REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 057842/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

3/11/2023_____ _____
DATE SIGNATURE

In the matter between:

DEL ARBRE BODY CORPORATE First Applicant

THE WILLOWS HOME OWNERS' ASSOCIATION NPC. Second Applicant

and

KEITH MABETA First Respondent

UNIT 2 DEL ARBRE CC. Second Respondent

JUDGMENT

SIWENDU J

[1] The first applicant, The Body Corporate of Del Arbre Sectional Title Scheme Number SS132/1993, is a body corporate as defined in the Sectional Titles Schemes Management Act (as amended)[1] (the Act). The Willows Home Owners Association NPC is the second applicant. The applicants seek a final winding up order of the second respondent in the hands of the Master of the High Court.

[2] The second respondent, Unit 2 Del Arbre Close Corporation (Registration number: 1995/009551/23) is the registered owner of the Unit 2 Del Arbre, The Willows, 3 Pitsani Road, Kelland, Randburg (the Close Corporation). Unit 2 Del Arbre (the unit) is located in the sectional title scheme of the applicant. The Close Corporation uses the unit as its registered address.

[3] In May 2023, Mr Keith Mabeta was joined as a first respondent in the liquidation application by a court order. He is the sole member of the Close Corporation. It is common cause that the Close Corporation does not trade, but serves as a property holding vehicle, and Unit 2 at Del Arbre is its sole asset.

[4] Since the provisions of the Companies Act[2] (the old Companies Act) apply to the winding up of companies, the final winding-up liquidation order the applicants seek, is brought in terms of Section 69(1)(a) of the Close Corporation Act[3] as read with Section 344(f) and Section 345(1)(a)(i) the old Companies Act read together with Item 9(1) of Schedule 5 of Companies Act[4] (the new Act) .

[1] 8 of 2011.
[2] 61 of 1973.
[3] 69 of 1984.
[4] 71 of 2008.

[5] The applicants claim that the Close Corporation is deemed unable to pay its debt, alternatively in terms of section 69(1)(c) of the Close Corporations Act, that it is proven to the satisfaction of the court that the Close Corporation is unable to pay its debt. It has failed to pay the monthly levies and charges and is in arrears in an aggregate amount of R92,392.19 being:

• R59,776.84 due, owing and payable to the first applicant, (as per annexure "F1")

• R32,615.35 due, owing and payable to the second applicant, (as per annexure "F2").

[6] On 30 August 2022, the applicants served the requisite Notices in terms of Section 69(1)(a) as read with Section 345(1)(a)(i) of the old Companies Act which were delivered to the Close Corporation at its registered address by hand. These came to the attention of the Close Corporation. The first respondent made two payments, of an amount of R9,000.00.

[7] As at 1 September 20221 to 5 December 2022, the outstanding amount of R97, 684, 17 remained due, owing and payable to the applicants. The applicants say that they are entitled to the liquidation order as the Close Corporation has failed to make payment to the applicants of the entire aggregate debt demanded, for the statutory monthly contributions and charges in terms of the Act and the Memorandum of Incorporation. It remains indebted to them in the aforesaid amount.

[8] The first respondent, who represented himself opposed the application. He submitted that the property is his primary residence. His wife and children have a direct and/or indirect equity in the property and he has the responsibility to protect that equity. It is unlikely that he and his wife will be able to afford to buy a similar house for the remainder of our working lives. He informed the Court that the onset of Covid-19 affected his

consulting business negatively. He did not dispute that Unit 2 Del Arbre cc fell behind with levy payments.

[9] Around February 2022, he requested a payment arrangement from the Chairperson of the Del Arbre Body Corporate. He claims that the chairperson welcomed the proposal and informed him to approach the Managing Agent and ask them to implement the payment arrangement. The only condition was that he should pay "the current due rent in full." He says that "after the issuing of the final letter of demand, The Body Corporate's counsel, Venter and Associates asked him to submit a payment proposal which he did.

[10] The first respondent now denies that it has been proven that Unit 2 Del Arbre is unable to pay its debts. He says that the Close Corporation has been paying according to the proposals submitted. Further, given the unprecedented devastating effects of the pandemic, "those who are responsive and engaged in resolving their debt problems should not be stripped of their basic rights such as owning a home. Liquidating the [Close Corporation] cannot be the first and only solution to resolve the levy backlog, especially given that the company was already discussing a payment arrangement." He says the resolution to liquidate made on 20 June 2022, and the application is "in bad faith."

[11] The applicants deny that they accepted the respondent's payment proposals. It is evident from the answering affidavit that the first respondent does not dispute the debt or that it is due and payable. In addition, the first respondent does not dispute that the applicant has afforded it indulgences to pay over a period of time to bring the arrears up to date. As can be gleaned from the correspondence attached to the

answering affidavit. On 15 February 2022 the first respondent as the sole member wrote to the managing agent of the applicants that:

"Hi Yolanda,

I am assuming that we are still negotiating in good faith, but given that you have not responded to my mail, my position is: 1. I am open to the last proposal I sent you. See attached mail addressed to you. Before making the proposal, I consulted Tim Labuschagne and his recommendations are incorporated in my proposal. 2. In tandem, I have put my property in the market. I am in a better position selling my property and paying what I owe you.

[12] These are unprecedented limes and you have in the past accommodated me. I thank you for your compassion. My challenges will be resolved within three months but we can implement proposal one end of this month.

Regards, Keith."

[13] The starting point is the approach to the application and the apt guidance by the Court in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd*[5] when it held that:

> "The question of onus is indeed critically relevant in a case such as this. lt bears repeating that once the respondent's indebtedness to the applicant for a winding-up order has, prima facie, been established, the onus is on it, the respondent, to show that this indebtedness is indeed disputed on bona fide and reasonable grounds…."

[14] The basis underpinning the liquidation and the indebtedness is that the Close Corporation "is *mero moto* prioritising payments by making some payments on the current levies and charges and neglecting payment on the arrears or visa versa." The applicants contend that the arrears and current

[5] 2022 (1) SA 91 (SCA) at 98, para 17.

levies and charges have to be paid, but the payments are not enough to cover the aggregate debt of arrears and current debts. Despite these payments, the Close Corporation remains unable to pay its debts as and when same falls due for payment. The arrears are not being reduced. Moreover, they discovered that the Close Corporation was about to be de-registered. The first respondent as the sole member does not dispute these assertions by the applicants.

[15] The first respondent raised what can be construed as *force majeure* by reason of the COVID–19 Pandemic. It was pointed to the first respondent during the hearing that various legal difficulties arise which do not favour his defence. It is correct, as stated by the Supreme Court of Appeal in *MV Snow Crystal: Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*[6] ("*MV Snow Crystal*"), that as a general rule, impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract, but notwithstanding this, the inability to perform the terms of one's contractual obligations is not excused in all cases of *force majeure* The Court *in Unibank Savings and Loans Ltd* (*formerly Community Bank*) *v Absa Bank Ltd*,[7] stated as follows with regards to *force majeur* held that:

> "Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable."

Here, a related difficulty is that the first respondent has been making intermittent payments albeit not covering the arrears, so the inability to

[6] 2008 (4) SA 111 (SCA) at 123 para 28
[7] 2000 (4) SA 191 (W) at 198 para 9.3.1.

perform is not absolute. To the extent that it could be said *force majeure* should be implied, the defence does not assist the respondents.

[16] A second difficulty is "the nature of the contract in relation to the parties" giving rise to the liability of the Close Corporation, which the Court in *MV Snow Crystal* states should be considered.[8] The Close Corporation owns property in a collective sectional scheme. There is no evidence that they agreed not to proceed against the Close Corporation, and it is doubtful that such an agreement would be lawful. A long line of authorities deals with s 37 read with s 39 of the Sectional Titles Act, and make it clear that the trustees of the sectional title scheme are obliged to perform the legislative designated function, and a body corporate has no power to pass a resolution to the effect that it will not carry out one or more of the duties imposed upon it by s 37 read with s 39 of the Sectional Titles Act[9]. The applicants have a legal obligation to collect all levies due. In any event, as held by the Court in the *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another*[10] the liability of owners for levy contributions cannot be modified without the written consent of owners in the scheme who are adversely affected by such modification.[11].

[17] The third difficulty, pointed to the first respondent by the court during the hearing, is that the Uniform Rules of Court are designed to protect natural persons from execution of property by subjecting that process to the supervision of the court. In *Segalo v Botha N.O. and Others*[12] the court

[8] Above n 6.

[9] *Zikalala v Body Corporate of Selma Court and Another (AR255/2020) [2021] ZAKZPHC and Prag N.O. and Another v Trustees of Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others* [2021] JOL 50837 (WCC)

[10] 2020 (2) SA 61 (SCA)

[11] section 32(4) of the Sectional Titles Act 95 of 1986; see also section 3(1) in particular 3(1)(c), 3(2) and 3(3) thereof.

[12] [2021] JOL 52487 (GJ).

held that the protection is aimed at poor people who own and occupy the property sought to be executed without proper consideration of their circumstances. The Constitution does not require judicial oversight when the property belonging to a company is sold.

[18] The above was confirmed by the court in *Investec Bank Ltd v Fraser No and Others*[13] when the Court held that Rule 46A applies to individuals and natural persons only. Immovable property owned by a company, a close corporation or a trust, of which the member, shareholder or beneficiary is the beneficial owner, is not protected by the rule even if the immovable property is the shareholder's, member's or beneficiary's only residence. In any event, the liquidation of the second respondent will not necessarily translate to homelessness. In this instance the protected right to housing will likely be triggered in the event that the sale of the property eventuates.

[19] Lastly s346(1)(b) of the old Companies Act, provides that an application to court for the winding-up of a company may be made by one or more of its creditors. As is contended by the applicant, "the best proof of solvency is payment by the debtor of its debts." Relatively, the amount of the levies owing is not excessive, yet it meets the legal threshold to ground the order. The failure to pay despite the indulgences is itself an indicator of insolvency, so too is a request for time to pay. As held by the court in *Service Trade Supplies (Pty) Ltd v Dasco & Sons (PTY) LTD*[14], the discretion of a court to refuse a winding up in these circumstances is a very narrow one.

Order

[20] In the result, the following order is made:

[13] 2020 (6) SA 211(GJ).
[14] 1962 (3) SA 424 (T).

1. The second respondent be placed under final winding-up in the hands of the Master of the High Court;

2. The costs of the application will be costs in the winding up of the second respondent.

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NTY SIWENDU
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 16 October 2023

Date of judgment: 20 October 2023

Appearances:

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