Reportable

Republic of South Africa

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

Case no: 17096/2009

In the matter between:

VINCENZO BELLINI	Plaintiff
and	
ANDRE FRANCOIS PAULSEN	First Defendant
MARGERETHA ELIZABETH PAULSEN	Second Defendant
RYNO ENGELBRECHT N.O.	Third Defendant
FARAHNAAZ SAFODIEN N.O.	Fourth Defendant

CORAM	The Hon Ms Acting Justice U R D **Mansingh**
FOR THE PLAINTIFF	Adv J H Loots
INSTRUCTED BY	Louw Coetzee & Malan, Cape Town
FOR THE 1st & 2nd DEFENDANTS	Adv J C Swanepoel, Adv A J Murphy
INSTRUCTED BY	Webber Wentzel, Cape Town
DATES OF HEARING	8, 9, 10 and 18 October 2012
DATE OF JUDGMENT	28 November 2012

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JUDGMENT DELIVERED ON 28 NOVEMBER 2012

MANSINGH AJ

1. The plaintiff, Vincenzo Bellini, ("Bellini"), as a creditor of Ama Casa Props 115 (Pty) Ltd (in liquidation), ("Ama Casa"), seeks to hold the first and second defendants liable for the debts and other liabilities of Ama Casa, by virtue of the provisions of section 424 of the Companies Act, No 61 of 1973 ("the Act").

POINT *IN LIMINE*:

2. Defendants' counsel raised a point *in limine* during argument of the matter that plaintiff has no *locus standi* to the relief sought in terms of s 424(1) of the Act as plaintiff failed to prove that Aorta or he is a creditor for the purposes of the instant case. That the only evidence tendered by plaintiff is that a claim was lodged with the liquidator and it was proven.

3. The point *in limine* must fail for four reasons:

One: On 2 October 2012, the parties held a pre-trial conference and in terms of Uniform Rule 33(4), agreed to separate the issues as recorded in para 5 of the pre-trial minutes, which reads: "*Without admitting that Ama Casa Props 115 (Pty) Ltd is liable to pay to Plaintiff or Aorta GMBH the amount claimed in Plaintiff's particulars of claim the question to be decided is whether 1st and 2nd Defendant can be held personally liable for the debts of Ama Casa Props (Pty) Ltd as contemplated by section 424 of the Companies Act 61 of 1973 and as pleaded in para 18 and 19 of the Plaintiff's particulars of claim*". The first line of the paragraph was to prevent the plaintiff seeking judgment in a specified amount in the event of it being successful in holding the first and second defendants personally liable for the debts of Ama Casa.

Paragraphs 18 and 19 of the Particulars of Claim reads as follows:

"18. On date of conclusion of the agreement and when AOTA GmbH rendered services in terms of the agreement the First and Second

Defendants, alternatively the First Defendant, alternatively the Second Defendant:

18.1. Were duly appointed directors of AMA CASA and acting in their capacity as such;

18.2. Were fully aware of the fact that AMA CASA did not have sufficient funds to perform its obligations in terms of the agreement;

18.3. Were fully aware of the fact that AMA CASA would not be able to generate sufficient funds in the future in order to perform timeously in terms of the agreement;

18.4. Were fully aware that there were no reasonable prospects of AMA CASA generating and/or obtaining the sufficient funds in future in order to perform in terms of the agreement;

18.5. Fraudulently misled AORTA into rendering services to AMA CASA with the knowledge as set out in paragraphs 18.1. to 18.4;

18.6. Carried on business recklessly by entering into an agreement knowingly that AMA CASA was unable to perform accordingly.

19. The aforementioned actions and/or omissions by the First Defendant and/or Second Defendant, constitute the reckless carrying on

of the business of AMA CASA by the Defendant and/or Second Defendant, alternatively constitute intent on behalf of the First Defendant and/or Second Defendant to defraud creditors of the company, as contemplated by section 424 of the Companies Act, Act 61 of 1973."

Two: Plaintiff's attorney of record and previous counsel vouch that this was so agreed. Correspondence from plaintiff's attorneys to the defendant's attorneys supports such agreement.

Three: Any other construction would frustrate the very purpose of the Rule 33(4) agreement and paragraph 5 of the pre-trial minutes, which is to define the issues and curtail the proceedings. On the construction that the first and second defendants now wish to place on the agreement, the plaintiff would be obliged to prove its entire case before the decision on the issue separated in terms of Rule 33(4) can be made.

Four: The submissions are ill founded on the evidence that was presented. Sufficient evidence as enumerated hereunder was presented that plaintiff is a creditor of Ama Casa and in the amount claimed. In respect of the non achievement of milestones, plaintiff stated that insofar as they were not reached, they were not reached due to Ama Casa and first and second defendants not providing Aorta with information to allow them to reach the milestones. Defendants may not rely on their own default as a defence in these circumstances.

SECTION 424 OF THE ACT:

4. Section 424(1) of the Act provides as follows:

> *"424.* ***Liability of directors and others for fraudulent conduct of business-***
>
> *1.- When it appears, whether it be in a winding up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the court my direct."*

5. The Supreme Court of Appeal, in **Ebrahim and Another v Airport Cold Storage (Pty) Ltd 2008 (6) SA 585 (SCA)** at para 15, per Cameron JA, definitively stated the policy considerations behind section 424 of the Act:

> *"It need hardly be added that the function of the statutory provision also shapes its application. Although juristic persons are recognised by the Bill of Rights- they may be bound by its provisions, and may even receive its benefits- it is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when*

the object of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable." (See too **McLuckie v Sullivan 2011 (1) SA 365** at p369 *et seq*)

With Intent to Defraud / Fraudulent Purpose:

6. The intent to defraud or a fraudulent purpose can easily be deduced where the misrepresentation is overt.

7. Even omitting to inform creditors of the ability or inability to pay the company's debt when it falls due can constitute an intent to defraud. Goldstone JA, (as he then was), stated the following in **Ex Parte De Villiers NO: In re Carbon Developments (Pty) Ltd 1993 (1) SA 493 (A)** at 503-504: "*the mere carrying on of business by directors does not constitute an implied representation to those with whom they do business that the assets of their company exceed its liabilities. The implied representation is no more than that the company will be able to pay its debts when they fall due.*"

Recklessness:

8. In tying fraudulent intent in with recklessness in **State v Harper 1981 (2) SA 638 D** at 681, Milne J (as he then was) pointed out that conduct which constitutes a carrying on of the business of the company with the intent to defraud would almost invariably be reckless conduct where, for any reason, the intent to defraud is absent.

9. Recklessness must be given its ordinary meaning, requires gross negligence in the form of *culpa lata* (not necessarily *dolus eventualis*) - and need not only pertain to foreseen circumstances but also to culpably unforeseen consequences, whatever they may be. **Philotex (Pty) Ltd and Others v Snyman and Others 1998 (2) SA 138**.

10. **Ebrahim and Another v Airport Cold Storage (Pty) Ltd**-*supra* provides further guidance, where in paragraph 14 it is stated that: *'Acting "recklessly" consist in "an entire failure to give consideration to the consequences of one's actions, in other words an attitude of reckless disregard of such consequences". In applying the recklessness test to the running of a close corporation, the court should have regard to amongst other things the corporation's scope of operations, the members roles, functions and powers, the amount of the debts, the extent of the financial difficulties and the prospects of recovery plus the particular circumstances of the claim "and the extent to which the [member] has departed from the standards of a reasonable man in regard thereto".* **Philotex** supra; **Braitex (Pty) Ltd v Snyman and Others 1998 (2) 138 (SCA)**.

11. The fact that Ama Casa is a company, as opposed to a close corporation, does not alter the principles referred to in the passage quoted from **Ebrahim and**

Another v Airport Cold Storage (Pty) Ltd. **McLuckie v Sullivan** *supra at para 6.*

12. Giving further context to recklessness relevant to the matter under consideration is the following passage from **McLuckie v Sullivan**: *"Another way of describing the situation between the parties is that, at the time he repudiated the contract on behalf of Dansk, the defendant, as its sole director and shareholder, was aware that there was no chance of the company being able to perform its obligations without his financial input. Despite this knowledge, he purposefully caused Dansk to be wound up, being fully aware that the plaintiff could not for one moment expect to receive any dividend from the insolvent estate of Dansk in respect of the monies paid to in terms of the repudiated agreement of settlement. The defendant in acting as he did, conducted the affairs of Dansk in a manner which falls foursquare in the definition of reckless conduct, as has been described in the Act. He is therefore liable to recompense the plaintiff for the monies paid by him in terms of the settlement agreement, in terms of section 424 of the Act."*

THE FACTUAL MATRIX

Common Cause:

13. It is common cause that:

13.1. First defendant became interested in new technology for sustainable energy known as Inductive Vehicular Energy ("IVE").

13.2. First defendant and a business associate, Mr Cobus Myburgh ("Myburgh"), went to London and met with Mr William Cronje ("Cronje"), who developed the IVE concept and applied to have the said technology registered as a patent.

13.3. First defendant and Myburgh visited a factory in London and Cronje showed them a prototype of the IVE technology.

13.4. First defendant testified that he honestly believed that the IVE concept could work. He and Myburgh visited New Zealand during October 2008, where they again met with Cronje. A second and more advanced prototype of the IVE concept was illustrated to them.

13.5. Around the beginning of 2008, an agreement was entered into between first defendant, Myburgh, Cronje, Shemi Akdogan and Ama Casa in terms whereof Cronje and Akdogan agreed with first defendant and Myburgh to transfer all their right, title and interest in the IVE to Ama Casa. A twenty percent shareholding in Ama Casa would be awarded to a Research and Development Company (in formation) and wherein Cronje, Akdogan and others would hold their interest.

13.6. In terms of clause 3.3. of the said agreement, Ama Casa *inter alia* was to pay Cronje 25 000,00 Australian Dollars per month plus direct expenses for a period not exceeding six months. First defendant made payment from his personal bank account to Cronje in the total sum of R1 355 278, 44. (First defendant testified that he had a loan account in a

trust called the Keurbos Beleggings Trust. The said sum originated from the trust, was transferred to his personal bank account and transferred to Cronje. Apparently it was easier to transfer monies to an overseas bank account from a personal bank account as opposed to a business account.)

13.7. The IVE Technology needed to be commercialised and this is where Aorta came into the picture. Plaintiff, Mr Robert Howe ("Howe") and Mr Carl King ("King") were consultants for Aorta. Plaintiff met Paulsen and Myburgh on 19 June 2008 and another meeting in London followed during July 2008 where Howe and King were invited to attend.

13.8. On 14 August 2008, Aorta and AMA CASA concluded a commercialisation and consultancy agreement ("consultancy agreement"). Clause 3 (a) reads, (reference to ACPPL is to Ama Casa): *"Compensation a) Consulting team offers a minimum of 12 working days per month dedicated to ACPPL. The contractual compensation is 12 000,00 Euros per month (plus VAT where applicable). Payments will be made monthly after receiving a correct invoice from the Consulting Team. Invoices will be processed and paid by ACPPL within 5 business days of invoice date. It is acknowledged by both parties that the Milestones are the primary measure of performance for the Agreement and that the Consultancy Team is responsible for ensuring delivery of same within the given time frames. The ACPPL is obligated to pay the Consulting team on the above terms for the first three months, commencing 1 August 2008. Thereafter, the Consulting team's compensation will be subject to payment from government or customer funds."* Thereafter, on achieving pre-agreed

milestones and/or based upon Ama Casa's satisfaction with the consultancy team's first 90 day performance (not to be unreasonably withheld), the Consultancy Team would, for no cost, receive 10% of the equity in Ama Casa.

13.9. The milestones were two fold, the first 60 days relating to tax considerations, pricing and cost analysis, establishing a market position, initiate the corporate registration process, commence a customer definition strategy and then a second 60 days relating to commence executing a mutually agreed strategic business plan, begin early dialogue with at least two target customers, research government funding, commence insurance assessment process, assess a target "in-situ" AVE demonstration project, identify employees and develop draft launch strategy.

13.10. Aorta did work for Ama Casa in terms of the Consultancy Agreement regulating the relationship between Ama Casa and Aorta.

13.11. On 26 June 2009, Aorta ceded its claim against Ama Casa in the sum of 37 336, 83 Euros or the equivalent amount in South African Rands to the plaintiff.

13.12. Save for expenses to the approximate value of R 21 000.00, being for the travelling expenses to the Gordon's Bay meeting on 22 September 2008, (which the first defendant or one of the entities controlled by him paid), no payment to Aorta was made in terms of the Consultancy Agreement;

13.13. Ama Casa did not oppose the application for its liquidation.

Formal Admissions:

14. At the commencement of the hearing the defendants formally admitted that:

14.1. Ama Casa was registered at SARS for income tax purposes only;

14.2. Ama Casa had no financial statements;

14.3. Ama Casa had no bank account and no bank statements;

14.4. There are no written resolutions of any directors meetings;

14.5. Save for the initial process there were no shareholders meetings or resolutions;

14.6. That, apart from the agreement in terms of which Ama Casa purchased the rights to the intellectual property held by William Allan Cronje (hereinafter referred to as the "Cronje Agreement") and the Consultancy Agreement dated 14 August 2008, there were no other written agreements concluded by Ama Casa;

14.7. No list of creditors was lodged with the liquidators on behalf of Ama Casa;

14.8. First Defendant did not lodge a claim with the liquidator in Ama Casa's liquidated estate;

14.9. No register of assets was submitted to the liquidators on behalf of Ama Casa; (Defendant in testimony conceded that Ama Casa had no assets);

14.10. No loan account was lodged with the liquidators relating to Ama Casa. In fact nothing was submitted to or lodged with the liquidator;

14.11. No list of debtors or finance agreements was lodged with the liquidators on behalf of Ama Casa;

14.12. The directors of Ama Casa did not attend the first two meetings of creditors. They attended the third meeting after being subpoenaed to attend;

14.13. No objection was lodged against the plaintiff's claim against Ama Casa, which claim was subsequently proven;

14.14. No statement of affairs was lodged with the liquidators on behalf of Ama Casa.

CONCESSIONS BY FIRST DEFENDANT:

15. The first defendant during the course of his testimony, *inter alia*, conceded that:

15.1. At the time of the conclusion of the aforementioned agreements, and, in fact, at no time, was Ama Casa itself able to pay its debts without the benevolence of the first defendant;

15.2. Ama Casa's obligation to pay Aorta in terms of clause 3 of the Consultancy Agreement was not subject to the success of the "property deal" which he had earmarked as the source from which the funds were to come to pay Aorta and neither had Aorta, in terms of the agreement, agreed thereto.

15.3. There was no obligation on anybody, including the defendants or any entity controlled by them, to finance Ama Casa or to make any payment on its behalf;

15.4. At no time during Ama Casa and Aorta's relationship did the first defendant make any mention of any failure by Aorta to reach the milestones referred to in clause 3 of the Consultancy Agreement, including not mentioning it when the plaintiff's attorney of record, Mr Charl Coetzee, contacted him about the failure to pay the debt owed to the plaintiff, and on the first defendant's own version, threatening to liquidate Ama Casa and to hold the first defendant liable in terms of section 424 of the Companies;

15.5. At the time payment for the work done by Aorta was due in terms of the agreement and the promises to pay, the first defendant did not know

whether the milestones had been reached (which milestones on his version only had to be reached after the dates in question, namely, 14 November 2008 and 18 November 2008 as being the dates of the emails from the first defendant wherein he records an inability to pay Aorta as promised).

SYNOPSIS OF PLAINTIFF'S EVIDENCE:

16. The plaintiff testified that:

16.1. The first defendant approached him with a sustainable energy concept which the first defendant wished to market in South Africa.

16.2. The plaintiff approached Messrs Howe and King to form a consultancy team for the project on behalf of Aorta.

16.3. Prior to the conclusion of the Consultancy Agreement, Aorta, *inter alia* met with the first defendant and Myburgh in London to discuss a course of action with regard to moving the concept to market.

16.4. As the vehicle through which the project was to be ultimately finalised would hold the intellectual property rights relating to the concept, it was suggested that the entity in question be "clean". By "clean" the Aorta consultancy team meant that it would be unencumbered so that creditors would not be able to lay claim to the intellectual property rights.

16.5. Upon being questioned as to how the project was to be financed, the first defendant informed Aorta consultancy team that the project would be financed through Ama Casa via external sources. It was for this reason that the agreement was concluded directly with Ama Casa, with Ama Casa itself attracting the liability to pay Aorta.

16.6. Had Aorta known that Ama Casa would not itself be able to pay the consultancy fees when they fell due, Aorta would not have contracted with Ama Casa.

16.7. Following the conclusion of the Consultancy Agreement, Aorta commenced work in terms thereof.

16.8. On 1 September 2008 the first invoice in the sum of 12 000,00 Euros for services rendered during the month of August 2008, was sent to Ama Casa.

16.9. This invoice went unpaid, apparently due to difficulties experienced by Ama Casa in transferring the money to Aorta in Switzerland.

16.10. Ama Casa then indicated that they would pay the invoiced amount in cash at a meeting which was to take place in Gordon's Bay on 22 September 2008. Incidentally, this is how the travelling expenses of R21 000, 00 to fly Howe from Switzerland to Cape Town was incurred.

16.11. At the meeting in Gordon's Bay, the first defendant then indicated that Ama Casa would prefer to pay the entire amount due to Aorta for the first three months of the Consultancy Agreement, August, September and October 2008, in one payment, which payment was also to include the expenses incurred in flying Howe to the meeting.

16.12. Aorta therefore issued a credit note in respect of the first invoice and simultaneously issued a single invoice dated 1 October 2008, for the full amount of the contact in the sum 37 336, 83 Euros, for "*Consultancy Fees linked to work carried out for the months of August, September and October 2008.*"

16.13. Ama Casa indicated that they would be able to pay this amount from 10 October 2008. It went unpaid. Numerous telephonic requests were met with empty promises to pay.

16.14. The consultancy team also experienced difficulty in obtaining necessary information from Ama Casa with regard to moving the project forward. While the first defendant disputed the fact that they did not provide Aorta consultancy team with the necessary information, he conceded that they did not forward certain technical information to aorta consultancy team as Cronje failed to provide them with this information.

16.15. Ultimately the plaintiff met with the first defendant on 23 February 2009 in order to ascertain what the status of the payment for their services was. The first defendant informed him that they were still

waiting for the funds to become available and would pay. On 14 March 2009 the plaintiff sent an email to the first defendant and Myburgh stating, *"Andre assured me in our meeting that payment will be made once funds are available. No date was specified as funding was expected from a different source. Andre, can you provide an update of any expected date of payment."* On 16 March 2009 the first defendant replied, *"The status quo (sic) is still the same as at 23 February 2009 and will update you as soon (sic) as we know."*

16.16. Following the email from the first defendant, the Aorta consultancy team consulted with their attorney, Mr Charl Coetzee ("Coetzee"). Coetzee, in the presence of the plaintiff, contacted the first defendant telephonically. During the telephonic conversation that followed Coetzee informed the first defendant that they would apply for the liquidation of Ama Casa and that they would seek to hold the defendants liable for the debts of Ama Casa. The first defendant responded that *"they must do what they must do"*.

16.17. The plaintiff, furthermore, confirmed that the first defendant, at no time informed the Aorta consultancy team that they would not be paid for their services, whether due to the consultancy team failing to reach any milestone, or at all.

16.18. At no time did the second defendant play any role in the project and the plaintiff was unaware thereof that she was a director of Ama Casa.

THE SYNOPSIS OF DEFENDANTS' EVIDENCE:

17. Only the first defendant testified on behalf of the defendants.

18. He testified that:

18.1. The Consultancy Agreement was concluded in Ama Casa as the Aorta consultancy team wanted a "clean" company with which to contract;

18.2. Prior to the conclusion of the Consultancy Agreement the Aorta consultancy team was aware thereof that Ama Casa would be externally funded and funded by a property transaction;

18.3. The first defendant personally paid the amounts due by Aorta in terms of the Cronje Agreement;

18.4. The first defendant would also personally, or through one of his enterprises (companies or trusts), have paid Aorta;

18.5. However, due to the Aorta consultancy team failing to reach the milestones contained in the Consultancy Agreement he decided not to pay Aorta;

18.6. The first defendant contended that, at all relevant times, funds were available to pay Aorta, should Aorta have reached the milestones referred to herein above; and

18.7. With regard to the management of Ama Casa the first defendant contended that Ama Casa's directors met on an informal basis, making oral decisions regarding Ama Casa's management as they went along, conceding that they did not meet regarding what he termed small payments.

18.8. In general the first defendant contended that Ama Casa never traded and that it was normal practice to conclude agreements in shelf companies and, only when things take off, to open bank accounts and to formalise everything.

CONSIDERATION OF THE EVIDENCE PRESENTED:

19. On the evidence that was presented:

19.1. The first defendant concluded an agreement with Cronje through Ama Casa at a time when Ama Casa had no assets, no bank account and no means itself of paying any debt incurred on its behalf.

19.2. The first defendant personally, or through one of the entities controlled by him, paid for the acquisition of the intellectual property rights from William Cronje on behalf of Ama Casa because, as he conceded, it

was important to obtain the intellectual property rights in order to move forward with the project.

19.3. Likewise the first defendant concluded the Consultancy Agreement with Aorta at a time when Ama Casa had no way of paying the debt it so incurred. It is again pointed out that the Consultancy Agreement made no provision for external funding.

19.4. Aorta's team started working on the project to move the technology towards the marketplace.

19.5. Ama Casa failed to pay Aorta for the work done and many and varied excuses followed for Ama Casa's failure to pay Aorta.

19.6. On 23 October 2008, Howe addressed an email to defendants complaining of the *"endless array of 'toing and froing' on this critical situation, we were advised prior to Andre's departure for New Zealand that Cobus completed the payment on Friday the 10th October. Andre committed to getting us a 'proof of payment receipt' and of course this has not happened. We have tried tirelessly to reach both of you by mobile, text, e-mail and skype since 16th and have not had a single response. Our team collectively has travelled to most pockets of the world and always manage to communicate, so we can only be led to believe that you are avoiding contact."*

19.7. Ultimately, however, the emails of 14 and 19 November 2008 contain the correct position with regard to payment in that therein the first defendant concedes as follows:

"As promised to Rob here is the email regarding payment of services rendered by you.

After numerous unsuccessful attempts to transfer the money to your overseas account our financial circumstances has changed dramatically this week.

Unfortuanatly (sic) Cobus and I had a big financial setback with a property deal that fell through. We were expecting to collect R 25Mil but now all of a sudden we had to fork out R 18milj(sic) to save the transaction. Which mean that we are expierencing (sic) serious cashflow problems, due to the fall of the property market and the banks are tightening their belts as well here in South Africa,

We remain positive and hopfully (sic) our situation fill change in the new year towards the end of January.

I ask you to be understanding our predixcament (sic) and do not expect payment before the end of January 2009.
Sorry about the bad news but things are tight.
Andre"

and

"Gentlemen

Please bear with us in this difficult times, but unfortunately today was not our day with the bank.

After promising outlook at the bank yesterday to save the property transaction as been told to you, they came back with bad news and we are in for R 18 milj(sic) which put us in a position that we cannot pay you as promised. However we are still positive that everything will be sorted out towards the end of Jan 09 as initially was anticipated and as previously discussed with you.

Sorry guys but that is the case and we are unable to pay you now. Hope you understand our situation and once again our apologies for this. Andre Paulsen"

19.8. Howe responded to first defendant's email of 14 November 2008, stating, *"It was good that we were able to speak on Friday afternoon....As we discussed, we are sorry that your real estate transaction has not transpired as planned, but we do not see any linkage between this event and your collective obligation to us. We are confused by the co-mingling of your business affairs and why we should shoulder your cash flow issues."*

19.9. The emails of 14 and 19 November 2008, indicate a total inability to pay from whatever source, including the sources the first defendant alleged funding could have been obtained from. The first defendant

conceded that at this time there was an inability to pay, although he later contradicted himself by again proffering his initial version. First defendant provided his personal bank statements, together with the August 2008 statement from the Keurbos Beleggings Trust and the first pages of the bank statements of the Keurbos Beleggings Trust for the months of October and November 2008. However, the statements do not show an ability to pay Ama Casa's debt.

19.10. On the version confirmed by the abovementioned emails, the first defendant knew at all relevant times that the debts of Ama Casa to Aorta, although due, could not be paid. This in itself, is reckless.

19.11. The alternative version proffered by the first defendant, as well as also within the context of section 424 of the Act, constituting recklessness, is impossible for the following reasons:

19.11.1 At the time the payments to Aorta were due Ama Casa and the first defendant had no way of knowing whether the milestones had been reached, since the time period during which they had to have been reached had not yet expired. This also shows that clause 3 of the agreement did not contemplate the reaching of the milestones before payment for the first three months would become due.

19.11.2 The first defendant promised (without reservation) to pay the amount claimed by Aorta.

19.11.3 At no time (as would have been expected of a reasonable businessman) did the first defendant raise the question of milestones, not even when Ama Casa was threatened with liquidation.

19.12. On his own version the first defendant lied in the above mentioned emails, which, in the circumstances, is not only reckless conduct but fraudulent managing of Ama Casa's affairs.

19.13. The evidence shows that the first defendant knew that Ama Casa would not be able to pay its debts as and when they fell due. That the first defendant, with reckless disregard of his duties, allowed this situation to continue to the detriment of Aorta and when the plaintiff sought to exact payment from Ama Casa for the debt due to him the first defendant, well knowing that Ama Casa has no assets and no way of servicing the debt allowed Ama Casa to be liquidated while attempting to hide behind Ama Casa's separate legal personality.

19.14. The first and second defendants further more totally failed to comply with any statutory provision regarding the management of the affairs of Ama Casa, which it is submitted is per se reckless. These admissions were made by the defendants.

19.15. The second defendant's conduct by not being involved in the management of Ama Casa at all, is per se, reckless.

19.16. First Defendant continued to string plaintiff along from inception of the consultancy agreement, 14 August 2008 to March 2009, with misrepresentations and lies. Excuses ranging from a cash payment will be made at the Gordon's Bay meeting, to payment on a cumulative invoice, difficulties in transferring funds internationally, collapse of a property deal, silence to cries for payment, and even as late as February 2009, as evidence by the email dated 18 February 2008, from plaintiff to first defendant, which states, *"Andre has confirmed that he will pay the full outstanding amount as per the contract when his loan from the property deal comes through. We are expecting this sometime next month. It is understood that no fixed date is set but that Andre will advise us when the funds comes through and issue full payment accordingly."*

19.17. Defendants' counsel submitted that the case of **Ozinsky N.O. v Lloyd and Others 1995 (2) SA 915 (AD),** was apposite, and referred to para 923-B-D, which reads, *"The Court* a quo *accepted her evidence that she retained her faith in the future of both companies; that she would have ensured, if needs be from her own resources, that all the debts were met; and that it was only with reluctance that she was persuaded to move for the liquidation of the companies....she injected massive funds into the business; she placed her own assets at its disposal; she stood surety for its debts; she worked for the companies tirelessly and without remuneration and she was grimly determined that the business should succeed. ... These facts leave little scope for the argument that the first defendant acted with intent to defraud Atlantis's creditors."*

19.18. This submission is incorrect. Whilst, the first defendant contended that he retained faith in the project, there is no similarity between the case at hand and the **Ozinsky** matter. First Defendant, save for the travelling expenses of Cronje to attend the Gordon's Bay meeting, at which first defendant bought himself further time to pay the invoices, did not make any attempt at paying part or all of the debt owing from date of the first invoice, 1 September 2008. No attempt was made to move the project forward.

19.19. Defendants also relied on **Ex Parte de Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (In Liquidation) 1993 (1) SA 493 (AD),** at para 504 A, *"However, there is nothing to say that directors who genuinely believe that the clouds will roll away and the sunshine of prosperity will shine upon them again and disperse the fog of their depression are not entitled to incur credit to help them over the bad time."*

19.20. This reliance is misplaced. There was in the matter at hand, no "*clouds to roll away and sunshine of prosperity to shine upon them again and disperse the fog of their depression*". Ama Casa was never in a position to pay the debt, nor would it be, and at the time of incurring it, first defendant was aware of this.

19.21. In regard to the parties dispute over the compliance with milestones and whether in fact payment of the first three months was to be measured against the milestones, I find that a consideration of the conduct of the parties, both first defendant and Ama Casa is consistent with an interpretation that payment of the full amount of the debt was due and payable without it being subject to any compliance with milestones. First defendant specifically throughout agreed to pay the full amount without any

reference to the milestones. For him now to assert that he was affording Ama Casa time to comply is rejected. The recent case of **Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd (759/11) [2012] ZASCA 126 (21 September 2012),** at para 15, held, *"In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were knowing that they knew, would construe the disputed provision."*

19.22. I find that there was a wilful perversion of the truth with intent to defraud and that this wilful perversion caused prejudice to the plaintiff. **R v Herzfeld 1907 TH 246**.

19.23. This is a classic case of corporate identity being used as the *alter ego* of an individual, the first defendant. I find that this case demands a piercing of the corporate veil. **Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (AD); Badenhorst v Badenhorst 2006 (2) SA 255 (SCA)**.

19.24. The first and second defendants owned all the shares and are in control of Ama Casa attempting to use its formal identity to avoid paying a debt by it to a creditor, where first defendant on behalf of Ama Casa caused it

to incur a debt at a time when he knew Ama Casa could not pay it, then nor ever. That when alerted to a possible liquidation application, first defendant's response was a nonchalant, *"they must do what they must do"*, as he knew that Ama Casa did not have any assets and he stood to lose nothing.

19.25. The first and second defendants failed to act as reasonable business people and that conduct, measured against the provisions of Section 424(1) of the Act, as afforded context by the case authorities, constitutes fraudulent and reckless management of Ama Casa's affairs.

19.26. The following order is granted.

THE ORDER:

1. *It is declared that the first and second defendants are liable to the plaintiff in terms of section 424(1) of the Companies Act 61 of 1973 for the debts incurred by Ama Casa.*
2. *Costs of suit.*

U R D MANSINGH, AJ