

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

10965/2010

5 **DATE:**

8 DECEMBER 2010

In the matter between:

BODY CORPORATE OF SOTERIA SCHEME

Applicant

10 and

REALITY DYNAMICS 32 (PTY) LTD

Respondent

JUDGMENT

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MIA, AJ:

In this matter the Applicant seeks a provisional order for the winding-up of the Respondent company. The Applicant avers
20 it has a claim for damages in the amount of R4 629 234 against the Respondent. It applies for the winding-up of the Respondent on the ground that it is unable to pay its debts as contemplated by section 344(f) read with section 345(1) of the Companies Act, Act No. 61 of 1973, (hereafter the "Companies
25 Act").

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The issues to be considered are whether the Applicant is a creditor of the Respondent and whether it is unable to pay its debts. The Respondent disputes the Applicant's claim and
5 avers that it can meet any claim against it through raising shareholder loans.

The facts which give rise to this application are as follows: the Applicant is the body corporate of Soteria Scheme,
10 (hereafter Soteria"), a sectional title scheme comprising 14 separate buildings together with common properties situated in Strand, Cape Town. The Respondent is a company with limited liability, duly registered and incorporated in accordance with the provisions of the Companies Act. The Respondent
15 was the developer and seller of units in Soteria together with the common property pertaining thereto. Paragraph 13.2 of the sale agreement provides that:

"The seller shall only be responsible in terms of
20 clause 14.1 for defects caused by faulty materials and/or workmanship and the SELLER shall under no circumstances be liable for any consequential loss."

Further, that:

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5 "The contractor shall abide by all requirements of the NHBRC (the National Home Builders Registration Council), and provide warranties according to their requirements. In addition to 13.1 above the roof leaks are guaranteed for 12 months from occupation date and the structure of the building and roof is guaranteed for five years from date of occupation." (My emphasis)

10 The Respondent as developer gave warranties against latent or patent defects caused by faulty materials and or workmanship. The developer also provided a guarantee against roof leaks for 12 months. The structure of the building and the roof is guaranteed for five years from the date of
15 occupation.

20 The Applicant avers that the occupation of the units occurred less than five years ago and the warranties are therefore applicable. The Applicant avers that various defects have manifested and have come to light in all the apartment blocks in Soteria. The areas of concern relate to waterproofing, window seals, poorly designed plumbing, tiling and cracking of external walls.

25 In an attempt to address their concerns they held meetings

with the director of the Respondent to obtain the Respondent's compliance with the warranty obligations. This endeavour did not succeed in addressing the concerns and remedying the defects. Initially a report was submitted to the Respondent, 5 which was compiled by Property Diagnostic Services. Hereafter I will refer to it as the "PDS report".

The report comprises about 24 pages. In the summary of the report the consultant listed problems with waterproofing of the 10 roof, the balcony and walkways, joints that have been insufficiently finished, leading to excessive water ingress and damage to units. The plumbing is also alleged to be in contravention of SABS codes. It ends by suggesting a meeting with the developers to assist in bringing the original builders 15 and subcontractors back to the site to reinstate areas which have failed or are insufficient.

The Respondent did not acknowledge responsibility for remedying the problems raised. The response of the sole 20 director is reflected in correspondence dated the 19th of July 2009. The relevance excerpt reads as follows:

"Ek weet nie wat julle opdrag was nie en wil nie onnodige kritiek daarop lewer nie. Ongelukkig skep 25 die verslag die indruk dat die ontwikkeling 'n totale

gemors is en dat dit afgebreek en oorgebou moet word. Dit is nie waar nie en julle weet dit. My voorstel is dat julle die beheerliggaam sal bystaan om 'n ordentlike instandhoudingsplan ("maintenance plan"), op te stel sodat hulle voorkomende instandhouding kan uitvoer. Sodra ons oortuig is dat hulle bereid is om hulself te help, sal ek my invloed en die verhaalsreg wat JBCC gee gebruik om die kontrakteur te versoek om die latente defekte reg te stel."

The developer responds to the PDS report and describes the majority of the problems as maintenance issues. The sole director, Mr Van Der Berg's response to the PDS report refers to "die paar probleme wat gevind is", and notes that no solutions are suggested. In response to the problem with the gutters he alleges that it ought to have been raised with the roof inspection and it was too late to raise it. He acknowledges that the faded coating is possibly a latent defect and he indicated that there was no intentional negligence on the part of the developer and acknowledged the existence of "sekere kleiner latente defekte".

Mr Van Der Berg does not accept responsibility for remedying the defects that are present, and refers to a right of recourse

- against the contractor and avers that the defects should be addressed through a maintenance plan for Soteria. The Respondent's attitude is that the matter is a building dispute and should have been referred to the appropriate forum. The
- 5 defects are disputed and it is averred that the Applicant does not have a liquidated claim. Mr Le Roux on behalf of the Respondent concedes that the complaints, if valid, could amount to latent defects.
- 10 The Applicant appends a detailed report prepared by Davis Langdon Africa (Pty) Ltd, construction consultants, to their founding papers. The report details extensively the defects and estimates the costs of repair. The total costs, which includes some maintenance items as well, amounts to
- 15 4 629 234. The Respondent refuted that it was liable based on advice received from a structural engineer. It denies that the defects are structural defects which it is liable to remedy. The Respondent denies that it is indebted to the Applicant. It also denies that should any indebtedness arise, that it would be
- 20 unable to pay its debts.

The dispute raised by the Respondent that the Applicant is not a creditor with a liquidated claim is met by the Applicant's reply that the application is based on it being a contingent or

25 prospective creditor. Section 346(1)(b) of the Companies Act

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provides the following:

5 "An application to the Court for the winding-up of a
company may, subject to the provisions of this
subsection be made –

(a)

(b) by one or more of its creditors, (including
contingent or prospective creditors).

10 The Applicant as the body corporate has the right of recourse
against the Respondent for damage to the common property,
or if determined by special resolution of the Body Corporate.
Section 36 of the Sectional Titles Act, Act 95 of 1986 provides:

15 "36(6) The Body Corporate shall have perpetual
succession and shall be capable of suing and
being sued in its corporate name in respect
of:

(a) any contract made by it;

(b) any damage to the common property;

20 and

(e) any claim against the developer in
respect of the scheme if so determined
by special resolution."

25 This does not require the claim to be a minimum amount,

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except where it relies on section 345(1)(a). In Gillis Mason Construction Company (Pty) Ltd v Overvaal Crushers (Pty) Ltd 1971(1) SA 524 (TPD) at 528C-D, Trengrove, J stated the following:

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"It seems to me in light of these authorities that a contingent or prospective creditor may be defined as one who by reason of some *vinculum iuris* has a claim against the company which may ripen into an enforceable debt on the happening of some future event or on some future date....

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Further,

... it follows in my view, that an Applicant who has a valid claim against a company for damages for breach of contract is a contingent or a prospective creditor of such company and, as such he would have *locus standi* to present a petition for the winding-up of the company."

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20 The Respondent highlighted a number of defects listed in the Davis Langdon Report which, it was submitted, did not fall under the warranty for defects related to the roof.

In any event, it is immaterial that only part of the indebtedness is disputed by the company. The Applicant through the reports

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placed before this Court showed that there are various defects that are covered by warranties noted by the construction consultants. The agreements of sale for the units in Soteria make provision for warranties against defects. The warranty
5 must accordingly cover latent defects. These defects raise the possibility of a claim against the Respondent, which the Applicants had given their attorneys an instruction to pursue.

In Holzman v Knights Engineering and Precision Works (Pty)
10 Ltd 1979(2) SA 784 (W) at 787E-F Nestadt J, describes the *vinculum iuris* as:

"A legal obligation which creates a right enforceable in a court of law and which could arise
15 from contract or delict."

After considering the definition of "contingent and prospective creditors" as described by Trengrove J in the Gillis Mason case, Nestadt J, notes at 787F-G that there are two elements
20 to the definition, namely that a claim against the company (1) arises from a *vinculum iuris*; and that it; (2) may in the future ripen into an enforceable debt.

The Learned Judge then concludes that:

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"It is clear therefore that the claim of the creditor need not be due or payable on the date of the presentation of the application for winding-up."

5 The existence of the warranty against defects and prospective claims to realise the relief raises a *vinculum iurus* between the Applicant and the Respondent. Where such *prima facie* indebtedness is shown, the Respondent bears the onus to show that the indebtedness is disputed in good faith. See
10 Henochsberg 5th Edition at page 694(1).

The Respondent boldly disputes liability and indicates that it is not responsible for the defects listed. The Respondent suggests that the claims may lie against the contractor and he
15 indicates that the Respondent had insufficient time to address the faults in the Davis Langdon report, as the application was lodged in May 2010. It has not dealt with the Davis Langdon report in any detail, since the order in June 2010 required it to file its opposing affidavit.

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In opposing the application the Respondent relies on the expertise of the engineer of Ekcon (Pty) Ltd to indicate that there are no structural defects. Mr Ekermans of Ekcon has not dealt with the Davis Langdon report in any detail and concedes
25 that there are latent defects. In the opposing papers there is
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an acknowledgement that there may be latent defects. The Respondent does not indicate that it has taken any steps to ensure that the contractor addresses the latent defects, which it acknowledges require attention.

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In Reynolds NO versus Mecklenberg (Pty) Ltd 1996(1) SA 75 at 105A-B, Stegmann J found that,

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“...a provisional winding-up order may be issued when the grounds relied on in the Applicant’s affidavit, although disputed in the Respondent’s affidavit, can nevertheless be said to have been established *prima facie* in the sense that subject to anything that may emerge at a later hearing of oral evidence, the Applicant’s case appears to have been established on a balance of probabilities.”

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The Respondent was a shelf company utilised to develop Soteria. The sole director, acknowledges in his reply to the previous report that:

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"Die maatskappy sal binnekort tot niet gemaak word, omdat alle ontwikkeling reeds einde September 2007 voltooi is en alle finansiële en kontraktuele verpligtinge nagekom is."

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The company closed its books after the last unit was sold in 2009 and an audit was completed for the year March 2008 to June 2009. It has fulfilled its obligations to the bank, SARS
5 and paid dividends to its shareholders. Consequently it has no assets left. It was in the process of being deregistered at the instance of its sole director. Mr Le Roux on behalf of the Respondent indicated that the deregistration was being effected in the normal course and was initiated by the
10 accountants, as the company's business was now complete and the purpose for which it was registered no longer existed.

It is thus clear that the company has no funds at its disposal to meet any claim which the Applicant may have. The
15 Respondent was aware of the concerns raised by the Body Corporate of Soteria and in response raised that the company was being wound up, giving the impression that there could be no relief sought against the company.

20 The Respondent states that there is a possibility of raising shareholder loans in the event that the Applicant's claims may be successful. Nothing more is said about this and no supporting documents are referred to in this regard. The Respondent has not responded meaningfully to a number of
25 issues herein. It denied that it is liable for defects. This

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denial is not supported by the warranty that it had given in the contracts. In response to the problems raised, it informs the complainants that it has commenced a deregistration process.

5 The Respondent claims that the Applicant has a right of recourse against the contractor. From these papers I cannot see that the Applicant had a contract with the contractors. Accordingly I cannot find that the Applicant has a right of recourse against the contractor.

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In having regard to these various aspects, it cannot be said that the Respondent has met the onus that there is a genuine dispute which was raised in good faith. Any suggestion that there is a *bona fide* dispute falls shy of the measure in the
15 concession that there are latent defects. Mr Le Roux conceded that at the present there was no evidence before this Court that the Respondent could pay any debt due to the Applicant.

20 The Applicant has assumed responsibility for the repair and maintenance of the common property in the Scheme and has a right of recourse in terms of section 36(6) of the Sectional Titles Act, Act 95 of 1986. Accordingly, the Applicant is properly before this Court and is entitled to seek the relief it
25 does.

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Upon considering the papers and having heard counsel herein,
I am of the view that the papers reflect that the Respondent
acknowledges a claim by the Applicants with regard to latent
5 defects. The Respondent is unable to pay any claim made by
the Applicant at present and has not indicated sufficiently how
it can access funds to meet the claim of the Applicant.

Consequently I am satisfied that an order for the provisional
10 winding-up of the Respondent be granted.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by 'IA, AJ'. The signature is written over a horizontal dashed line.

MIA, AJ

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