

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

CASE NO: 5490/2011

**ABSA BANK LIMITED**

**Intervening creditor**

In the matter between:

CASE NO. 9762/2008

**ERF 289, BANTRY BAY (PTY) LTD**  
(In liquidation Master ref no C757/2008)

**Applicant**

And

**First Respondent**

**EXQUISITE HOTEL PROPERTIES (PTY) LTD**  
(Registration Number. 1996/001706/07)  
(In provisional liquidation Master Ref No C326/2008)

**BELMONT GUEST HOUSE (PTY) LTD**  
(Registration Number 1998/00276/07)

**Second Respondent**

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**JUDGMENT DELIVERED ON 31 JANUARY 2012**

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**WEINKOVE, AJ**

[1] In this matter I have made an order granting Absa Bank Limited (Absa) leave to intervene. I have further directed that the rule nisi issued at the instance of erf 289 Bantry Bay (Pty) Ltd (Erf 289) be discharged and that the respondent be placed under provisional liquidation in the hands of the Master at the instance of Absa.

[2] I have granted the usual *rule nisi* and I have placed on record that Belmont Guesthouse (Pty) Ltd (Belmont) has withdrawn its intervention application and has tendered costs to Absa in respect thereof up to date hereof.

[3] In the circumstances it is unnecessary for me to give reasons why I would have refused Belmont's application to intervene.

[4] On the 25<sup>th</sup> June 2008 the respondent, Exquisite Hotel Properties (Pty) Ltd (Exquisite), was placed under a provisional winding up order at the instance of Erf 289. Exquisite opposed that application and the matter was postponed for hearing on the semi-urgent roll on the 27<sup>th</sup> November 2008.

[5] I pause to record that the directors of Exquisite and the directors of Belmont are the self same people viz. Mr and Mrs Jacobs.

[6] On the 1<sup>st</sup> October 2008 Erf 289 tried to evict Exquisite and Belmont and brought an urgent eviction application.

[7] On the 3<sup>rd</sup> October 2008 that application was by agreement postponed to the 27<sup>th</sup> November 2008 to be heard simultaneously with the main liquidation application.

[8] Prior to the return date of the first liquidation application and on the 21<sup>st</sup> November 2008 Erf 289 was itself place in provisional liquidation.

[9] In the meantime Exquisite and Belmont continued to occupy the premises owned by Erf 289.

[10] It is uncertain what happened on the 27<sup>th</sup> of November 2008, but on the 12<sup>th</sup> December 2008 Erf 289 itself was finally liquidated. The application against Exquisite was never proceeded with and it remains under a provisional liquidation order. Eventually on the 18<sup>th</sup> May 2010 the liquidators of Erf 289 again sought to evict Belmont and this second eviction order was granted on the 23<sup>rd</sup> September 2010. An application for leave to appeal was granted and on the 12<sup>th</sup> Of August 2011 that appeal was dismissed with costs.

[11] I again note that throughout this time the Jacobs family through Exquisite or through Belmont remained in occupation of Erf 289's property.

[12] It is obvious from the foregoing that the activities of the Jacobs family have resulted in an absurd situation. Exquisite has still not been finally liquidated and they probably still occupy the property owned by Erf 289.

[13] The application for Absa's application for intervention is predictably opposed by Belmont through the activities of the Jacobs family.

[14] For reasons which will hereafter be amplified I find their opposition to be contrived and disingenuous. Mrs Jacobs who appeared in this matter and apparently is the draughtsman of the heads of argument and affidavits, sought to hide behind her own inexperience to attempt to mislead this court because she knew full well that Absa was a creditor and was owed millions of rand on the mortgage bonds it was relying upon. She and her husband were at all material times directors of Exquisite and on questioning by this court she resorted to obfuscation and deflection to avoid admitting that

her suggestion that Absa was not in fact a creditor whose claim at least exceeded R1,000 at the date of the *concurus creditorum* was palpably false.

[15] It appeared to me that she perceived the role of counsel or a legal representative to <sup>ENTITLE HER TO</sup> use her best endeavours to mislead the court <sup>IF NECESSARY</sup> for the purposes of advancing her submissions on behalf of her client. She is also her own client.

[16] ~~In the result~~ Mrs Jacobs took various points *in limine*. The first point was that applicant should have joined Belmont as a party. The prejudice was not described save that the parties' names would be different on the heading.

[17] Fortunately this court was spared listening to this submission any further. It is devoid of any merit.

[18] The second point is that Mrs Jacobs complained that in the applicant's heads of argument and in the affidavits and filing sheets, the parties were inconsistently described sometimes by name and other times by reference as "applicant" or "first or second respondent". I find this complaint to be utter nonsense and I do not propose to dignify it with any further discussion. I hold that the heads of argument and the affidavits and the filing sheets adequately described who were being described ~~as~~ as the parties.

[19] The next complaint was that Absa lacked *locus standi* because it had referred to a letter of demand dated 14<sup>th</sup> October 2010 which was subsequent to the date of the provisional winding up order on the 24<sup>th</sup> June 2008. Mrs Jacobs laboured under the impression that a demand for payment subsequent to the *concurus creditorum* is a fatal

defect in regard to the creditor's *locus standi*. She pretended on direct questioning from this court not to know the extent of Absa's claim at the date of the provisional winding up and claimed that she did not even know if that claim exceeded R1000. She further suggested that Absa had failed to establish insolvency at the commencement of the *concursum*. That insolvency was in any event common cause in the Erf 289 application and was also proven in the founding papers by Absa <sup>who annexed</sup> ~~by~~ annexing the mortgage bonds which reflected Absa as a creditor of many millions of rands.

[20] To bring an end to her attempts to trivialise these proceedings, I permitted Absa to file a further affidavit which was necessary to stop Mrs Jacobs rather than reinforce Absa's claim as proven in the affidavits.

[21] The claim of Absa is not disputed anywhere in the affidavits and surfaces for the first time in Mrs Jacobs' heads of argument. As Absa points out the debt of Exquisite on the 14<sup>th</sup> October 2010 in terms of the two mortgage bonds were over R4 million. Exquisite's commercial insolvency has clearly been established on these papers. The only defence raised by Exquisite (again through the Jacobs family) is the submission that Absa failed to comply with section 345(1)(a) of the Companies Act by serving the letter of demand at its registered office. As counsel pointed out Absa is relying on the provisions of section 345(1)(c) to prove that Exquisite is unable to pay its debts and failure to comply with section 345(1)(a) is a red herring. In any event this court had already found on the 25<sup>th</sup> June 2008 that Exquisite is unable to pay its debts and this issue is *res judicata*. It must at all times be remembered that Exquisite and Belmont are operated by the same directors and these defences raised by Belmont

should have been raised by Exquisite in the first place if they had any credibility. No evidence has been placed before this court to suggest that Exquisite can pay its debts or possesses other assets. Absa cannot foreclose on its mortgage bonds while Exquisite is under liquidation and the true motive for the Jacobs in opposing this matter is to drag out that liquidation for another few years while they seem to be able to occupy the premises.

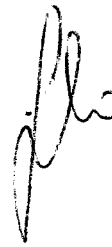
[22] I am enjoined by Belmont to exercise my discretion to dismiss Absa's provisional winding up order and it is suggested that the provisional liquidators were not given notice of Absa's application. This is false.

[23] In the circumstances, I have made the order abovementioned and only regret that Belmont withdrew its application to intervene and deprived me of the opportunity of dismissing that application with attorney and client costs and directing that Mr and Mrs Jacobs be declared jointly and severally liable for those costs.

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WEINKOVE, AJ

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



CAPE TOWN: MONDAY, <sup>31</sup>~~30~~ JANUARY 2012  
BEFORE THE HONOURABLE ACTING JUSTICE WEINKOVE

Case No: 5490/2011

**ABSA BANK LIMITED**

**Intervening Creditor**

Case No: 9762/2008

**ERF 289, BANTRY BAY (PTY) LIMITED**  
(in liquidation Master Ref No C757/2008)

**Applicant**

and

**EXQUISITE HOTEL PROPERTIES (PTY) LTD**  
(in provisional liquidation)

**Respondent**

Case No 7828/2011

**BELMONT GUEST HOUSE (PTY) LTD**

**Intervening party**

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**ORDER**

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After reading the papers and after hearing counsel for the intervening creditor, the following order is made:

1. Leave is granted to the intervening creditor ("ABSA") under case number 5490/2011 to intervene in the application for liquidation

of respondent ("*Exquisite Hotel*") brought under case number 9762/2008, with costs;

2. The rule *nisi* granted on the instance of the applicant under case number 9762/2008 ("*Erf 289, Bantry Bay (Pty) Ltd*") is hereby discharged;

3. Exquisite Hotel is placed under provisional liquidation in the hands of the Master of the above Honourable Court on the instance of ABSA.

4. A rule *nisi* is issued calling upon Exquisite Hotel and all interested parties to give reasons, if any, on **MONDAY, 12 MARCH 2012**, at 10h00, as to why:

4.1 a final order of liquidation should not be granted; and

4.2 the costs of the application should not be costs in the liquidation.

5. Service of this order be effected:

5.1 By the sheriff:

5.1.1 on Exquisite Hotel's registered address at 33 Belmont



Avenue, Oranjezicht, Cape Town, Western Cape;

5.1.2 on Sanek Trust Recovery Services (Pty) Ltd, 5 St  
George's Mall, Cape Town, Western Cape

5.1.3 Exquisite Hotel's employees (if any) as required by  
section 346A of the Companies Act 61 of 1973;

5.1.4 on the South African Revenue Service.

5.2 All creditors by way of one publication of this order in each  
of the Cape Times and Die Burger newspapers.

6. It is recorded that the intervention party under case number  
7828/2011 ("*Belmont Guest House (Pty) Ltd*") withdraws the  
intervention application under the aforesaid case number and  
tenders all ABSA's costs in respect thereof up to date.

**BY ORDER OF THE COURT**

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**COURT REGISTRAR**