THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 221/2000
Reportable

Case No: 505/99

In the matter of:

THE BODY CORPORATE OF CAROLINE COURT APPELLANT

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Coram: ***Vivier ADCJ, Olivier, Schutz, Navsa JJA and Cloete AJA***

Date of hearing: **17 August 2001**

Date of delivery: **12 September 2001**

Summary: **In an application by a body corporate, established in terms of the Sectional Titles Act 95 of 1986, for a provisional order for its winding-up due to its inability to pay its debts, notice should have been given to all interested parties for them to be heard on whether a winding-up is competent, and, if so, the form of the order.**

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JUDGMENT

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NAVSA JA:

[1] The appellant is a body corporate established in terms of section 36 of the Sectional Titles Act 95 of 1986 ("the Act") and is responsible, in terms of the Act, for the enforcement of the rules relating to the control, administration and management of a building named "Caroline Cour" ("the building"), situated at 48 Caroline Street, Hillbrow, Johannesburg. The building forms part of a sectional title scheme with individuals owning sectional units.

[2] During July 1999 the appellant, on the ground of its inability to pay its debts, applied *ex parte* in the Witwatersrand Local Division of the High Court for an order that its affairs be provisionally wound up and that certain provisions of the Companies Act 61 of 1973 be made applicable to the winding-up. In addition it sought, *inter alia*, an order that upon its dissolution following on the winding-up, a new body corporate be declared to be in existence comprising existing owners of individual units.

[3] The matter was decided by Coppin AJ. In a brief judgment the learned judge considered section 36(5) of the Act which states that the provisions of the

Companies Act shall not apply to a body corporate established in terms of the Act. Since the body corporate could not be wound up in terms of the Companies Act, Coppin AJ had regard to the provisions of section 48 of the Act and concluded as follows:

> "...section 48(6) of the…Act is the only provision...dealing with the winding-up of a body corporate. In my view upon a proper construction of that section, a body corporate…can only be wound up when the building to which it attaches is damaged or destroyed. This is not the position in this case. I accordingly dismiss the application with costs."

Coppin AJ refused an application for leave to appeal. The present appeal is with the leave of this Court.

[4] The appellant contends that in terms of section 48(6) of the Act or in terms of section 48(1)(c) read with section 48(6) of the Act a Court is empowered to wind up the affairs of a body corporate due to its inability to pay its debts.

[5] The learned judge in the court below did not consider whether he should refuse to entertain the application because of the *ex parte* procedure adopted by the appellant and was content to decide a complex issue on which no Court had pronounced before, without the benefit of such argument and evidence that might have been advanced by the various interested parties. The fate of this appeal rests on the procedural issue overlooked by Coppin AJ. I will deal with this issue in due

course.

[6] I turn to set out in some detail the basis of the application as presented to the Court below: There are 34 units in the building, the total market value of which is estimated to be approximately R340 000-00. Many units are subject to mortgage bonds. Some owners of sectional title units in the building have over the years defaulted in the payment of their contribution levies with the consequence that the appellant was unable to meet its obligation to pay all water and electricity charges and assessment rates, resulting in an indebtedness to the local authority concerned in an amount approximating R1 million, as at 29 April 1999. In May 1998 during negotiations between the appellant and the local authority the appellant made an offer to settle its indebtedness on specified terms, *inter alia*, that the amount of R577 000-00 then owing be paid over a ten-year period without interest accruing. The offer included an undertaking by the appellant that upon acceptance of the offer it would embark on major renovations. The offer has not been responded to. In the interim the building has had its electricity supply intermittently suspended by the local authority. The appellant asserts that the local authority may reject its offer of settlement with the attendant risk of further suspensions of the electricity supply. The appellant faces mounting debts which it is unable to pay. Owners of units in the building continue to default on the payment of their levies. Attempts by the appellant to execute judgments obtained by it against some defaulting

owners have come to nought. In a number of instances this was due to the attitude adopted by bondholders. The appellant has no cash reserves. The appellant states that although it is unable to pay its debts a winding- up of its affairs will benefit the general body of creditors since a liquidator will be able to take effective steps to recover monies from debtors and be in a better position to reach agreement with the local authority on the settlement of its account.

[7] It appears that many bodies corporate established in terms of the Act find themselves in a chaotic financial position similar to that of the appellant. In the June 2001 issue of the attorneys' journal *De Rebus*, Roger Green and Peter Feuilherade in an article entitled *Lost Property* (at p 18) state the following:

> "Bodies corporate have always had to contend with members who have not been able to maintain payment of regular monthly levies because of financial difficulties. However, in the past few years a tendency has developed for some owners to refuse to pay levies. This has occurred very often when most of the purchase price of the unit has been funded by a bank loan. In some instances the owners who are members of the body corporate fail to recognize that the body corporate is their alter ego, namely the corporate representative of all the owners of the units in the scheme. Instead the body corporate has been seen as an alien body to which no allegiance is owed. Failure to recognise the obligations of communal living and to pay levies has resulted in several sectional title schemes being placed in jeopardy. The members of the scheme

> who have been diligent in paying their levy contributions have been prejudiced."

The authors state (at p.20) that there has been a tendency on the part of some bondholders to be obstructive when a body corporate attempts to sell a defaulting member's unit in execution. The authors note that in some schemes, members of the body corporate who are in arrears with payment of their levies and are in the majority have themselves elected as trustees of the body corporate and choose not to take action against defaulting members, resulting in the financial affairs of the body corporate becoming chaotic.

[8] It is clear from the contents of the affidavit filed in support of the application, the prayer in the notice of motion for an order declaring a new body corporate to come into existence comprising the same members as before and a concession before us by appellant's counsel, that the appellant's trustees, who authorised the application, hold the view that an order winding up its affairs is a speedy and simple solution to its financial predicament. They believe that after a new body corporate has been established it can continue with its business unburdened by the previous debts. It is clear that the trustees authorised an application for a winding-up having such an effect and bearing only on the affairs of the body corporate. There was no appreciation that in the event of a winding-

up, assuming it to be competent, a Court might hold that the individual owners could be pursued for such debts as are owing by them to the body corporate. This means that there is a risk that individual units would have to be sold to recover the amounts owing. The entire scheme may be at risk: see in this regard section 47 of the Act which provides that a creditor who has obtained a judgment against a body corporate, which remains unsatisfied, may apply to the Court which gave the judgment for the joinder of the members of the body corporate in their personal capacities as joint judgment debtors in proportion to their respective participation quotas; and section 36(6)(c) of the Act, which provides that a body corporate shall have perpetual succession and be capable of suing and being sued in its corporate name in respect of any matter in connection with the land and building for which the body corporate is liable or for which the owners are jointly liable. There appears to be a fundamental misunderstanding on the part of the appellant to the effect that in respect of debts such as assessment rates and water and electricity charges, individual owners are not co-debtors with the body corporate.

[9] I now turn to deal with the *ex parte* procedure adopted by the appellant. The appellant's notice of motion is addressed only to the registrar of the Court below and was not served on any other person. It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest. In ***Amalgamated Engineering Union v Minister***

***of Labour* 1949(3) SA 637 (A) (**at **651)** the following is stated:

> "It was rather a subtle reasoning, which helped the Court to do what it no doubt regarded as substantial justice in the peculiar circumstances of the case, while at the same time enabling it to stand firm on the two essential principles of law that had to be borne in mind, viz.(1) that a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties before it."

Later in the judgment (at **659-660)** the following appears:

> "Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interests… It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both."

This principle finds expression in Rule 6 (2)(a) of the Uniform Rules of Court which states that where it is necessary or proper to give any person notice of an

intended application, the notice of motion shall be addressed to both the registrar and such person.

[10] On the applicant's version of events there are numerous interested parties who in the ordinary course would have been entitled to receive notice of the intended application. The local authority, which is the major creditor, is an interested party. Individual owners, who in terms of section 36 of the Act are all members of the body corporate are clearly interested parties. This is particularly so given the potential risks to owners and the sectional title scheme spelt out earlier in this judgment. Bondholders are clearly also interested parties.

[11] Counsel representing the appellant submitted that the *ex parte* procedure adopted by the appellant is in line with the generally accepted procedure followed in applications for the winding-up of a company and the sequestration of individuals, namely, that a provisional order is granted *ex parte* with standard directions that the order be served on interested parties including creditors pending a return day. This analogy is unfounded.

[12] The law regulating the winding-up of companies and close corporations and the sequestration of individuals is largely settled and the procedure is well established. Of course novel questions may arise and a Court will deal with them as and when they arise in such manner as it deems fit. Section 48 of the Act, on the other hand, is complex in structure and its provisions concerning a winding-up of

the affairs of a body corporate are brief to the extent of inadequacy. No Court has yet pronounced on the interpretation of section 48(6) of the Act. Difficult questions arise when the interpretation and application of section 48 are to be decided. This is demonstrated by the brief and limited consideration of section 48 which follows. Section 48 bears the heading: "**Destruction of or damage to building**." Section 48(1) of the Act provides:

> "The building or buildings comprised in a scheme shall, for the purposes
> of this Act, be deemed to be destroyed -
> (a) upon the physical destruction of the building or buildings;
> (b) when the owners by unanimous resolution so determine and all holders of registered sectional mortgage bonds and the persons with registered real rights concerned, agree thereto in writing; or
> (c) when the Court is satisfied that, having regard to all the circumstances, it is just and equitable that the building or buildings shall be deemed to have been destroyed, and makes an order to that effect."

Section 48(2) states:

> "In any case where an order is made under subsection (1)(c), the Court may impose such conditions and give such directions as it deems fit for the purpose of adjusting the effect of the order between the body corporate and the owners and mutually among the owners, the holders of registered sectional mortgage bonds and persons with

registered real rights."

Section 48(3) is irrelevant for present purposes. Section 48(4) lists the persons who may apply for an order in terms of section 48(1)(c) as: a body corporate, an owner, a bondholder, a registered lessee, an insurer who has effected insurance on the building and a local authority. Unlike section 48(6) the list does not include creditors but does include a local authority.

Section 48(6) reads as follows:

> "(a) The Court may, on the application of a body corporate or any member thereof or any holder of a registered real right concerned, or any judgment creditor, by order make provision for the winding-up of the affairs of the body corporate.
> (b) The Court may, by the same or any subsequent order, declare the body corporate dissolved as from a date specified in the order"

The following questions readily present themselves:

- Do the circumstances referred to in the appellant's affidavit in support of the application justify an order in terms of section 48(1)(c), or would this be stretching notional destruction beyond the provisions of the Act?
- Do the provisions of section 48(2), which prospectively regulate the relationship between affected parties, indicate that section 48(1)(c) operates only in circumstances where it is envisaged that the scheme will come to an

end or not continue in its existing form and consequently, that they do not apply in circumstances such as the present, where it is intended that the scheme will continue as before?

- Does section 48(6) enjoy an existence and application independent of the remainder of the section of which it is part?
- Does the heading of section 48 assist in the interpretation of section 48(6)?
- Does the distinction drawn between the persons who may bring an application in terms of section 48(1)(c) and those who may bring an application in terms of section 48(6) support a contrary conclusion?
- What is meant by the expression "winding-up of the affairs of the body corporate as it appears in section 48(6) - does it relate to the relationship between the members and the body corporate and to their position as joint debtors as set out in section 47 of the Act?
- Assuming that it is held that a winding-up of the affairs of a body corporate based on its inability to pay its debts is competent, is the Court at large to fashion directions for such a winding-up?
- May the Court, in giving such directions, have regard to such mechanisms as are set out in the Companies Act and employ them, despite the provisions of section 36(5) of the Act?
- In particular, what happens to the pro rata liability of an owner for the debts

of other owners, provided for in s 47?

- How, in formulating directions, does the Court deal with the body corporate in relation to its members and what directions may it give insofar as individual defaulting and non-defaulting unit owners are concerned?
- Should the Court consider other remedies that the Act provides to owners, bondholders, members, trustees and local authorities when it considers whether to grant a winding-up order?
- What are the circumstances which in terms of section 48(6)(b) will justify a Court granting an order for the dissolution of a body corporate at the same time as it grants an order for the winding-up of its affairs?
- What are the circumstances that will justify a Court withholding an order for the dissolution of the body corporate at the time that it grants an order that its affairs be wound up?
- What happens after a body corporate's affairs are wound up?

[13] These questions are not meant to be exhaustive but to demonstrate how necessary it is for such issues as may arise from the interpretation of section 48 to be fully ventilated among all interested parties. Lamentably, the Legislature neglected to deal with questions which would obviously arise. This makes it all the more necessary for a Court to have the benefit of argument by parties who may be affected by its decision.

[14] Coppin AJ was faced with a manifestly incomplete set of facts in the absence of a range of interested parties, who might have wished to present argument on a novel issue of public importance concerning the interpretation of legislation which raises more questions than it answers. This situation does not begin to compare with the asserted analogous situation of an *ex parte* application for a provisional winding-up of a company or for the provisional sequestration of an individual. The company being wound up or the individual being sequestrated is usually the debtor whose assets have to be surrendered so that they may be sold to meet debts owed to creditors. A body corporate established in terms of the Act represents its members and such debts as the body corporate incurs are usually incurred on behalf of its members. Members of a body corporate have assets apart from the body corporate. Usually the body corporate's assets will be negligible when seen against the collective assets of its members. As stated earlier, the rules and procedure governing the winding-up of companies and close corporations and the sequestration of individuals are established and clear. The complex of questions raised in the present case does not arise. A primary question in the present case on which the Court should have the benefit of argument of all interested parties, is whether it is empowered in the circumstances of this case to issue any winding-up order at all- provisional or otherwise. In this regard a *dictum* in a recent decision of this Court is relevant. In ***Pretorius v Slabbert*** **2000 (4) SA 935 (SCA)** at **939 C-**

F the following is stated:

"Mr *Louw*, for the respondent, sought to persuade us that Syfrets had no material interest in the proceedings, so that the appeal might proceed. There is an immediate difficulty with this argument, as it appears to contradict the very contention upon which the respondent succeeded below and wishes to succeed here, namely that the appellant's rights in the deed of sale (reversionary rights excepted) had become vested in

> Syfrets. Depending upon a variety of possible considerations, upon which the record throws no clear light, Syfrets might have an interest. For instance, it may have something to say about the form of order, which envisages payment to the appellant and not itself as cessionary. But more to the point, as was rightly said in ***Selborne Furniture Store (Pty) Ltd v Steyn NO*** **1970(3) SA 774 (A)** at **780G**, the substantial question is whether it is proper for this Court to proceed to draw an inference as to Syfret's rights, without giving it an opportunity of being heard in regard thereto. The answer is no."

The basic principle of our law that interested parties who may be prejudiced by an order issued by a Court should be joined in the suit, as set out in the ***Amalgamated Engineering*** and ***Pretorius*** cases, *supra*, and expressed in Rule 6(2)(a) of the Uniform Rules of Court should have been applied by Coppin AJ.

[15] For these reasons it follows that although Coppin AJ erred in his approach to the matter, his decision to dismiss the application should remain unaffected. In the light of all the circumstances of the case it would serve no useful purpose to remit the matter to the Court below. It follows that the appeal should fail. The appeal is

dismissed.

MS NAVSA
JUDGE OF APPEAL

CONCUR:
VIVIER ADCJ

OLIVIER JA
SCHUTZ JA
CLOETE AJA