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

CASE NO.: 15961/2008

In the matter between :

CARLOS ANTHONY NEVES	First Applicant
ROB VILOSE	Second Applicant

[in their capacities as trustees for the time being
of the Can Prop Trust (IT No. 3470/2005)]

JOHN DENNIS GORDON	Third Applicant

and

MERLICO 148 CC	First Respondent
STELLENBOSCH MUNICIPALITY	Second Respondent

JUDGMENT 14 APR 2010

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[1] The Applicants launched urgent interdict proceedings on 1 October 2008 effectively preventing the First Respondent from executing unauthorised building work. First Respondent consented to an interim order which was granted on 14 October 2008 to the effect that it was precluded from undertaking building work on erf 1332 Franschhoek, which was not permitted

in terms of plans approved by the Municipality. The matter was then referred for hearing on the opposed motion roll and was heard on 15 October 2009.

[2] In terms of the court order dated 14 October 2008, the Applicants were obliged to deliver their replying affidavits by no later than 12 February 2009. The replying affidavits were eventually only filed on 1 October 2009 some 8 months out of time. The Applicants simultaneously filed an application for condonation for the late filing of the replying affidavits, a supplementary affidavit deposed to by the First Applicant on 30 September 2009 as well as the Applicants' heads of argument. The application for condonation was opposed by the First Respondent who filed a conditional counter application to strike out certain portions of the replying and supplementary affidavits and for leave to file further affidavits in response thereto. All of the applications were argued simultaneously at the hearing.

[3] The basis for the condonation application in respect of the replying affidavits and the supplementary affidavit was that the Applicants attempted to resolve the matter without incurring any further legal costs, on the basis that the interim order to which the First Respondent consented, should be made final. It was only after Applicants' efforts in this regard proved fruitless, that the replying affidavits were prepared as soon as possible and delivered on 1 October 2009. The Applicants' heads of argument could only be prepared subsequent to the delivery of the replying affidavits and were consequently also out of time. The supplementary affidavit dealt with recent developments

resulting from the fact that the First Respondent had started letting part of his building to tenants who interfered with the rights to privacy of the Applicants.

[4] It was indicated in argument that the First Respondent does not in principal oppose the application for the late introduction of the replying and further affidavits, but object to the contents thereof which in part is argumentative, vexatious, irrelevant, and constitutes new matter. In the event that the further affidavits being admitted, First Respondent made a conditional counter application for the striking out of the said portions and in the event of the application to strike out new matter is unsuccessful, leave is sought to introduce two further affidavits by Jean De Beer and Ivan Isaac Goodman both dated 14 October 2009.

[5] Full heads of argument were filed by both parties in respect of these preliminary applications which I have fully considered. Suffice it to say that the Applicants have given a satisfactory explanation for the delay in filing the further affidavits and that First Respondent cannot be prejudiced should the further affidavits be allowed. Insofar as the application to strike out is concerned, the principles applicable to applications of this nature are trite and do not warrant repetition. The introduction of new matter in the further affidavits has been satisfactorily explained by the Applicants and such matter is relevant to the issues in the case. In my view, First Respondent cannot be prejudiced should the new matter be allowed and First Respondent be given leave to introduce the further affidavits of De Beer and Goodman which fully deal with the new matter. To the extent that some of the contents of the

further affidavits could be regarded as being argumentative, the issues raised are relevant and it is not warranted in my view to have the same struck out. The application for condonation should accordingly be granted and the further affidavits filed by the Applicants be allowed in their entirety and the First Respondent should be given leave to file the further affidavits of De Beer and Goodman.

[6] Reverting to the merits of the matter, the Applicants are seeking final interdictory relief, the requisites whereof are well-known, namely a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy.

[7] Much of the pertinent facts are not in issue. The Applicants are the owners of erven 171 and 170 Franschhoek and the First Respondent is the owner of an adjacent property being erf 1332 Franschhoek. First Respondent acquired the property for the purpose of developing a retail and residential complex thereon. First Respondent intended to provide the residential flats he was constructing with balconies situated on the garage roof of the building, which balconies would have swimming pools and braai facilities. The construction of the balconies had the potential of seriously intruding into the privacy of the Applicants' properties and there was the further potential problem of unacceptable noise levels resulting from socialisation on the balconies. The First Respondent was required to obtain a formal departure in terms of the provisions of the Land Use Planning Ordinance, 1985 before the local authority would approve any plans providing for the proposed braai and pool

areas on the balconies. The consent of the Applicants were required in respect of the departure application. The Applicants refused to consent to the proposed swimming pools and braai facilities on the balconies. During May 2008 First Respondent resubmitted plans to the Municipality which omitted reference to the swimming pools and braai facilities, which plans were approved during June 2008. During or about August – September 2008, the First Respondent commenced construction in respect of the swimming pools and the balconies without any departure application or building plans approving such construction. This resulted in the Applicants serving the papers in the urgent High Court interdict application on the First Respondent on 1 October 2008. Prior to this, two "cease work" notices were served on the First Respondent by the local authority on 21 August and 23 September 2008 respectively. These notices were given pursuant to two inspections conducted by the local authority at the building site on 20 August and 18 September 2008 respectively when it was found that building work was in progress that was not authorised by the approved building plan. The notices required the First Respondent to stop all illegal building work at the premises immediately. The First Respondent only stopped the prohibited building work on 2 October 2008 and filled in the swimming pools. The First Respondent subsequently consented to the granting of the interim court order on 14 October 2008. The First Respondent indicated that it had abandoned the intention of constructing the swimming pools and braai facilities or the balconies.

[8] Having due regard to all the relevant facts and circumstances, it is readily apparent that the interim order was properly granted against the First Respondent and that the Applicants have made out a case for a final order. In my view, the Applicants have a clear right to require the First Respondent to comply with the National Building Regulations Act and the Regulations issued in terms of the Act as well as the relevant Zoning Scheme Regulations that regulated the First Respondent's development. The Applicants had a reasonable apprehension that their rights to privacy would be invaded by the unauthorised construction unless they approach the court for urgent relief which was the only satisfactory remedy in the circumstances. In fact, it was only after the High Court application papers were served on the First Respondent that the unauthorised construction work was ceased. The earlier notices to that effect given by the local authority did not have the desired effect. It is clear that an acrimonious relationship had developed between the parties concerning the construction of balconies with swimming pools and braai facilities adjacent to the residences of the Applicants. It is also clear that the First Respondent had decided to push ahead with the construction of the swimming pools and braai facilities without any authorisation and to deal with the consequences when they arise. Subsequent events have demonstrated that the fears of the Applicants were well-founded in that their privacy was invaded by tenants of the residential units on the First Respondent's property who entered the rooftop area whence they had a view into the Applicants' residences.

[9] I am satisfied in the circumstances that the Applicants are entitled to obtain appropriate final interdictory relief. The Applicants have moved for a final order in terms of paragraph 2.1 of the Notice of Motion as amended by the addition of the following clause at the end of the paragraph :

"where such approved building plans are required."

[10] I accordingly make the following order :

(a) The late filing of the replying affidavits and the supplementary affidavit by First Applicant deposed to on 30 September 2009 is condoned;

(b) First Respondent's application to strike out is refused;

(c) The affidavits of Jean De Beer and Ivan Isaac Goodman deposed to respectively on 14 October 2009 are allowed;

(d) The First Respondent is interdicted and restrained from undertaking any building work of whatsoever nature on erf 1332 Franschhoek, other than building work approved and permitted in terms of the building plans pertaining to erf 1332 Franschhoek, approved by Second Respondent on 4 June 2008 or in terms of any subsequently duly approved building plans, where such approved building plans are required;

(e) The First Respondent is ordered to pay the costs of suit.

DENZIL POTGIETER, A.J.

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

Case No. 15902/2009

In the matter between:

NORMAN WELTHAGEN Applicant

and

ROSMEAD INVESTMENT CONSULTANTS (PTY) LTD Respondent
(Registration No: 1994/006008/07)

JUDGMENT DELIVERED ON 14 MAY 2010

CLOETE , AJ:

[1] This is an opposed application for the provisional winding up of the Respondent. According to the Applicant, he is a creditor of the Respondent. He maintains that the Respondent is unable to pay its debts (section 344 (f) read with section 345 of the Companies Act, 61 of 1973), and also that it is just and equitable that the Respondent should be wound up (section 344 (h) of the Act).

[2] The Respondent disputes that it is indebted to the Applicant, and accordingly the Applicant's *locus standi* to present an application to the Court as a creditor of the Respondent for its winding up is in dispute.

[3] It is common cause between the parties that during or about November 2006 they entered into an agreement with each other in terms of which the Applicant paid the sum of R 2 270 000 to the Respondent to invest on his behalf. Furthermore, the Applicant would be entitled to redeem the capital amount of his investment on fourteen days notice to the Respondent.

[4] It is also not in dispute that in a letter dated 30 March 2009 by the Applicant's attorneys to the Respondent, the Respondent was informed that the Applicant required the immediate repayment of the said sum of R2 270 000. What is in dispute is whether the Applicant was at that stage still entitled to the repayment of the said sum on demand.

[5] The Respondent's version is that subsequent to the conclusion of the initial agreement, there was an express further agreement between the parties in terms whereof the Applicant agreed to the conversion of his investment with the Respondent into an investment in partnership in the Sky Harrier Partnership and the Sky Hawker Partnership. According to the Respondent it was, subsequent to the conclusion of this latter agreement, not liable on any basis to either the Applicant personally or the partners in the partnership, and that once the Applicant had provided the mandate for his investment to be placed in the partnerships, his investment with the Respondent had ceased. At that stage it was thus no longer open to the Applicant to seek repayment of its investment, or the payment of any other amounts, from the Respondent. Accordingly, the Respondent denies that it is indebted to the Applicant in any amount whatsoever.

[6] The Applicant's application is therefore opposed on the basis of a dispute as to the existence of the alleged debt. Accordingly, there is therefore a duty on the Respondent to show that the alleged debt is disputed on *bona fide* and reasonable grounds. (See: ***Kalil v Decotex (Pty) Ltd and Another*** 1988 (1) SA 943 (AD)). In ***Helderberg Laboratories CC v Sola Technologies*** 2008 (2) SA 627 (C) a full bench of this Division preferred to refer to this duty as an evidential burden and not an *onus*.

[7] The Applicant requested that this Court, in the event of it not being disposed to grant a provisional winding up order, should refer the issue of the Applicant's *locus standi* as a creditor (i.e. whether the Respondent is indebted to him) for the hearing of *viva voce* evidence . In exercising its discretion in this regard the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the Applicant. (See the ***Kalil*** case at p 979 H).

[8] In considering whether the Respondent has managed to show that the alleged debt is disputed on *bona fide* and reasonable grounds, I have had regard to the caution expressed *inter alia* in ***Robson v Wax Works (Pty) Ltd and Others*** 2001(3) SA 1117 (C) at para 15 that a lack of *bona fides* is not readily inferred.

[9] Having carefully considered the affidavits in this matter and the arguments before me on behalf of the parties, I have arrived at the conclusion that I

should in the exercise of my discretion in this regard allow the matter to be referred for the hearing of *viva voce* evidence on the disputed issue of whether or not the Applicant is a creditor of the Respondent. I have decided to do so because genuine questions have been raised about the veracity of the versions of both the Applicant and Mr Wells who deposed to the answering affidavit on behalf of the Respondent, and in my view the probabilities on the disputed issue are at this stage evenly balanced.

[10] I have decided against embarking in this judgment on an exposition of what I regard as being contradictions, discrepancies and improbabilities in the versions of both the main deponents to affidavits in this matter, in order to allow the judge who will hear the oral evidence to form his own views in this regard in due course.

[11] Accordingly, it is ordered as follows:

1. The application is postponed to a date on the semi-urgent roll to be arranged with the Judge President, for the hearing of *viva voce* evidence.

2. The issue to be resolved at such hearing is whether or not the Applicant is a creditor of the Respondent.

3. The evidence to be adduced at the aforesaid hearing shall be that of any witness whom the parties or either of them may elect to call, subject, however, to what is provided below.

4. Save in the case of any persons who have already deposed to affidavits in these proceedings, neither party shall be entitled to call any person as a witness unless –

   4.1 he or it has served on the other party, at least 14 days before the date appointed for the hearing, a statement by such a person wherein the evidence to be given in chief by such person is set out; or

   4.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

5. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

6. The fact that a party has served a statement or has subpoenaed a witness shall not oblige such party to call the witness concerned.

7. Within 45 days of the making of this order, each of the parties shall made discovery on oath, of all documents relating to the issue referred to above, which documents are, or have at any time been, in the possession or under the control of such party.

8. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

9. The costs of the hearing of the application before Cloete AJ stand over for determination by the Court which hears the postponed application.

CLOETE, AJ