in the manner set out in paragraph 2.2.

[15] For the reasons set out in paragraph 2.4 to 2.6 inclusive, the applicant avers that it has an interest in ensuring that the obligations of the respondent are properly carried out. The applicant avers that it was the respondent's duty to oversee not only the construction of the residences, but it was to ensure that

a) The Atlantis property on which each of the units was constructed should be adequately subdivided so that transfers could take place;

b) Payment of the rates, water and electricity be made on a regular basis so that transfer could ultimately be effected in the name of the qualifying residents; and

c) The management and collection of rentals paid pursuant to the agreements in place between the respondent and the occupants should be properly accounted for.

The applicant avers that the respondent has failed to carry out these duties. It points out that the respondent constructed buildings on land owned by the City of Cape Town adjacent to the land owned by the respondent using the applicant's funds.

[16] As far back as November 2001 a report furnished by Price Waterhouse Coopers ("PWC") revealed that the respondent was not in a position to generate sufficient cash flow in order to fund its operation, or to repay its loan to the applicant and

warned against the continuation of the business in circumstances where there was no prospect of it being in a position to meet its liabilities.

[17] In August 2002 and at its own request, the respondent was placed under provisional liquidation as it was hopelessly insolvent at the time. With assistance from the applicant, this order was set aside in February 2003.

[18] In 2004 a group of persons occupying buildings constructed by the respondent in Atlantis obtained an order against the respondent in terms whereof the respondent was, pending the outcome of the finalisation of the application, interdicted from taking any further action against the tenants on the basis of agreements which had been entered into with the respondent. The respondent records that

> *"This Order was not seen by the tenants for what it was and what the court tried to achieve. To the beneficiaries it was seen as a justification of not paying for anything at all. As a result of this Court Order, the tenants failed to make any payments to the Respondent whatsoever. The knock-on effect being that the Respondent slipped further into financial difficulties. The respondent had to abandon the matter due to a lack of funds to settle the legal cost of the legal team that attended to the matter."*

[19] It is clear that the controllers of the respondent have failed to carry out their mandate and the applicant avers that in doing so have acted to its prejudice.

[20] Of the 670 residential units which can be established on the Atlantis property, only seven have been transferred into the names of residents.

[21] The commission of irregularities in the past is admitted by the respondent, but it seeks to pass the blame on to the applicant and the City of Cape Town without any valid reason for it being set out in the papers.

[22] On 29 September 2009 the applicant received a letter from the respondent's legal advisor, Adv Neelan K Ramsingh ("Ramsingh"). The letter records the financial predicament of the respondent and concludes

> *"There are three strategic options for HAB:*
>
> *(a) be resuscitated so it can continue performing its administrative responsibilities to its existing tenants;*
>
> *(b) be reinvigorated to deliver a new round of housing (which presupposes (1) or....*
>
> *(c) winding-up its interests to the satisfaction of all stakeholders as quickly as possible."*

Ramsingh continues and states under the heading *"Core Purpose"*

> *"To wind-up HAB as quickly as possible, being explicitly careful to incur:*
>
> *(a) No political (public relations) damage;*
>
> *(b) Minimal financial loss on all sides*
>
> .....
>
> *(c) No legal infringements."*

The view of the respondent's legal advisor that the winding-up of the respondent is a core purpose is a clear indication that it would be just and equitable to wind up the respondent.

[23] On a conspectus of the above, it is clear to me that it will also be just and equitable to wind up the respondent.

[24] In the result the following order is granted

24.1 The requirements of the rules of court relating to service and time periods are dispensed with and the matter may be dealt with as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

24.2 The respondent is placed under a provisional order of liquidation in the hands of the Master of the High Court.

24.3 A rule *nisi* be and is hereby issued calling upon the respondent and all persons concerned to appear and show cause at 10h00 on 23 March 2010 as to why

24.3.1 Respondent should not be placed under a final order of liquidation;

24.3.2 The costs of this application should not be costs in the liquidation.

24.4 Service of this order shall be effected

24.4.1 On the respondent at its registered office;

24.4.2 On the South African Revenue Services;

24.4.3 By one publication in each of the Cape Times and Die Burger newspapers;

24.4.4 On any employees of the respondent; and

24.4.5 On the trade union representing such employees, if any.

R B CLEAVER