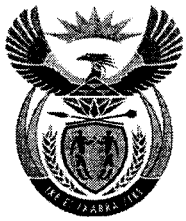

Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number 23255/2010

In the matter between:

ABSA BANK BEPERK Applicant

versus

ERF 1252 MARINE DRIVE (EDMS) BPK Respondent

Case Number 25370/2010

In the matter between:

KING CHARLES WINELANDS (PTY) LTD First Intervening Party

versus

ERF 1252 MARINE DRIVE (EDMS) BPK Respondent

Case Number 9260/2011

In the matter between:

KING CHARLES WINELANDS (PTY) LTD Second Intervening Party

versus

ERF 1252 MARINE DRIVE (EDMS) BPK Respondent

JUDGMENT DATED THIS 3rd DAY OF NOVEMBER 2011

ZONDI, J:

Introduction

[1] This is an application for the provisional winding-up of the respondent on the ground that it is unable to pay its debts within the meaning of section 345 as read with section 344 of the Companies Act, 61 of 1973 ("the Act") (respondent's failure to respond to a statutory demand and "commercial insolvency"). The respondent's indebtedness to the applicant arises from a deed of suretyship in terms of which the respondent had bound itself as surety and co-principal debtor for the obligations of Charles Potgieter Investments (Pty) Ltd (in liquidation) ("the principal debtor" or "CPI") in respect of certain overdraft facilities afforded to it by the applicant.

[2] The respondent opposes the application essentially on three grounds, firstly that a letter of demand purporting to be a notice in terms of section 345 ("the statutory notice"), upon which the applicant relies, is defective; and secondly that as a result of the applicant's prejudicial conduct towards the principal debtor it has been discharged from the suretyship and thirdly that the principal debtor has a counterclaim for an amount which far exceeds the applicant's claims.

[3] King Charles Winelands (Pty) Ltd launched two applications, on 22 November 2010 and 6 May 2011 respectively, for leave to intervene in the winding-up application. In terms of the first intervention application, King Charles Winelands (Pty) Ltd sought to obtain an order in terms of section 354 (1) of the Act, that the winding-up proceedings be stayed with a view to the implementation of section 413 of the Act.

[4] In relation to the first intervening application no order, save for the issue of costs, is sought. The second intervening party opposes the liquidation of the

respondent on the grounds that the respondent is not commercially insolvent and is in a position to pay its debts; the value of the respondent's assets exceeds its liabilities and finally that it is not just an equitable that the respondent be wound-up. The applicant did not file an answering affidavit opposing the second intervention application.

The facts

[5] The applicant alleges that the respondent is indebted to it in the sum of R657 324.23 in respect of a mortgage bond account number 8065084217. The applicant avers that on 20 September 2010 its attorneys on its instructions addressed a written demand to the respondent for the payment of the sum of R657 324.23 by the respondent within a period of three weeks from delivery of the letter of demand. The letter constituting a notice in terms of section 345 of the Act was delivered at the respondent's registered address on 21 September 2010.

[6] The respondent denies that it is in arrears with its bond repayments and in substantiation of its denial has filed a copy of the bank statement indicating that it is up to date with its repayments on the bond.

[7] In its reply the applicant concedes that the respondent is not in arrears with its bond repayments and that for that reason it cannot rely on the respondent's liability based on the mortgage bond in bringing this application. In light of this concession it therefore follows that for the purposes of establishing a cause of action and its *locus standi* the applicant will have to rely on a deed of suretyship in terms of which the respondent bound itself as surety and co-principal debtor with Charles Potgieter Investments (Pty) Ltd (in liquidation).

[8] In this regard the applicant alleges that the respondent bound itself as surety and co-principal debtor with Charles Potgieter Investments (Pty) Ltd for due and punctual payment of all amounts due and payable by the said Charles Potgieter Investments (Pty) Ltd to the applicant in the sums of R10 000 000.00 in respect of account number 4046363654; R379 365.75 in respect of account number 8058537257 and R384 547.96 in respect of account number 8058537273.

[9] The applicant further alleges that on 15 October 2010 its attorneys addressed in terms of section 345 of the Act a written demand for payment of all amounts owing by the respondent in terms of the deed of suretyship and for payment thereof within a period of three weeks from delivery of the notice to the respondent. The letter of demand was delivered at the respondent's principal place of business on 18 October 2010.

[10] In its opposing affidavit the respondent admits having concluded a deed of suretyship with the applicant but denies that it is liable to the applicant for the payment of any amount pursuant thereto. In substantiation of its denial the respondent alleges that when the applicant brought the liquidation proceedings on 21 October 2010 a period of 10 days, within which it was required to make payment in terms of the letter of demand, had not expired. It therefore contends that the liquidation application was brought prematurely and that for this reason the applicant may not rely on the respondent's failure to respond to a section 345 statutory demand as a ground of its liquidation.

[11] I agree with the respondent's contention. It seems to me that the application for the winding-up was brought two weeks too soon. The period of three weeks from

the service of the demand required by section 345 (1) (a) (i) had not expired when the applicant brought this application and it therefore follows that when the application was launched there had been no neglect for three weeks to pay the sum demanded within the meaning of section 345 and in the circumstances the contention, that the respondent because of its failure to pay is deemed to have been unable to pay its debts, is incorrect. (*Re Lympne Investments Ltd* [1972] 2 ALL ER 385 (Ch)). In commenting on the provisions of section 345(1) (a) (i) Henochsberg on the Companies Act vol 1 at (709) says:

> *"Three weeks thereafter. – It is submitted that in the calculation of this period the date of service of the demand must be excluded (cf National Bank of South Africa Ltd v Leon Levson Studios Ltd 1913 AD 213 at 217-218; Versveld v SAR & H 1937 CPD 55 at 59; Re Lympne Investments Ltd [1972] 2 All ER 385 (Ch) at 387). The ground for winding-up under s 344 (f) read with s 345 (1) (a) does not exist until the whole of the three-week period, ie twenty-one days has expired; hence an application presented before such period has expired must be dismissed..."*

[12] The applicant's case for liquidation based the respondent's failure to respond to a section 345 statutory demand must therefore fail as when it brought the winding-up application on 21 October 2010 the whole of the three weeks period had not expired. But this is not the end of the matter because this is not the only ground on which the applicant relies for the winding-up of the respondent. It also relies on the respondent's commercial insolvency. It alleges that the respondent is unable to pay its debts and that for this reason it must be wound-up. This is denied by the respondent.

[13] In its reply the applicant rejects the denial by the respondent that it is unable to pay its debts. The applicant alleges that on 22 October 2010 and in response to the letter of demand it addressed to the respondent in terms of section 345 the general manager of Charles Potgieter Group ("the Group"), which included both Charles Potgieter Investment (Pty) Ltd and the respondent, addressed a letter to the applicant's attorneys in which it admitted that Charles Potgieter Investments (Pty) Ltd and the respondent were liable to the applicant for the payment of the amounts claimed; that the respondent is a property owning entity whose only income was rental income and that it is the intention of Charles Potgieter Group to pay all its debts by way of selling properties. In the letter Charles Potgieter Group further pointed out that its assets are in excess of its liabilities and that it requested a period of six months within which to sell certain immovable property owned by the Group to enable them to pay the debts from the proceeds of such sales.

[14] The second intervening party has sought leave to intervene in this application on the basis that it is the creditor of the respondent. It alleges that the respondent is indebted to it in the sum of R16 143 603.59 which is far in access of the amount claimed by the applicant. It opposes the application on the ground that the second respondent is not commercially insolvent. It contends that the respondent is in a position to pay its debts. The second intervening party further alleges that the value of the respondent's assets exceed its liabilities by an amount of R7 925 969.84. It points out that in its normal cause of business the respondent remains a successful financial concern and in this regard it says:

> *"5.2 Op 21 April 2011 en in navolging van 'n transaksie met MSP Residential Property Fund (Pty) Ltd ter waarde van ongeveer R72 000 000.00, het het die bate en laste posisie van die Charles Potgieter*

Group en ook veral die respondent aansienlik verander en sien die respondent se eiendomsportjefulte tans daaruit soos gereflekteer duer die schedule aangeheg as AANHANGSEL "2TBP 4" hiertoe. Bevesting van die registrasie van hierdie eiendomme van die respondent ter waarde van R43 175 329.00 word gevind in die skrywe van die oordrag prokureurs, gedateer 3 Mei 2011, hierby aangeheg, gemerk as AANHANGESEL "2TBP 5".

5.3 Die gevolg van hierdie transaksie met MSP Residential Property Fund (Pty) Ltd (wie Mettle Property Group (Pty) Ltd se transaksie as kontrakteurende party vis-á-vis die Groep vervang het) is dat die respondent se laste van R63 995 659.42 verminder het na R20 820 330.16. Die netto batewaarde van die respondent se eiendomsportefulje, billik gewaardeer, beloop huidiglik R7 925 969.84 (R28 746 300.00 – R20 820 330.16). Weereens moet in aggeneem word date die dekkingsverbande, in die totale debrag van R9 720 000.00, wat ten gunste van ABSA Bank Beperk geregistreer is ter verseking van die borgstelling van R10 000 000.00, vir doeloendes van hierdie bereking as deel van die respondent se laste ingesluit is, nieteenstande die feit dat die hoofskuld huidiglik in dispuut is."

[15] The second intervening party further points out that the respondent's monthly rental income is R129 275.50 which far exceeds its monthly bond repayment obligation of R90 983.86. It accordingly asks for the dismissal of the application.

[16] Before I deal with the merits of this application I consider it necessary to first deal with the points *in limine* raised by the respondent and the second intervening party.

[17] Mr **Joubert** together with Mr **De Vries** appeared for both the respondent and the second intervening party. The first point taken by Mr **Joubert** is to the effect that the applicant's application is defective in that the documents, upon which the applicant's claim is based, were not annexed to its founding affidavit. He pointed out that the mortgage bond and the loan agreement on which the applicant relies for its first claim and a copy of the deed of suretyship in respect of the applicant's second claim were not annexed. Mr **Joubert** submitted that in application proceedings the affidavits take the place not only of the declaration but also of the essential evidence which would be led at a trial and that it is for this reason that a litigant must annex to its founding affidavit a document upon which it relies. For this proposition he relied on rule 18(6) of the Uniform Rules and to *Die Dros (Pty) Ltd & Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C); *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 C – G).

[18] It is correct that in terms of rule 18(6) a party who in its pleading relies upon a written contract must annex it to the pleadings. It is also correct that if a party fails to comply with any of the provisions of rule 18 his pleading is deemed to be an irregular step and the opposing party is entitled to have it set aside in accordance with rule 30. I am, however, of the view that in the present case in light of the respondent's admission that it concluded a deed of suretyship, upon which the applicant relies, the applicants' failure to annex a copy of the deed of suretyship, is not fatal to the application. With regard to the applicant's failure to annex a copy of a mortgage loan I am also of the view that its absence is not fatal to the applicant's application as the applicant in its reply has disavowed any reliance on a cause of action based on the respondent's indebtedness pursuant to a mortgage bond.

[19] A second point taken by Mr **Joubert** is to the effect that the applicant's application is fatally defective in that it failed to allege in its founding affidavit whether or not its claim is secured and if so, to set out the nature and value of such security as required by section 9(3)(a)(iv) of the Insolvency Act 24 of 1936 whose provisions are incorporated by section 339 of the Companies Act. It is correct that in terms of section 339 of the Companies Act in the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be complied *mutatis mutandis* in respect of any matter not specifically provided for by the Companies Act. Henochsberg on the Companies Act vol 1 at 667 in commenting on the provisions of section 339 says:

> "*The effect of s 339 is to apply in the winding-up of a company (ie: the process of liquidation which commences once an order of winding-up has been granted [and not] the legal proceedings which lead to the grant or refusal of such an order" (Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 961 per Corbett JA (as he then was)) unable to pay its debts, mutatis mutandis, those provisions of the law relating to insolvency, in so far as they may be capable of application, in respect of any matter not otherwise specially provided for by the Act.*"

It therefore seems to me that it is not a requirement for the applicant in the winding-up proceedings to state whether or not its claim is secured as the Companies Act does not require the applicant to do so. For these reasons Mr **Joubert's** second point should fail.

[20] I turn now to consider the respondent's defences to the application for its winding-up. In defending the application the respondent alleges that it has been discharged from the suretyship as a result of the applicant's prejudicial conduct

towards the principal debtor. In support of its defence the respondent alleges that as part of Charles Potgieter Group ("the Group") it owns various properties and is also involved in property development and administration. It alleges that in an attempt to counter the severe financial setbacks which the Group had experienced as a consequence of the combined effect of the economic depression and the introduction of the National Credit Act ("the NCA") the Group developed a business plan which in effect guaranteed buyers of potential properties in developments of the Group, a rental income in respect of such properties for a period of five years. Furthermore the transaction would be structured on the basis that 10% of the purchase price would be delayed and only be payable upon the resale of the property or within five years of the date of transfer which ever occurs first.

[21] The respondent goes on to say in its answering affidavit: *"hierdie besigheidsmodel is openlik bemark en was suksesvol bedryf tot en met November/Desember 2009 toe ABSA Bank Beperk besluit het om alle finansiering van verkope van die Groep te staak. Weens die besondere mag wat ABSA Bank Beperk in die finansiele mark het, het hul daarin geslaag om ook Eerste Nasionale Bank en Standard Bank te oortuig om in hulle voetspore te volg, in omstandighede waar die eindegebruiker alreeds goedgekeurde verbande gehad het en waarvan 13 aktes reeds ingedien was en 12 ander gereed was vir indiening in die Akteskantoor. Ongeveer 40 ander eiendomme was reeds verkoop met goedgekeurde verbande. Die banke kon eensydiglik hierdie transaksies met die kopers kanselleer, sonder behoorlike gronde daarvoor, bloot eenvoudig omdat hul geweet het dat dit nie ekonomiese sin sal maak vir die kopers om hulle te dagvaar of om regsstappe te neem om hul gebonde te hou aan die betrokke verbandooreenkomste nie."*

[22] The respondent denies the suggestion by the applicant that it cancelled the approved mortgage bonds because its sale agreements were "loaded transaction" and in contravention of the provisions of the NCA. The respondent denies that this was the case *"aangesien die kopers nie enige gedeelte van die koop som ooit vanaf die verkoper terug kry nie en is ABSA Bank Bpk gehoorlike van die nooidige feit en dokumente dien aangaande voorsien".* The respondent points out that the Group held a meeting with the applicant on 21 November 2009 in order to explain the operation of its business model to the applicant and it thereafter readjusted its business model to address the applicant's concerns.

[23] The respondent goes on to say *"as uitvloeisel van die vergardering van 21 November 2009 het Charles Potgieter Investments (Edms) Bpk sy kontrakte aangepas, soos met ABSA Bank Beperk ooreenkom, deur onder andere die woord "loan" met "Delayed Payment" te vervang, soos gestaaf deur die skrywe van Jacques Du Toit van 23 September 2009".*

[24] The respondent alleges that some few days later the applicant gave notice that it would no longer provide further financing in respect of sales concluded on the basis of the altered conditions of sale. The respondent says as a consequence the Group was forced to abandon this financial model and sell its properties at reduced prices in order to generate cash flow at minimal profit margins.

[25] The respondent further alleges that notwithstanding the modification of its financial model the applicant persisted in its attitude not to finance the Group's property sales with explanation that the Group had become *"risiko ontwikkelaar".*

[26] According to the respondent this explanation was untrue. It contends that the true explanation for the applicant's decision to classify the Group as a *"risiko ontwikkelaar"* related to the severe problems which were being experienced by the principal debtor in respect of another development known as Tyger Falls II. The respondent contends that as a consequence of the applicant's refusal to provide finance for the sale of its properties the principal debtor was unable to sell its properties which resulted in its inability to service its overdraft facility of R20 million.

[27] The question is whether the respondent has succeeded to show that it has been discharged as a surety as a result of the applicant's conduct towards the principal debtor. In our law there is no general principle to the effect that if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released. (*ABSA Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) at 1123 J – 1124 A) see also *Bock and Other v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) at 252 D – 253 B). As a general proposition, prejudice to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach or other legal duty or obligation; and the prime source of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If the alleged prejudice is caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the resultant prejudice is one which the surety undertook to suffer and the creditor's conduct cannot be said to constitute breach.

[28] I agree with Mr **Van Riet** who appeared with Mr **Vivier** for the applicant that the respondent's contentions should fail as the prejudicial conduct complained of was authorised by the contractual relationship between the applicant and the

principal debtor. Their contractual relationship in so far as it related to the approval of finance for the purchase of the respondent's Units in the development, was governed by the "*Developer Declaration for ABSA End-User Package*" which *inter alia* authorised the applicant to withdraw the approval should the applicant discover that there had been non-compliance by the principal debtor with the terms of the "*Developer Declaration*". In my view the applicant acted within its rights when it refused to grant mortgage finance in respect of the sale agreements which it considered constituted loaded transactions in contravention of the NCA. In these circumstances the fact that the principal debtor became unable to service its overdraft facility because of the applicant's decision to withdraw its credit extension provides no basis for the contention that the respondent should be discharged as surety.

[29] The second defence raised by the respondent is that the applicant's liquidation application should fail because the principal debtor has a counterclaim for an amount far greater than the amount which the principal debtor allegedly owes to the applicant. The allegations in support of this averment are set out as follows in paragraph 5.14 of the answering affidavit: *"Charles Potgieter Investments (Edms) Bpk het 'n oortrokke fasiliteit van R20 miljoen by ABSA Bank Beperk gehad en weens die opskorting van finansiering en verlies van inkomste vervoorsaak deur die handelinge van ABSA Bank Beperk kon Charles Potgieter Investments (Edms) Bpk nie hierdie rekening diens nie en het dit agterstallig geraak".*

[30] In explaining the contractual arrangement which Charles Potgieter Investments (Edms) Bpk had with the applicant the respondent has this to say in paragraph 5.15 of the answering affidavit:

"5.15 In die kontraktuele verhouding tussen Charles Potgieter Investments (Edms) Bpk en ABSA Bank Beperk:

5.15.1 ABSA Bank Beperk het die geld aan Charles Potgieter Investments (Edms) Bpk geleen en voorgeskiet op oortrokke rekening sodat Charles Potgieter Investments (Edms) Bpk sy normale besigheid, naamlik die ontwikkeling en verkoop van eiendomme kon doen en voorsit;

5.15.2 Te alle relevante tye en in die besonder ook by die aangaan van die ooreenkoms ten aansien van die oortrokke rekening, was dit in die kontemplasie van ABSA Bank en Charles Potgieter Investments (Edms) Bpk, en was dit as sodanig geïnkorporeer as 'n stilswyende of/of geïmpliseerde term van daardie ooreenkoms, dat ABSA Bank Beperk, in die gewone loop van besigheid, soos al die ander finansiële instellings, finansiering sal verskaf aan kopers van eiendomme van die Groep, en in die besonder ook die van Charles Potgieter Investments (Edms) Bpk, op die normale bankpraktyk en standaarde, welke beperk is tot:

(a) Die kopers se finansiele vermoë, dit is sy vermoë om die verbandverpligtinge na te kom; en

(b) Die bestaan van sekuriteit, in die vorm van die waarde van die onroerende eiendom.

5.15.3 In die omstandighede het daar:

(a) 'n Regsplig op ABSA Bank Beperk gerus om nie gewillige en daartoe instaat kopers van Charles Potgieter Investments (Edms) Bpk se eiendomme, teen billike en markverwante pryse, se finansiering af te keur op gronde

nie verbandhoudend met die koper se finansiele vermoë en die bestaan van voldoende sekuriteit in die waarde van betrokke onroerende eiendom, nie.

(b) *'n Regsplig op ABSA Bank Beperk gerus om hul nie skuldig te maak aan onredelike besigheidpraktyke en samespanninge deur ander finansiele instansies te oortuig om gewillige en daartoe instaat kopers van Charles Potgieter Investments (Edms) Bpk se eiendomme, verkoop teen billike en markverwante pryse, se finansiering af te keur op gronde nie verbandhoudend met die koper se finansiele vermoë en die bestaan van voldoende sekuriteit in die waarde van die onroerende eiendom, nie."*

[31] The respondent goes on to say that the applicant had a legal duty not to disapprove applications for mortgage financing on grounds unrelated to these contractual terms or conduct unreasonable business practice or to collude with other financial institutions with a view to persuading the latter to disapprove applications by potential buyers for mortgage financing on grounds unrelated to the purchasers' financial means and the availability of the *res vendita* to be mortgaged as security for the loan.

[32] The respondent further alleges that the applicant breached such legal duty by refusing mortgage bond financing to *"willing and able buyers"* on grounds unrelated to the purchaser's financial means and the availability of the security to the applicant and that it was guilty of conducting an unreasonable business practice by persuading First National Bank as well as Standard Bank to disapprove mortgage financing to

the purchasers for invalid reasons. The respondent says that as a result of the applicant's conduct the principal debtor had suffered damages in an amount of R50 067 250.00 being loss of past and future income as well as consequential damages.

[33] In its reply the applicant defends its decision to reject the principal debtor's business model on the ground that it regarded its sale agreements as loaded transactions. In explaining its reason for treating them as such the applicant points out that it is a standard business practice for developers such as Charles Potgieter Investments that before the commencement of a residential property development the developer would ask the applicant to finance the sale of all the individual units in the development. The development which was involved in this matter is known as Burgundy Estate. The sections of the Estate which are involved are Villa Sienna and Zinfandel. The applicant further points out that for the purposes of such application, a detailed and comprehensive presentation is submitted to it and that the developer's standard contract of sale would form an important part of the presentation.

[34] The applicant further alleges that in order to prevent any irregularities occurring in respect of the subsequent transactions with individual buyers, it would require the developer to provide certain guarantees which are recorded in a document entitled *"Developer Declaration for ABSA End-User Package"* ("the declaration").

[35] The applicant further alleges that when it in due course considers individual applications for mortgage financing by individual buyers it will rely on the developer's initial presentation as well as the guarantees provided by the developer in terms of

the declaration. The applicant says the declaration which was signed in the present matter and provided to it by the Group relates to Villa Sienna and is dated 30 September 2009. It provides *inter alia* as follows:

"I/We hereby confirm the following:

1. *I/We are the developers of the abovementioned Development which is classified as Vacant Land /Plot &Plan / Sectional Title (please delete the not applicable),*
2. *I /We confirm that this development does not form part of irregular deal structuring classified as follows:*
    - *Any form of irregular deal structuring, including but not limited to:*
        - *Any form of cash back to the buyer*
        - *Deposit paid on behalf of the buyer*
        - *Any form of rental guarantee to the client*
    - *Any development that forms part of a Rental Pool (compulsory or voluntary)*
    - *Hotel suites (of any kind)*
    - *Extension of Real Rights developments (where the developer sells his right of extension to an end user)*
    - *Any form of lending on Fractional Ownership.*
    - *99 year decreasing terms lease.*

I/We warrant that all the information I/we supplied is to the best of my/our knowledge and belief true and correct in all material respects and I/we am not aware of any other information which, should it become known to the bank, would affect the consideration of my/our application in any way.

I/We are aware that should information become available to the bank that could impact this application negatively; the bank has the right to withdraw the application/ approval without prior notice."

[36] The applicant contends that the financial model or business plan which the Group introduced and in terms of which it sold its Units constituted a material breach of the declaration in that in order to make the Units more attractive to potential purchasers it guaranteed a rental income. It avers that neither the principal debtor nor any other company in the Group had obtained its approval to market and sell the Units in Villa Sienna on the basis of the incorporation of the *"rental income guarantee"* to potential purchasers.

[37] The applicant says it was not prepared to condone these irregularities and to finance future transactions concluded on the basis thereof. It argues it was for these reasons that it decided to terminate the commercial relationship with the principal debtor.

[38] In an e-mail which the applicant sent on 28 October 2009 to one Ernest Albrecht, who had been appointed to market the units in Villa Sienna, the applicant explained why it terminated the commercial relationship with the principal debtor. It says:

> *"1. ABSA can not find sufficient security value in the development, 'the asking prices are considered too high for current market'*
>
> *2. as you are aware, ABSA will not entertain irregular deal structuring regarding end user finance ...*
>
> *The marketing of this development is aimed at investor buyers (buy or rent) with delayed deposits been offer, the deposit only payable at the same time the lease agreement expires. The purchaser must then either refinance the deposit or sell the unit to pay the deposit. This format of deal structuring is not considered acceptable to the bank."*

[39] In response to the applicant's email one Annerika Engelbrecht, the principal debtor's marketing manager wrote to the applicant on 28 October 2009 stating that the principal debtor did not consider the transaction to be an irregular deal structuring because "*the 10% deposit is a delayed payment to be paid either on the resale of the unit by the purchase or within five years from the date of transfer whichever is the earliest. The lease agreement is between the seller and the purchaser. The seller has the right to sublet the property for their own account at maximum rental achievable in any escalation. The current rental achieved in Burgundy Estate to similar units is between R4 200 – R4 500 per month this is also the rental we are getting at our development, Bella Vie. Both the delayed deposit payment and the lease agreement is optional for the purchaser. It is an offer currently promoted for a limited time period. At all times the selling price remains R799 900.00 and the purchase price remains payable in full by the purchaser*".

[40] The applicant further alleges that on 13 November 2009 it came to its attention that the principal debtor had been selling units in the Zinfadel section of Burgundy Estate in terms of a standard contract of sale which contained, in an addendum, a term to the effect that no deposit would be payable by the purchaser. Instead the deposit would be treated as a loan by the principal debtor to the purchaser. The addendum to the sale agreement provided for the payment of a loan by the purchaser to the seller.

[41] Clause 2 of the addendum provided for the payment of the loan. Sub-clause 2.1 provides: "*The parties agree that the purchaser owes an amount of R ..... ("the capital amount") to the seller being a shortfall on the purchase price of the property*". In terms of the addendum the purchaser would pay the capital amount to the seller

either immediately upon the sale of property by the purchaser to any third party or before the expiry of 60 months calculated from the date of registration of transfer of property into the name of the purchaser. The capital amount payable in terms of the addendum would attract interest at the rate of the prime rate plus 3% per annum from either immediately upon the sale of property by the purchaser to any third party or before the expiry of 60 months from the date of registration of transfer of property into the name of the purchaser. After becoming aware of the scheme the applicant took a decision to no longer provide loans to purchasers of units in Burgundy Estate as the units had be marketed and sold in contravention of the declaration and the provisions of the National Credit Act.

[42] In an attempt to persuade the applicant to change its mind, the principal debtor had a meeting with the applicant on 7 December 2009 and following that meeting Mr J Du Toit of the principal debtor wrote to the applicant on 8 December 2009 *inter alia* stating the following:

> *"We have implemented the following system: Purchase price: R799 000 in terms of pre-valuation of the bank and at which we have sold the properties for over the last two years. As the bank found value in our properties, no transaction can be seen as loaded transaction. We offered a delayed payment of 10 % of the purchase price re-payable either on the resale of the property or within 5 years from date of transfer, whichever comes first. Furthermore, as we have contracted with a rental management company, who currently manage 380 properties, to manage and rent the properties on behalf of purchasers if they wish to rent the properties for investment purposes. This is at a rate of R5 500 per month fixed for 5 years resulting in the managing company being cash positive over the term of the rental as the rental currently*

obtained, is an amount of R4 200 to R4 500 per month per unit with 10% escalation clauses."

[43] The principal debtor denied that the scheme it introduced constituted irregular transaction contending that:

"Throughout the world, structured transactions are the order of the day. It is commercially sound and part of the free market system which is safeguarded in South Africa by the democracy and our constitution. Our structure is not as referred to in the ABSA directive, a cashback in any way, or a deposit paid on behalf of a purchaser or a rental guarantee given by the developer. The definition of delayed payment is clear, the money is payable to the developer, if not paid, we will collect in terms of the agreement of sale and it cannot be seen as a loaded transaction. Furthermore, a management and rental company will rent the property from the purchaser on a basis of them being able to sub-let and furthermore to manage the property on behalf of the purchaser which again is normal commercial practise in South Africa.

The abovementioned is a commercial structure based on a valuation of the bank meaning that the finance provided on a transaction is normally 90% to value resulting in the bank being secured and the developer having to wait for the balance of the purchase price. ABSA bank is now preventing us from structuring the balance of the purchase price even though they have security and are satisfied with the value of the property, which can only be seen as the bank preventing out property rights to be exercised, unilaterally changing the free market system into dictatorship and thirdly causing us irreparable harm and damage in preventing us doing business in a commercial sound way as conducted throughout the world in these difficult times."

[44] The respondent alleges that the applicant's refusal to provide bond finance to the principal debtor's prospective purchasers of its Units in accordance with the agreement with the applicant constituted breach of the agreement. It says as a result of breach the principal debtor suffered damages for the past and future loss of income in the sum of R50 067 250.00. These are the facts which, the respondent alleges, give rise to the principal debtor's counterclaim against the applicant and upon which the respondent relies for its defence.

[45] It is correct that defences available to the principal debtor are available to the surety provided that such defences go to the root of the debt and are not personal to the debtor. (*Standard Bank of SA Ltd v SA Fire Equipment (Pty) Ltd and Another* 1984 (2) SA 693 (C) at 696 C – E). An unliquidated claim for damages is one of the defences which may be available to the surety. (*Muller and Others v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA) at para 8.

[46] The nature of the defence to be raised by the principal debtor is an alleged counterclaim for damages for loss of income which the principal debtor allegedly suffered as a result of the applicant's breach of the contract between the principal debtor and the applicant when the applicant decided not to grant bond financing for the purchase of the principal debtor's units.

[47] The question is whether the applicant has, in light of the respondent's averments forming the basis of its defence, made out a *prima facie* case against the respondent. The determination of this question is important because winding-up proceedings ought not to be resorted to in order 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 (*Hülse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C) at 218 E-J; Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T); *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 956 I-J; *Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening)* 1978 (1) SA 70 (D) at 72 A). A respondent in a liquidation application, who disputes the applicant's claim does not have to establish that the company will succeed in any action which might be brought against it by the applicant to enforce its disputed claim. All that is required of the respondent is to allege facts which, if proved at trial, would constitute a good defence to the applicant's claim.

[48] An applicant for a provisional order of liquidation need only make out a *prima facie* case. Where the application is opposed and the factual disputes have been raised in the affidavits in deciding whether or not the applicant has made out a *prima facie* case regard should be had not only to the applicant's papers but also to the respondent's rebutting evidence (*Kalil v Decotex (Pty) Ltd* supra at 976 H).

[49] I am not satisfied in the present matter that the respondent has established, first, the existence of a tacit, alternatively an implied term of the overdraft agreement secondly, and its breach. A tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind (*Wilkins No. v Voges* 1994 (3) SA 130 (A) at 136 I-J) and the onus is on the respondent to prove the material facts from which the inference is to be drawn.

[50] In my view the respondent's defence is flawed as it assumes that there is a

relationship between the terms governing the grant and use of the overdraft facility and the terms regulating the grant of the bond finance. In my view the two transactions are separate and operate independently of each other. In order to succeed in its defence the respondent would have to show that it was an implied term of the overdraft agreement that in considering the bond finance the applicant was enjoined to consider not only the purchaser's financial situation but also the terms upon which the overdraft finance was made available to the principal debtor. I doubt very much that the applicant would have agreed to have such a term imported into the overdraft agreement to ensure its business efficacy. In my view an implied term pleaded by the respondent is not necessary to render the overdraft agreement fully functionally and as such it cannot be inferred. Accordingly I find that the facts which the respondent has alleged are not facts which, if proved at trial, would constitute a good defence to the applicant's claim. The respondent's defence should therefore fail.

[51] It is clear from the evidence that the financial model or business plan introduced by the principal debtor entailed a delayed payment of the deposit of the purchase price and a rental guarantee through a company associated with it. The principal debtor had not obtained the applicant's approval to market and sell units in Villa Sienna on the basis of the incorporation of the rental income guarantee to potential purchasers and in these circumstances the applicant was entitled to decline bond finance applications.

[52] The second intervening party is opposing the application in terms of section 354 if the Act[1]. It alleges that it is the largest creditor of the respondent and it is owed

[1] ***354. Court may stay or set aside winding-up*** – *(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof of the satisfaction of the Court that all proceedings in relation*

R16 144 387-41 by the respondent. It opposes the liquidation application on the grounds, firstly, that the respondent is not commercially insolvent; secondly, that the respondent's assets exceed its liabilities and thirdly, that it is not just and equitable that the respondent be wound-up.

[53] It is correct that in terms of section 354 (2) the views of creditors should be taken into account by the Court in exercising its discretion. However, the Court will not follow the wishes of the majority of creditors except where they are on the face of them, reasonable (*Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd* supra at 74).

[54] The discretion which the Court exercises is limited to a certain extent by the provision of section 413 (b) which provides that when the Court has regard to the wishes of the creditors it should consider the value of the respective creditor's claim. In this regard the second intervening party points out that the respondent is indebted to it in the amount of R16 144 387.41 which is far in excess of the applicant's claim of R10 763 872 .71.

[55] The second intervening party further alleges that the value of the respondent's assets exceeds its liabilities by an amount of R7 925 969.84 and that in its normal course of business the respondent remains a successful financial concern. It points out that in April 2011 it concluded transactions amounting to R43 175 329.00 and the value of 6 pending transfers is R4 104 900.00. The second intervening party further alleges the respondent's monthly rental income of R129 275.50 exceeds its monthly bond repayment obligations of R90 983.36 and that the respondent is not in arrears

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to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.

with its bond repayments. It contends that it is not just and equitable to wind-up the respondent as the effect of liquidation will reduce the value of its assets by about 60%.

[56] I am not inclined to, in the exercise of my discretion, postpone or stay the liquidation application in terms of section 354 (2) as there is no doubt in my mind that the respondent is commercially insolvent. It does not have liquid assets or readily realisable assets available to meet its liabilities. It is clear from the respondent's financial statements that if the respondent were to pay R10million demanded by the applicant it would not be in a position to carry on normal trading. The respondent is a property owning company and a substantial amount of its assets consists of properties which are mortgaged to various financial institutions. The value of the investment property is indicated as R93 125 900.00 and the total amount owing under mortgage bonds is R61 829 516.00. It is also not clear whether other-creditors of the respondent are in support of the application for a stay and whether they will derive any benefit therefrom, and if so, what the nature of such benefit will be. In the circumstances the second intervening party's application should be dismissed.

[57] To sum up, I am satisfied that the applicant has established that the respondent is unable to pay its debts as described in section 345. Although the Court has a discretion whether or not to grant the order even when the applicant has established that the company is unable to pay its debts as described in section 345 there is no basis for this Court in the present matter to exercise its discretion in favour of the respondent. The respondent is a surety and the principal debtor has been liquidated. I am not satisfied that the respondent has readily realisable assets available out of which, or the proceeds of which, the respondent can in fact pay its

debts (*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (N) at 597 E).

The Order

[58] In the result the following order is granted:

1. The respondent be placed under provisional liquidation in the hands of the Master of the High Court (Western Cape High Court) in terms of Act 61 of 1973.
2. A *rule nisi* be issued in terms of which the respondent and all other interested parties are called upon to show cause, if any, to this Honourable Court on Tuesday, 29 November 2011 at 10h00, why:
   2.1 the respondent should not be placed under final liquidation;
   2.2 the costs of this application should not be costs in the liquidation.
3. The order shall be served as follows:
   3.1 By the Sheriff of the High Court on the respondent at its registered address being Haumann Rodger-Shiraz House, The Vineyards Office Estate, 99 Jip de Jager Road, Bellville;
   3.2 By the Sheriff of the High Court on the South African Revenue Services;
   3.3 Publication of this Order in one publication each "Die Burger" and the "Cape Times" newspapers in the language in which this order is granted; and
   3.4 On the employees of the respondent, if applicable, and on all trade unions representing such employees.
4. The second intervening party's application is dismissed.

5. The first and second intervening parties are ordered to pay the costs occasioned by their intervention including the costs consequent upon the employment of two counsel.

D H ZONDI
HIGH COURT JUDGE